DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-96
Title: Shelby County, Alabama, Petitioner
v.
Eric H. Holder, Jr., Attorney General, et al.
Docketed: July 24, 2012
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (11-5256)
Decision Date: May 18, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 20 2012	Petition for a writ of certiorari filed. (Response due August 23, 2012)
Aug 7 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 8 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 15 2012	Order extending time to file response to petition to and including September 24, 2012.
Aug 20 2012	Brief amicus curiae of Cato Institute filed. VIDED.
Aug 23 2012	Brief amicus curiae of Mountain States Legal Foundation filed.
Aug 23 2012	Brief amici curiae of Former Department of Justice Officials filed.
Aug 23 2012	Brief amici curiae of Arizona, et al. filed.
Aug 23 2012	Brief amicus curiae of Alaska filed.
Aug 23 2012	Brief amicus curiae of National Black Chamber of Commerce filed.
Aug 23 2012	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Sep 24 2012	Brief of respondents Eric H. Holder, Jr., Attorney General in opposition filed.
Sep 24 2012	Brief of Respondents-Intervenors in opposition filed.
Oct 9 2012	Reply of petitioner Shelby County, Alabama filed. (Distributed)
Oct 10 2012	DISTRIBUTED for Conference of October 26, 2012.
Oct 26 2012	Record Requested .
Oct 29 2012	DISTRIBUTED for Conference of November 2, 2012.
Oct 29 2012	Record received from the United States Court of Appeals for the District of Columbia (one box).
Oct 29 2012	Record received from the U.S. District Court for the District of Columbia (two boxes).
Nov 5 2012	DISTRIBUTED for Conference of November 9, 2012.
Nov 9 2012	Petition GRANTED limited to the following Question: Whether Congress decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage

	formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.
Nov 15 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 21 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 30 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel on behalf of all respondents-intervenors.
Dec 18 2012	SET FOR ARGUMENT ON Wednesday, February 27, 2013
Dec 26 2012	Joint appendix filed.
Dec 26 2012	Brief of petitioner Shelby County, Alabama filed.
Dec 27 2012	Brief amici curiae of John Nix, et al. filed.
Dec 28 2012	Brief amicus curiae of Judicial Education Project filed.
Dec 28 2012	Brief amicus curiae of Justice and Freedom Fund filed.
Dec 28 2012	Brief amicus curiae of Mountain States Legal Foundation filed.
Jan 2 2013	Brief amicus curiae of Southeastern Legal Foundation filed.
Jan 2 2013	Brief amicus curiae of National Black Chamber of Commerce filed.
Jan 2 2013	Brief amici curiae of Arizona, et al. filed.
Jan 2 2013	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Jan 2 2013	Brief amicus curiae of Landmark Legal Foundation filed.
Jan 2 2013	Brief amici curiae of Former Government Officials filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Reason Foundation filed. (Distributed)
Jan 2 2013	Brief amici curiae of Abraham Lincoln Foundation for Public Policy Research, Inc., et al. filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Center for Constitutional Jurisprudence filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Cato Institute filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Texas filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Project 21 filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Alabama filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Merced County, California, in support of no party filed. (Distributed)
Jan 2 2013	Brief amicus curiae of Alaska filed. (Distributed)
Jan 2 2013	Brief amicus curiae of American Unity Legal Defense Fund filed.
Jan 2 2013	Request from counsel for amicus curiae Merced County to lodge non-record materials cited in its brief.
Jan 4 2013	CIRCULATED.
Jan 23 2013	Brief amici curiae of Professor Broussard, Named Students, and Organizations filed.
Jan 25 2013	Brief of respondent-intervenors Earl Cunningham, et al. filed. (Distributed)
Jan 25 2013	Brief of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Jan 25 2013	Brief of respondent Respondent-Intervenor Bobby Lee Harris filed. (Distributed)
Jan 25 2013	Brief of respondents Respondent-Intervenors Bobby Pierson, et al. filed. (Distributed)
Jan 29 2013	Record received from the U.S.C.A. for the District of Columbia Circuit. (1 Box)

Jan 30 2013	Motion for divided argument filed by respondents Bobby Pierson, et al.
Jan 31 2013	Brief amicus curiae of National Bar Association filed. (Distributed)
Jan 31 2013	Brief amicus curiae of Hon. Congressman John Lewis filed. (Distributed)
Feb 1 2013	Brief amici curiae of Reps. F. James Sensenbrenner, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Dick Thornburgh, et al. filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Senate Majority Leader Harry M. Reid filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Veterans of the Mississippi Civil Rights Movement, Inc. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Gabriel Chin, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Constitutional Law Scholars, and Constitutional Accountability Center filed. (Distributed)
Feb 1 2013	Brief amici curiae of Professors Richard L. Engstrom, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Marcia L. Fudge, member of Congress and Chair of the Congressional Black Caucus, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Political Science and Law professors filed. (Distributed)
Feb 1 2013	Brief amici curiae of Jurisdictions that have bailed out filed. (Distributed)
Feb 1 2013	Brief amicus curiae of National Lawyers Guild filed. (Distributed)
Feb 1 2013	Brief amicus curiae of American Bar Association filed. (Distributed)
Feb 1 2013	Brief amici curiae of National Latino Organizations filed. (Distributed)
Feb 1 2013	Brief amici curiae of Section 5 litigation intervenors filed. (Distributed)
Feb 1 2013	Brief amici curiae of Alabama legislative black caucus and Alabama Association of Black County Officials filed. (Distributed)
Feb 1 2013	Brief amici curiae of New York, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Senator C. Bradley Hutto, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Navajo Nation, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Joaquin Avila, et al. filed. (Distributed)
Feb 1 2013	Brief amici curiae of Asian American public interest groups filed. (Distributed)
Feb 1 2013	Brief amici curiae of Historians and Social Scientists filed. (Distributed)
Feb 1 2013	Brief amici curiae of Ellen D. Katz and the Voting Rights Initiative filed. (Distributed)
Feb 1 2013	Brief amici curiae of Alaska Federation of Natives, Alaska Native Voters and Tribes filed. (Distributed)
Feb 1 2013	Brief amici curiae of City of New York, et al. filed. (Distributed).
Feb 15 2013	Motion for divided argument filed by respondents Bobby Pierson, et al. GRANTED.
Feb 19 2013	Reply of petitioner Shelby County, Alabama filed. (Distributed)
Feb 27 2013	Argued. For petitioner: Bert W. Rein, Washington, D. C. For respondents: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondents Bobby Pierson, et al.: Debo P. Adegbile, New York, N. Y.

PETITION
FOR
WRIT OF
CERTIORARI

12 96

No. 12-

Supreme Court, U.S.
FILED
JUL 20 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET AL.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Shelby County, Alabama.

Respondents are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS. iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI. . . . 1

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 1

INTRODUCTION. 1

STATEMENT OF THE CASE 5

- A. History of the Voting Rights Act 5
  - 1. The Voting Rights Act of 1965 5
  - 2. The 1970, 1975, and 1982 Reauthorizations 8

Page

3. The 2006 Reauthorization 10

B. Proceedings Below 12

REASONS FOR GRANTING THE PETITION . . 18

I. The Constitutional Issues Presented In This Case Are Of Public Importance And Should Be Settled Now By This Court 18

II. Review Is Required Because The Court Of Appeals Incorrectly Decided These Important And Unsettled Constitutional Issues 23

A. The court of appeals wrongly upheld Sections 5 and 4(b) by distorting *Boerne*'s "congruent and proportional" test 23

B. The court of appeals should not have upheld Section 5's preclearance obligation under any applicable legal standard 25

C. The court of appeals should not have upheld Section 4(b)'s coverage formula under any applicable legal standard . . . 29

CONCLUSION 36

TABLE OF APPENDICES

Page

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED MAY 18, 2012 .... 1a

APPENDIX B—MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DECIDED SEPTEMBER 21, 2011 .... 111a

APPENDIX C—MINUTE ORDER OF U.S. DISTRICT COURT, DISTRICT OF COLUMBIA, DATED FEBRUARY 4, 2011 .... 292a

APPENDIX D—MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 16, 2010 . 294a

APPENDIX E—RELEVANT CONSTITUTIONAL AMENDMENT & STATUTORY PROVISIONS 304a

TABLE OF CITED AUTHORITIES

Page

Cases

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 22, 23, 24

Beer v. United States,
425 U.S. 130 (1976) 6, 19, 24

City of Boerne v. Flores,
521 U.S. 507 (1997) . . . . *passim*

City of Rome v. United States,
446 U.S. 156 (1980) . . . . *passim*

Coleman v. Court of Appeals of Maryland,
132 S. Ct. 1327 (2012) 22, 34

Crawford v. Marion County Election Bd.,
553 U.S. 181 (2008) 20

Florida v. United States,
No. 11-cv-1428-CKK-MG-ESH (D.D.C.) 19, 20

Georgia v. Ashcroft,
539 U.S. 461 (2003) 10

Gregory v. Ashcroft,
501 U.S. 452 (1991) 18

Miller v. Johnson,
515 U.S. 900 (1995) 6, 26

Page

Mistretta v. United States,
488 U.S. 361 (1989) 21

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009). . . . . *passim*

Nw. Austin Mun. Util. Dist. No. One v. Mukasey,
573 F. Supp. 2d 221 (D.D.C. 2008). 34

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) 9, 10, 26

Samuelsen v. Treadwell,
No. 12-cv-00118-RRB-AK-JKS (D. Alaska) 19

South Carolina v. Katzenbach,
383 U.S. 301 (1966) . . . . *passim*

Tennessee v. Lane,
541 U.S. 509 (2004) 26, 29

Texas v. Holder,
No. 12-cv-128-RMC-DST-RLW (D.D.C.) 19

United States v. Bd. of Comm'rs of Sheffield,
435 U.S. 110 (1978) 3

Page

Federal Statutes and Rules

42 U.S.C. § 1973(a) 2

42 U.S.C. § 1973a(c) 2, 7, 35

42 U.S.C. § 1973b 1

42 U.S.C. § 1973c 1

42 U.S.C. § 1973c(a) 6

42 U.S.C. § 1973c(b) 11

42 U.S.C. § 1973c(c) 11

42 U.S.C. § 1973c(d) 11

42 U.S.C. § 1973h 2

42 U.S.C. § 1973l(b) 4

42 U.S.C. § 1973l(e) 16

Pub. L. No. 89-110, 79 Stat. 437 (1965) . . . . *passim*

Pub. L. No. 91-285, 84 Stat. 314 (1970) 8

Pub. L. No. 94-73, 89 Stat. 400 (1975) 2, 8, 9

Pub. L. No. 97-205, 96 Stat. 131 (1982) 9

Page

Pub. L. No. 109-246, 120 Stat. 577 (2006) 11

Sup. Ct. R. 10(c) 18

Legislative Materials

The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d. Sess. (May 16, 2006). 31

H.R. Rep. No. 91-397 (1969) 8

H.R. Rep. No. 109-478 (2006). 10, 27

S. Rep. No. 109-295 (2006) 19

Other Authorities

Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://sitemaker.umich.edu/voting rights/files/masterlist.xls 33

National Conference of State Legislatures: Absentee and Early Voting (July 22, 2011), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner Shelby County, Alabama ("Petitioner") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is available at 679 F.3d 848 and is reprinted in the Appendix ("App.") at 1a-110a. The opinion of the United States District Court for the District of Columbia is available at 811 F. Supp. 2d 424 and is reprinted at App. 111a-291a.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its decision on May 18, 2012. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution, 42 U.S.C. § 1973b, and 42 U.S.C. § 1973c are reprinted in the Appendix.

INTRODUCTION

Article IV and the Tenth Amendment reserve to the States the power to regulate elections. Notwithstanding, the Fifteenth Amendment authorizes Congress to enforce against the States that amendment's guarantee of the right to vote free from discrimination on account of race, color or previous condition of servitude. It is this Court's duty to ensure that Congress appropriately remedies Fifteenth Amendment violations without usurping the States' sovereign powers. Shelby County asks the Court to protect this important federalism interest.

Congress invoked its Fifteenth Amendment enforcement authority to pass the Voting Rights Act of 1965 ("VRA") "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The VRA established a network of prophylactic remedies designed to remedy unconstitutional voting discrimination. Among them, Section 2 creates a private right of action to enforce the Fifteenth Amendment and prophylactically bans any state practice that even unintentionally "results in a denial or abridgment" of voting rights. 42 U.S.C. § 1973(a). Congress also outlawed literacy tests, poll taxes, and other ballot-access restrictions being used to disenfranchise African-Americans, Pub. L. No. 94-73, § 102, 89 Stat. 400 (1975); 42 U.S.C. § 1973h, and passed a "bail in" provision that could subject any jurisdiction found to have violated constitutionally-protected voting rights to judicially-supervised preclearance, *id.* § 1973a(c). None of these enactments is challenged here.

Rather, this Petition puts at issue Congress' decision in 2006 to reauthorize until 2031 the preclearance obligation of Section 5 of the VRA under the pre-existing coverage formula of Section 4(b) of the VRA. The preclearance regime is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies" and a "substantial departure ... from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). Section 5's preclearance obligation goes far "beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Nw. Austin*"). By singling out particular jurisdictions for coverage, Section 4(b) "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 203.

This Court has twice upheld the preclearance regime against facial constitutional challenge under then-prevailing conditions in covered jurisdictions. *Katzenbach*, 383 U.S. at 303; *City of Rome v. United States*, 446 U.S. 156 (1980). In 1966, the Court held that preclearance was an "uncommon exercise of congressional power" that would not have been "otherwise appropriate" but for the "exceptional conditions" and "unique circumstances" then documented by Congress. *Katzenbach*, 383 U.S. at 334-35. The Court upheld Section 4(b)'s coverage formula because it accurately captured "the geographic areas where immediate action seemed necessary" and where "local evils" had led to significant Fifteenth Amendment violations. *Id.* at 328-29. The 1975 reauthorization was upheld given the "limited and fragile" progress that had been made in the decade since the VRA's enactment. *Rome*, 446 U.S. at 182.

More recently, addressing the 2006 reauthorization, the Court recognized that "[s]ome of the conditions" that it "relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202. Moreover, the "evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id*. at 203. Because Congress has not since acted to rectify these problems, the constitutional validity of Sections 5 and 4(b) must now be resolved.

This Petition is the ideal vehicle to settle these important issues. Because the District Court for the District of Columbia ("DDC") has exclusive jurisdiction over challenges to the VRA's constitutionality, 42 U.S.C. § 1973*l*(b), and in light of the comprehensive decisions and dissent below, there is nothing to be gained from further vetting. Moreover, Congress has shown no interest in revisiting these issues in the wake of *Northwest Austin* and the Executive's recent refusals to preclear voting changes considered routine in non-covered jurisdictions underscores the severity of the burden that the preclearance regime imposes on covered jurisdictions. Delaying review of these unsettled issues to a future case will only make the situation worse.

The Court is understandably reluctant to decide avoidable constitutional questions. But the Court's "duty as the bulwark of a limited constitution against legislative encroachments" requires it to definitively settle important federalism questions when they are squarely presented. *Nw. Austin*, 557 U.S. at 205. The Court should grant the Petition.

STATEMENT OF THE CASE

A. History of the Voting Rights Act

1. The Voting Rights Act of 1965

The VRA included numerous judicially enforceable provisions (including Section 4(a)'s suspension of tests and devices) that directly confronted voting practices then employed throughout the South to infringe Fifteenth Amendment rights. But given deplorable conditions, Congress determined that even "sterner and more elaborate measures" were required. *Katzenbach*, 383 U.S. at 309. "After enduring nearly a century of systematic resistance to the Fifteenth Amendment," *id.* at 328, Congress was aware that adverse judgments would only lead offending states to adopt new discriminatory devices and local officials to defy court orders or simply close their registration offices, *id.* at 314.

To foreclose continuing and systematic evasions of constitutional guarantees, Section 5 required a "covered jurisdiction" to obtain preclearance before implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965). The Department of Justice ("DOJ") or the DDC could not preclear any change that had either "the purpose" or "the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

Section 5 was a radical solution to "a particular set of invidious practices that had the effect of undo[ing] or defeat[ing] the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995); *Beer v. United States*, 425 U.S. 130, 140 (1976). Unlike a traditional litigation remedy targeting specific acts of voting discrimination, Section 5 suspended all voting changes pending preclearance to prevent recalcitrant "jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a)." *Nw. Austin*, 557 U.S. at 218 (Thomas, J.) (concurring in the judgment in part and dissenting in part).

Section 4(b) relied on a formula to identify the jurisdictions subject to preclearance. A state or political subdivision became subject to preclearance if it "maintained on November 1, 1964, any test or device" prohibited by Section 4(a) and "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964" or "less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* § 4(b), 79 Stat. at 438. As a political subdivision of Alabama, Shelby County became a covered jurisdiction under this formula. App. 123a-124a.[1]

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[1] Also, Section 3(c) created a bail-in mechanism whereby federal courts could impose preclearance on any non-covered jurisdiction found to have violated the Fourteenth or Fifteenth

The Court upheld Section 5 as constitutional because of a demonstrated history of "widespread and persistent discrimination" and "obstructionist tactics." *Id.* at 328. "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act." *Id.* at 329. Especially given the massive racial disparity in registration and turnout rates, "Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination." *Nw. Austin*, 557 U.S. at 221 (Thomas, J.). Preclearance—an "uncommon exercise of congressional power"—appropriately enforced the Fifteenth Amendment only because of the "exceptional conditions" and "unique circumstances" that Congress had documented. *Katzenbach*, 383 U.S. at 334-35.

The Court upheld Section 4(b)'s coverage formula on the same legislative record because it appropriately enforced the Fifteenth Amendment "in both practice and theory." *Id.* at 330. The formula was sound in theory because "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average" pointed to the "widespread and persistent" use of discriminatory tactics to prevent African-Americans from voting and the clear threat of continuing evasion. *Id.* at 330-31. The formula was sound in practice because it accurately captured those

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Amendments. 42 U.S.C. § 1973a(c). The VRA also included a "bailout" provision that allowed a covered jurisdiction to terminate coverage by making a requisite showing (subject to a "claw back" mechanism). Pub. L. No. 89-100, § 4(a), 79 Stat. at 438.

jurisdictions where "reliable evidence of actual voting discrimination" was so severe and distinctive that the disparate application of preclearance was constitutionally justified. *Id.* at 329.

2. The 1970, 1975, and 1982 Reauthorizations

Congress had "expected that within a 5-year period Negroes would have gained sufficient voting power in the States affected so that special federal protection would no longer be needed." H.R. Rep. No. 91-397 (1969). In 1970, however, Congress reauthorized the temporary provisions of the VRA for five years, Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970), in order "to safeguard the gains in negro voter registration thus far achieved, and to prevent future infringements of voting rights based on race or color," H.R. Rep. No. 91-397, 1970 U.S.C.C.A.N. at 3281.

The 1970 reauthorization expanded the coverage formula to include any jurisdiction that had maintained a prohibited "test or device" on November 1, 1968, and had voter registration on that date or turnout in the 1968 presidential election of less than 50 percent. Pub. L. No. 91-285, § 4, 84 Stat. at 315. The statute also extended Section 4(a)'s ban on the use of any prohibited "test or device" to non-covered jurisdictions for a period of five years. *Id.* § 6, 84 Stat. at 315.

In 1975, Congress reauthorized the VRA for seven more years, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975), further expanding coverage to any jurisdiction that had maintained a prohibited "test or device" on November 1, 1972, and had voter registration on that date or turnout in the 1972 presidential election of less than 50 percent, *id.* § 202, 89 Stat. at 401. Congress also extended the preclearance obligation to certain States and political subdivisions that provided electoral materials only in English in order to protect language minority groups. *Id.* § 203, 89 Stat. at 401-02, and it made permanent the nationwide ban on discriminatory "tests or devices." *Id.* § 201, 89 Stat. at 400.

The Court upheld the 1975 reauthorization of Section 5, finding that a "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions" and that, "though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *Rome*, 446 U.S. at 180-81. Only ten years removed from Section 5's enactment, the Court rejected what it viewed as a request to overrule the *Katzenbach* decision. *Id.* at 180.

In 1982, Congress reauthorized the VRA for another 25 years. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). Although this reauthorization was not challenged facially, the Court became concerned that interpreting the discriminatory "purpose" preclearance requirement too broadly would exacerbate federalism costs "perhaps to the extent of raising concerns about § 5's constitutionality." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*"). The Court also grew concerned with the intrusiveness of the "effect" prong and adopted a standard geared more toward a "minority group's opportunity to participate in the political process" and less toward "the comparative ability of a minority group to elect a candidate of its choice." *Georgia v. Ashcroft*, 539 U.S. 461, 479-80 (2003). This interpretation ensured that the "effect" prong more closely tracked the constitutional standard, and it avoided the serious equal-protection problems associated with focusing preclearance on minority electoral success. *Id.* at 491 (Kennedy, J., concurring).

3. The 2006 Reauthorization

In 2006, Congress reauthorized the VRA for another 25 years without easing the preclearance burden or updating the coverage formula. Congress found "that the number of African-Americans who are registered and who turn out to cast ballots ha[d] increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass[ed] those of white voters." H.R. Rep. No. 109-478, at 12 (2006). It also found that "the disparities between African-American and white citizens who are registered to vote ha[d] narrowed considerably in six southern States covered by the temporary provisions … and … North Carolina." *Id.* Thus, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *Id.*

Congress nevertheless increased the already-significant federalism burden preclearance imposes on covered jurisdictions by overruling *Bossier Parish II* and *Ashcroft*. Pub. L. No. 109-246, 120 Stat. 577 (2006). Under the amended preclearance standard, Section 5's "purpose" prong now requires the denial of preclearance if the voting change was made because of "any discriminatory purpose," 42 U.S.C. § 1973c(c), and the "effect" prong requires denial of preclearance whenever the change "diminish[es] the ability of [minority] citizens ... to elect their preferred candidates of choice," *id.* § 1973c(b), (d).

Congress justified retaining (and indeed expanding) preclearance by finding that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." Pub. L. No. 109-246, §2(b)(2), 120 Stat. at 577. These "second generation barriers" included: racially polarized voting; various Section 5 preclearance statistics; "section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the [VRA]." *Id.*

The constitutionality of the 2006 reauthorization was immediately challenged in *Northwest Austin.* While relying on the canon of constitutional avoidance to resolve that appeal on statutory grounds, the Court concluded that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the dramatic changes in the covered jurisdictions. *Nw. Austin*, 557 U.S. at 204. In particular, Section 5 "imposes current burdens and must be justified by current needs," and Section 4(b)'s "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. The Court added that "[t]hese federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere." *Id.*

B. Proceedings Below

1. On April 27, 2010, Shelby County filed suit seeking resolution of the "serious constitutional questions" left open by *Northwest Austin*. In a 151-page opinion, the District Court granted summary judgment to Respondents. App. 111a-291a. It ruled that the constitutionality of Sections 5 and 4(b) must be judged under the congruence-and-proportionality standard of *City of Boerne v. Flores*, 521 U.S. 507 (1997), App. 161a-162a, but upheld both statutory provisions under that standard, App. 279a-280a, 290a. Shelby County timely appealed.

2. By a 2-1 vote, the D.C. Circuit affirmed. Writing for the majority, Judge Tatel concluded that "*Northwest Austin* sets the course for our analysis," thus requiring that Section 5's '"current burdens"' be justified by '"current needs"' and Section 4(b)'s '"disparate geographic coverage [be] sufficiently related to the problem that it targets"' in order to justify its departure from the fundamental principle of '"equal sovereignty."' App. 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203). In addition, the majority read *Northwest Austin* as "sending a powerful signal that [*Boerne*'s] congruence and proportionality [test] is the appropriate standard of review," App. 16a, and it purported to evaluate the constitutionality of Sections 5 and 4(b) under that standard.

The majority next considered the nature of the evidence that the legislative record needed to document in order to justify retaining the preclearance obligation for another 25 years. Rejecting Shelby County's argument that preclearance was appropriate only in the face of obstructionist tactics, the majority concluded that Congress need not document "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment" to reauthorize Section 5. App. 24a. Per the majority, the question was not "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." App. 26a.

The majority also disagreed with Shelby County's argument that Congress could not rely on vote dilution evidence to establish the constitutional necessity of the preclearance regime since the VRA enforces the Fifteenth Amendment. App. 27a-28a. Acknowledging that "neither the Supreme Court nor this court has ever held that vote dilution violates the Fifteenth Amendment," App. 27a, the majority concluded that Section 5 also enforces the Fourteenth Amendment, which "prohibits [intentional] vote dilution," App. 27a.

"Having resolved these threshold issues," App. 29a, the majority held that the legislative record was sufficient to sustain Section 5. It found that "the record contains numerous 'examples of modern instances' of racial discrimination in voting," App. 29a (quoting *Boerne*, 521 U.S. at 530), and that "several categories of evidence in the record support Congress's conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed," App. 31a. Finally, the majority dealt with the absence of widespread evidence of voting suppression by finding that Section 5's so-called "blocking" and "deterrent" effect bolstered Congress' reauthorization decision. App. 47a. The majority held that Congress' determination was "reasonable" and thus "deserves judicial deference." App. 68a, 48a.

The majority also upheld Section 4(b). App. 48a-66a. It rejected the argument that the coverage formula is irrational in theory because it relies on outmoded election data and creates an obvious mismatch between its first-generation triggers and the second-generation evidence in the legislative record. App. 56a. The majority found this "argument rests on a misunderstanding of the coverage formula" because "Congress identified the jurisdictions it sought to cover ... and then worked backward, reverse-engineering a formula to cover those jurisdictions." App. 56a. In its view, "Shelby County's real argument is that the statute ... no longer actually identifies the jurisdictions uniquely interfering with the right Congress is seeking to protect through preclearance." App. 57a.

The majority found Section 4(b)'s constitutionality "present[ed] a close question." App. 58a. The majority further acknowledged that, according to the Katz Study of Section 2 litigation included in the legislative record, of the ten fully covered (or almost fully covered) states, five "are about on par with the worst non-covered jurisdictions" and two "had no successful published section 2 cases at all." App. 58a. But relying on a post-enactment declaration that the United States submitted to the district court, the majority found that several covered States "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." App. 59a. The Court reasoned that these states "appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." App. 59a-60a. Last, the majority concluded that bail-in and bail-out alleviated any remaining concerns with the coverage formula. App. 61a-65a.

3. Judge Williams dissented, finding that Section 4(b)'s criteria for coverage are defective whether "viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?)." App. 70a. While "sometimes a dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder ... Congress hasn't proven so adept." App. 70a.

According to Judge Williams, that Section 4(b) must be "sufficiently related to the problem it targets" means that "[t]he greater the burdens imposed by § 5, the more accurate the coverage scheme must be." App. 71a. He found several aspects of the preclearance regime troubling. First, Section 5 creates severe federalism problems by "mandat[ing] anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to [DOJ] officialdom to seek approval of any and all proposed voting changes." App. 71a. Second, Section 5's "broad sweep" applies "without regard to kind or magnitude" of the voting change. App. 72a. Third, the 2006 amendments to the preclearance standard increased Section 5's federalism burden and "not only disregarded but flouted Justice Kennedy's concern" that the statute created serious equal-protection problems. App. 73a.

Judge Williams agreed that "[w]hether Congress is free to impose § 5 on a select set of jurisdictions also depends in part ... on possible shortcomings in the remedy that § 2 provides for the country as a whole." App. 77a. But he added that "it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay" because "plaintiffs' costs for § 2 suits can in effect be assumed by [DOJ]" and where DOJ does not step in, "§ 2 provides for reimbursement of attorney and expert fees for prevailing parties." App. 77a (citing 42 U.S.C. § 1973*l*(e)). Further, courts can "use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." App. 77a-78a.

Against this backdrop, Judge Williams concluded that "a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5's harsh remedy, even if one might find § 5 appropriate for a subset of that group." App. 78a. He found a negative correlation "between inclusion in § 4(b)'s coverage formula and low black registration or turnout," noting that "condemnation under § 4(b) is a marker of higher black registration and turnout." App. 83a. This was true for minority elected officials in the covered and noncovered jurisdictions as well. App. 85a.

"[S]econd generation" evidence in the record did not alter the picture. Judge Williams determined that "a number of factors undermine any serious inference" from federal election observer data. App. 87a. He also found that the Katz Study further undermined the formula, especially when looking at the Section 2 data on a state-by-state basis. App. 91a-93a. "The five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions .... Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered .... A formula with an error rate of 50% or more does not seem 'congruent and proportional.'" App. 93a. Judge Williams rejected the McCrary declaration's survey of "purportedly successful, but unreported § 2 cases" as unreliable. App. 93a.

Judge Williams attributed no significance to the purported "blocking" or "deterrent effect" of preclearance because Section 5 objections are not a fair proxy for successful Section 2 lawsuits and "the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens ... must be justified by current needs' would mean little if § 5's supposed deterrent effect were enough to justify the current scheme." App. 94a. Judge Williams also concluded that the problems with the coverage formula could not be solved "by tacking on a waiver procedure such as bailout." App. 101a (citation and quotation omitted).

Judge Williams ultimately concluded that "[b]ased on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a 'substantial' amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*." App. 96a. Accordingly, "there is little to suggest that § 4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination." App. 104a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the D.C. Circuit "decided an important question of federal law that has not been, but should be, settled by this Court" and it did so "in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

I. The Constitutional Issues Presented In This Case Are Of Public Importance And Should Be Settled Now By This Court.

1. "[The] Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). For covered jurisdictions, Section 5 arrests that sovereign authority as to "all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. Placing a jurisdiction in federal receivership raises fundamental questions of state sovereignty; and doing so selectively, absent compelling justification, unconstitutionally departs from the "historic tradition that all the States enjoy 'equal sovereignty.'" *Id.* at 202-03. In short, Congress' 2006 decision to reauthorize the VRA's preclearance regime for another 25 years "raise[s] serious constitutional questions" under any applicable standard. *Id.* at 204.

Congress compounded the problem by expanding the grounds for denying preclearance at a time when the "conditions that [the Court] relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* ha[d] unquestionably improved." *Id.* at 202. Preclearance must now be denied unless a covered jurisdiction can prove both the absence of "any discriminatory purpose" and that the voting change will not diminish a minority group's "ability to elect" a favored candidate even if it would not interfere with any voter's "effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The new preclearance standard thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." App. 75a (Williams, J., dissenting).

2. These federalism concerns are not academic. The preclearance regime has an outsized effect on the basic operation of state and local government. Based on the experience of covered jurisdictions between 1982 and 2007, Section 5 will foreclose the implementation of more than 100,000 electoral changes (more than 99% of which will be noncontroversial) unless and until they are precleared by federal officials in Washington, D.C. S. Rep. No. 109-295, at 13-14 (2006). Because of this prior restraint, a covered jurisdiction must either go "hat in hand to [DOJ] officialdom to seek approval," App. 71a, or embark on expensive litigation in a remote judicial venue if it wishes to make any change to its election system. It should be no surprise, then, that states such as Florida, Texas, and Alaska have joined Shelby County in challenging the 2006 reauthorization.[2]

These constitutional challenges arise, in significant part, in response to DOJ's needlessly aggressive exercise of preclearance authority. For example, DOJ has refused to preclear the Texas and South Carolina voter identification laws notwithstanding *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). As Judge Williams explained, there is simply no legitimate reason why "voter ID laws from South Carolina and Texas [should] be judged by different criteria ... from those governing Indiana" when "Indiana ranks 'worse' than South Carolina and Texas in registration and voting rates, as well as in black elected officials" and there is no other obvious basis for placing South Carolina and Texas, but not Indiana, in federal receivership. App. 103a.

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[2] *See Florida v. United States*, No. 11-cv-1428-CKK-MG-ESH (D.D.C.) (Doc. 54); *Texas v. Holder*, No. 12-cv-128-RMC-DST-RLW (D.D.C.) (Doc. 25); *Samuelsen v. Treadwell*, No. 12-cv-00118-RRB-AK-JKS (D. Alaska) (Doc. 25).

Similarly, Florida (which must obtain preclearance of statewide legislation because five of its 62 counties are covered jurisdictions) has been forced into preclearance litigation to prove that reducing early voting from 14 days to 8 days is not "discriminatory,"[3] when states such as Connecticut, Rhode Island, and Pennsylvania have no early voting at all.[4] Such questionable preclearance denials raise serious concerns about whether Section 5's mission has strayed from ensuring that discriminatory tactics do not disenfranchise minority voters to providing DOJ with a convenient and efficient means of imposing its preferred electoral system on the covered jurisdictions.

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[3] DOJ opposed preclearance even though Florida still provided the same total number of early voting hours (96 hours) by expanding evening hours and mandating additional weekend hours. *Florida v. United States*, No. 11-cv-1428-CKK-MG-ESH (D.D.C.) (Doc. 54).

[4] National Conference of State Legislatures: Absentee and Early Voting (July 22, 2011), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (last visited July 20, 2012).

3. Only this Court, the ultimate guardian and arbiter of the division of powers that lies at the heart of our constitutional system, *Boerne*, 521 U.S. at 528-29, can settle these important issues. Although previous decisions reviewing the VRA's constitutionality are instructive, there must be a contemporaneous assessment of whether Section 5's "current needs" justify its "current burdens" and whether Section 4(b)'s "departure from the fundamental principle of equal sovereignty" remains "sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. "Past success alone ... is not adequate justification to retain the preclearance requirements." *Id.* at 202. These constitutional issues will continue to fester until they are definitively settled.

For understandable reasons, this Court "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Id.* at 205. But this prudent separation-of-powers doctrine presupposes that the political branches will respond when the Court expresses concern over whether a federal law will withstand constitutional scrutiny upon further review. *Mistretta v. United States*, 488 U.S. 361, 408 (1989) ("Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest.").

Yet in the more than three years after *Northwest Austin*, Congress held not one hearing, proposed not one bill, and amended not one law in response to the concern that Sections 5 and 4(b) cannot be constitutionally justified based on the record compiled in 2006. And instead of judiciously exercising its statutory authority in order to avoid confrontation, DOJ's actions have magnified the burdens and inequities of the modern preclearance regime. *Supra* at 19-20.

This Court's intervention is therefore warranted. Because Congress' Fifteenth Amendment enforcement authority "is not unlimited," this Court must "determine if Congress has exceeded its authority under the Constitution." *Boerne*, 521 U.S. at 536. Both in this setting and in others, this Court has traditionally granted review whenever a serious challenge to Congress' enforcement authority arises. *See, e.g.*, *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). This case should not be an exception to that rule.

4. Shelby County's challenge provides an ideal vehicle for resolving the constitutionality of Sections 5 and 4(b). Unlike in *Northwest Austin*, Shelby County neither requested nor is eligible for bailout. App. 11a. Shelby County's challenge is based on the 2006 legislative record and no other evidence is constitutionally cognizable. *Infra* at 34a. There is no justiciability problem. App. 296a-297a. The decision below is binding precedent in the D.C. Circuit, the only Circuit in which this issue may be adjudicated, *supra* at 4, and its decision will provide the basis for this or any future review by the Court. The unresolved issues were thoroughly explored in the district court opinion and the majority and dissenting court of appeals opinions.

In acting on Shelby County's Petition, this Court must decide whether to allow the split decision below to stand as binding nationwide precedent or to acknowledge the importance of the issues presented and settle them.

Shelby County believes that the choice is obvious. The burdens imposed on it and other covered jurisdictions will continue until the constitutional issues left unanswered in *Northwest Austin* are definitively resolved by this Court. Indeed, the issues Shelby County raises inevitably will be presented to this Court until this cloud of uncertainty is lifted. The time to settle them is now.

II. Review Is Required Because The Court Of Appeals Incorrectly Decided These Important And Unsettled Constitutional Issues.

A. The court of appeals wrongly upheld Sections 5 and 4(b) by distorting *Boerne*'s "congruent and proportional" test.

1. The lower courts agreed that whether the preclearance regime remains "appropriate" enforcement legislation must be judged under the *Boerne* framework. App. 16a, 160a-161a. Under *Boerne*, the court must first "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, it must "examine whether Congress identified a history and pattern" of constitutional violations. *Id.* at 368. Third, it must find "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

2. While conceding the applicable standard, the majority deferred to Congress in ways alien to the *Boerne* line of decisions. The majority described its "job" as merely "to ensure that Congress's judgment is reasonable and rests on substantial probative evidence." App. 47a. But it confused the standard by which courts

review legislation enacted under Congress' Article I powers with review of Fifteenth Amendment remedial authority. Congress' enforcement authority under the Reconstruction Amendments is not substantive—it is strictly remedial. *Boerne*, 521 U.S. at 527. Treating the judicial task as akin to deferential review of Article I authority or administrative agency actions, App. 47a, abdicates the Court's duty to patrol "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Boerne*, 521 U.S. at 519.

The majority acknowledged that a "more searching" review of the legislative record is needed given Section 5's unprecedented burdens. App. 21a. But it honored this obligation in the breach, applying an overly deferential standard of review that infected every aspect of its analysis and thus effectively abandoning "vital principles necessary to maintain separation of powers and the federal balance." *Boerne*, 521 U.S. at 536.

3. Sections 5 and 4(b) are no longer constitutional under a proper application of *Boerne*. To reauthorize Section 5, Congress was required to document the kind of "widespread and persisting" pattern of Fifteenth Amendment violations that made the preclearance obligation constitutional in the first place: evasionary alteration of discriminatory voting laws to circumvent minority victories hard-won through traditional litigation. *Beer*, 425 U.S. at 140. It did not. *Nw. Austin*, 557 U.S. at 226-29 (Thomas, J.). And even if it were "possible to squeeze out of [the congressional record] a pattern of unconstitutional discrimination by the States," *Garrett*, 531 U.S. at 372, the preclearance obligation—especially given the burdensome amendments to the standard—"is

so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Boerne*, 521 U.S. at 532.

Section 4(b) likewise fails under *Boerne*. Its formula is not proportional because coverage is no longer "placed only on jurisdictions" in which there is "intentional racial discrimination in voting." *Id.* at 533. The registration, turnout, and minority elected officials statistics previously relied on by this Court to justify selective coverage reveal no difference between covered and non-covered jurisdictions. *Infra* at 27. And even the "second generation barriers to voting" are not concentrated in the covered jurisdictions. *Id.* at 32-34. The formula also lacks congruence because of the complete mismatch between its triggers and the kind of evidence relied on by Congress to reauthorize the preclearance obligation. *Id.* at 30. Congress must ensure a close fit between the reasons for imposing preclearance and the formula employed for choosing the jurisdictions subject to that obligation. Because Congress clearly failed to do so here, Section 4(b)'s coverage formula fails congruence-and-proportionality review. App. 70a, 93a, 97a (Williams, J.).

B. The court of appeals should not have upheld Section 5's preclearance obligation under any applicable legal standard.

1. Irrespective of the standard of review, to reauthorize preclearance for another 25 years the 2006 Congress needed to document "exceptional conditions" that could "justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 335. Section 5's

constitutionality has always depended on a legislative showing that "current burdens" imposed on the covered jurisdictions by this extreme remedy are "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

2. Contemporaneous evidence of systematic interference with the right to register and vote has always been required to trigger Fifteenth Amendment remedial authority. *Katzenbach*, 383 U.S. at 329 (legislative record was filled with "reliable evidence of actual voting discrimination"); *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("Congress may impose prophylactic § 5 legislation" when "there has been an identified history of relevant constitutional violations."). Here, Congress relied on "second generation" barriers that are not even remotely probative of intentional interference with the right to register and vote—let alone the kind of systematic violations that previously justified Section 5. *Nw. Austin*, 557 U.S. at 228 (Thomas, J.); App. 97a (Williams, J.). The majority should not have relied on this evidence to sustain Section 5.

Moreover, much of this evidence involved alleged vote dilution. App. 26a-29a. Because the Fifteenth Amendment has been the exclusive basis for upholding Section 5, however, *Katzenbach*, 383 U.S. at 308-10, 324-29; *Rome*, 446 U.S. at 180-82, the legislative record must document disenfranchisement—not vote dilution. *Miller*, 515 U.S. at 937-38. This Court has "never held that vote dilution violates the Fifteenth Amendment." *Bossier Parrish II*, 528 U.S. at 334 n.3. The majority incorrectly relied on evidence involving redistricting, annexations, at-large elections, and other practices that affect the weight of the vote once cast—not access to the ballot.

3. At most, the legislative record shows scattered and limited interference with Fifteenth Amendment voting rights in some covered jurisdictions. In *Katzenbach*, the Court relied on the compelling record of widespread infringement of voting rights coupled with a recent and deplorable history of "ingenious defiance" of traditional judicial remedies. 383 U.S. at 309. To sustain Section 5, this Court concluded that there must be current evidence in the legislative record of "systematic resistance to the Fifteenth Amendment." *Id.* at 328, 335.

No such record now exists. "Things have changed in the South .... Blatantly discriminatory evasions of federal decrees are rare." *Nw. Austin*, 557 U.S. at 202. Voter registration and turnout "now approach parity" and "minority candidates hold office at unprecedented levels." *Id.* at 202 (citing H.R. Rep. No. 109-478, at 12-18). "The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute." *Id.* at 229 (Thomas, J.).

To fill this gap, the majority went beyond the legislative record to speculate that the lack of evidence of discriminatory practices in the covered jurisdictions arose not from changed attitudes, but from Section 5's so-called deterrent effect. App. 42a-44a. Speculative deterrence is plainly insufficient to impose preclearance on the covered jurisdictions. Congress needed to find that Section 5 was justified under actual conditions uniquely present in the covered jurisdictions; it could not proceed from an unsubstantiated and unbounded assumption that the covered jurisdictions have a latent desire to discriminate that does not exist elsewhere in the country. Congress is not entitled to reauthorize Section 5 for another 25 years based "on outdated assumptions about racial attitudes in the covered jurisdictions." *Nw. Austin*, 557 U.S. at 226 (Thomas, J.); App. 94a (Williams, J.).

4. The court of appeals sought to avoid these record infirmities by holding that Congress did not need to document the kind of "unremitting and ingenious defiance of the Constitution" catalogued in *Katzenbach*. 383 U.S. at 309. In its view, Section 5 could be sustained so long as the legislative record showed the "inadequacy of case-by-case litigation" under Section 2. App. 26a. But it was not the ordinary costs and burdens associated with traditional litigation that rendered Section 2 inadequate in 1965. It was the covered States' "obstructionist tactics" and "systematic resistance to the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 328. Unrelenting defiance was the reason *why* case-by-case litigation was futile and Section 5 was justifiable as a last resort. Absent evidence that the systematic disenfranchisement of minority voters that made case-by-case enforcement impossible still exists, there is no constitutional basis for upholding Section 5. Congress' interest in preserving the administrative ease of preclearance is not a basis for retaining it.

In any event, nothing in the legislative record suggests that Section 2 litigation is inadequate today. The discriminatory tests and devices that once made case-by-case litigation futile have been permanently banned by Congress. *Supra* at 9. In addition, "the majority of § 5 objections today concern redistricting," App. 99a (Williams, J.), and Section 2 is an effective vehicle for challenging redistricting changes—especially statewide decennial redistricting plans—the principal target of those urging reauthorization, App. 26a, 99a. Moreover, there is no evidence in the legislative record that adverse Section 2 judgments are being evaded or designed around by recalcitrant jurisdictions.

Unlike Section 5's intrusive and selective suspension of all voting changes, Section 2 creates a nationwide private right of action allowing direct challenge to discriminatory voting laws and bases its remedy on proven violations. Especially in conjunction with Section 3's bail-in mechanism, *infra* at 35, Section 2 is now the "appropriate" prophylactic remedy for any pattern of discrimination documented by Congress in 2006.

C. The court of appeals should not have upheld Section 4(b)'s coverage formula under any applicable legal standard.

1. Section 4(b) is unconstitutional whether *Boerne* applies or not. Under *Katzenbach*, the coverage formula must be "rational in both practice and theory." 383 U.S. at 330. In *Northwest Austin*, the Court doubted the formula's constitutionality because "the evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance" and because "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." 557 U.S. at 203; *Lane*, 541 U.S. at 564 (Scalia, J. dissenting) (allowing a prophylactic remedy to be imposed only "on those particular States" where the problem exists). The decision below cannot be squared with any of this Court's decisions.

2. Congress constitutionally justified Section 5's reauthorization based on evidence different from that it had previously relied upon; but Congress irrationally failed to tie coverage under Section 4(b) to that evidence. The majority sidestepped this problem by suggesting that the formula's theoretical irrationality is not "Shelby County's real argument." App. 57a. That is wrong; the issue was briefed extensively both in the district court and on appeal. App. 292a-293a. The majority dodged this "theory" challenge because there is no answer to it. The coverage formula relies on decades-old voting data and there is a serious mismatch between its triggers, which are based on ballot-access interference, and the "second generation" barriers in the record, which relate only to the weight of a vote once cast. App. 98a (Williams, J.).

The majority's nearest approach to this issue was asserting that, because the formula "continues to identify the jurisdictions with the worst problems," it "is rational in theory." App. 57a. But that is an argument for rationality in practice—not theory. In fact, the majority disclaimed the need to defend the formula on a theoretical level, concluding that the coverage triggers "were never selected because of something special that occurred in [the identified] years" and that "tests, devices, and low participation rates" were not Congress' main targets; they were "proxies for pernicious racial discrimination in voting." App. 56a-57a. But this is pure revisionism. *Katzenbach* held that the "the misuse of tests and devices ... was the evil for which the new remedies were specifically designed" and that "a low voting rate [was] pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S. at 330-31. Thus, the

Court found a rational connection between the triggers for coverage and the problems that the preclearance was devised to remedy. Bypassing this question admits that it has no answer.

3. The majority's defense of the coverage formula at a practical level fares no better. As Judge Williams explained, of the four types of evidence in the legislative record for which comparative data exist:

> one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress's concerns.

App. 95a.

Such a legislative record cannot possibly show that voting discrimination is "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203. Had Congress studied the issue, it might have reconsidered the formula. But although it was alerted to the problem, Congress never seriously studied the comparative records of covered and non-covered States. The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d. Sess., at 200-01 (May 16, 2006) (testimony of Pildes) (noting that the issue was never "addressed in any detail in the [Senate] hearings ... or in the House" and "little evidence in the [legislative] record examines whether systematic differences exist between the currently covered and non-covered jurisdictions"). Congress cannot selectively impose preclearance if it fails to seriously study whether the identified problem is concentrated in the targeted jurisdictions.

4. Presumably aware that most of the comparative evidence in the legislative record could not be relied on to uphold Section 4(b), the majority focused on the Katz Study of Section 2 litigation. App. 49a-51a. The majority conceded that the study showed that the bulk of the covered States are no different from their non-covered counterparts, App. 58a, but it then resorted to manipulating the Katz data. First, it considered only a carefully selected slice of the data—Section 2 cases resulting in outcomes described as "favorable to minority plaintiffs," a characterization that vastly overstates the significance of this evidence, App. 93a-94a (Williams, J.), especially considering that Congress cited only the "continued filing of Section 2 cases in covered jurisdictions," Pub. L. No. 109-246, §2(b)(4)(C), 120 Stat. at 577. The Katz Study indicates that many of these Section 2 cases involved no finding of intentional discrimination, were not resolved on the merits, or both; it also indicated that some of the "outcomes" deemed "favorable to minority voters" merely reflected changes in voting laws.

Second, the majority primarily reviewed this slice of data by aggregating it into "covered" and "non-covered" categories, a mode of analysis that fails to afford equal dignity to each sovereign State subject to coverage. *Nw. Austin*, 557 U.S. at 203. Even viewed in this skewed manner, however, the data fails to show a meaningful difference between covered and noncovered jurisdictions. According to the Katz Study, there were more Section 2 lawsuits filed, as well as more resulting in a finding of intentional discrimination, in non-covered jurisdictions. Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls. And even if "successful" Section 2 lawsuits were the appropriate barometer, a 56% to 44% divide between covered and non-covered jurisdictions, especially given the limited number of cases overall, cannot justify retaining this outmoded coverage formula.

Third, the majority failed to properly review the Katz data state-by-state—the only mode of analysis that comports with the principle of equal sovereignty. Had it done so, the majority could never have found that the formula was actually capturing "the jurisdictions with the worst problems." App. 57a. If successful Section 2 litigation is the best measure of where the "worst problems" exist, then the coverage formula is both overinclusive—sweeping in states like Arizona and Alaska, which had no successful Section 2 cases—and underinclusive—omitting states like Montana, Arkansas, Delaware, Rhode Island, Hawaii, and Illinois, which had more successful Section 2 cases than South Carolina, Florida, Virginia, Texas, and Georgia. What the majority labeled a "close question," App. 58a, is in fact not close at all.

The majority examined the Katz data state-by-state only after supplementing it with the results of a post-enactment study that it conceded should be "approach[ed] … with caution," App. 54a, because it was conducted during this litigation and was partially dependent on extra-record evidence collected by different groups and pursuant to different methods than the Katz Study, App. 93a-94a (Williams, J.). But the study should have been disregarded entirely. The law's constitutionality must be measured against the legislative record alone. App. 299a-303a; *Coleman*, 132 S. Ct. at 1336-37; *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008).

Looking for precedential support, the majority attempted to analogize the 2006 record to the 1965 record, suggesting the two were similar. App. 60a. But the 1965 record included a category of States where "federal courts ha[d] repeatedly found substantial voting discrimination," a second category where "there was more fragmentary evidence of recent voting discrimination," and a third category where the use of tests and devices and low voter turnout justified coverage, "at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In contrast, the 2006 record could not possibly result in any States falling within the first category, and at most only three States in the second category, "leav[ing] six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully covered states (Virginia and Alaska) were not included in either category one or two." App. 97a. (Williams, J.).

5. The majority also relied on bail-out and bail-in to solve the massive problems with the coverage formula. But even setting aside the fact that the majority relied on

bailout figures inflated by post-reauthorization evidence,[5] only about 1% of all covered jurisdictions have bailed out since 1982. Bailout thus is "only the most modest palliative to § 5's burdens," App. 101a (Williams, J.), especially because bailed-out jurisdictions remain subject to the VRA's clawback provision for 10 years, *supra* at 6 n.1. Were bailout sufficient to save such an ill-fitting coverage formula, Congress could just randomly select jurisdictions for coverage so long as any unlucky jurisdiction could obtain some measure of relief from a federal court. Surely the "fundamental principle" of equal sovereignty requires more. *Nw. Austin*, 557 U.S. at 203.

Finally, judicial bail-in actually undermines the coverage formula's constitutionality. Bail-in is a narrower, more appropriate means of imposing preclearance because it is triggered by a prior judicial finding of unconstitutional voting discrimination, 42 U.S.C. § 1973a(c), and because it can be applied nationally. Unlike the outdated coverage formula, then, Section 3's bail-in mechanism does not "depart[] from the fundamental principle of equal sovereignty" by treating some States differently from others, *Nw. Austin*, 557 U.S. at 203.

* * *

Sections 5 and 4(b) of the VRA were essential to putting an end to "ingenious defiance" of Fifteenth Amendment voting rights in the covered jurisdictions. They were designed to overcome egregious discriminatory conditions that had persisted for 95 years and had made case-by-case litigation and the ban on abusive tests and devices insufficient to overcome the rampant electoral gamesmanship that had plagued the South. In 1965, Congress built the kind of legislative record that is needed to sustain a prophylactic remedy as invasive and novel as preclearance and crafted a coverage formula that was sound in theory and in practice. In 2006, Congress did neither. It is now incumbent upon this Court to review the decision below and settle the issues arising from Congress' failure to fulfill its obligation.

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[5] Approximately one-third of all bailouts occurred in the wake of *Northwest Austin*, App. 63a, and thus were not in the legislative record before Congress in 2006 and cannot support the validity of Congress' judgment, *see supra* at 34.

CONCLUSION

The petition for writ of certiorari should be granted.

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July 20, 2012

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED MAY 18, 2012

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5256

SHELBY COUNTY, ALABAMA,

Appellant,

v.

ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *ET AL*.,

Appellees.

January 19, 2012, Argued
May 18, 2012, Decided

JUDGES: Before: TATEL and GRIFFITH, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge TATEL. Dissenting opinion filed by Senior Circuit Judge WILLIAMS.

OPINION BY: TATEL

Dissenting opinion filed by Senior Circuit Judge WILLIAMS

OPINION

Tatel, *Circuit Judge*: In *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009), the Supreme Court raised serious questions about the continued constitutionality of section 5 of the Voting Rights Act of 1965. Section 5 prohibits certain "covered jurisdictions" from making any change in their voting procedures without first demonstrating to either the Attorney General or a three-judge district court in Washington that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The Supreme Court warned that the burdens imposed by section 5 may no longer be justified by current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets. Although the Court had no occasion to resolve these questions, they are now squarely before us. Shelby County, Alabama, a covered jurisdiction, contends that when Congress reauthorized section 5 in 2006, it exceeded its enumerated powers. The district court disagreed and granted summary judgment for the Attorney General. For the reasons set forth in this opinion, we affirm.

I.

The Framers of our Constitution sought to construct a federal government powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence. They feared not state government, but centralized national government, long the hallmark of Old World monarchies. As a result, "[t]he powers delegated by the . . . Constitution to the federal government, are few and defined," while "[t]hose which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45 (James Madison). Close to the people, state governments would protect their liberties.

But the experience of the nascent Republic, divided by slavery, taught that states too could threaten individual liberty. So after the Civil War, the Reconstruction Amendments were added to the Constitution to limit state power. Adopted in 1865, the Thirteenth Amendment prohibited involuntary servitude. Adopted three years later, the Fourteenth Amendment prohibited any state from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person within its jurisdiction the equal protection of the laws," and granted Congress "power to enforce" its provisions "by appropriate legislation." U.S. Const. amend. XIV. Finally, the Fifteenth Amendment declared that "[t]he right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" and vested Congress with "power to enforce this article by appropriate legislation." U.S. Const. amend. XV.

Following Reconstruction, however, "the blight of racial discrimination in voting . . . infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). As early as 1890, "the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia" began employing tests and devices "specifically designed to prevent Negroes from voting." *Id.* at 310. Among the most notorious devices were poll taxes, literacy tests, grandfather clauses, and property qualifications. *See Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011); *see also Katzenbach*, 383 U.S. at 310-11. Also widely employed, both immediately following Reconstruction and again in the mid-twentieth century, were "laws designed to dilute black voting strength," including laws that "gerrymandered election districts, instituted at-large elections, annexed or deannexed land . . . and required huge bonds of officeholders." *Shelby Cnty.*, 811 F. Supp. 2d at 429 (internal quotation marks omitted).

The courts and Congress eventually responded. The Supreme Court struck down grandfather clauses, *Guinn v. United States*, 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915), and white primaries, *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944). Congress "enact[ed] civil rights legislation in 1957, 1960, and 1964, which sought to 'facilitat[e] case-by-case litigation against voting discrimination.'" *Shelby Cnty.*, 811 F. Supp. 2d at 430 (alteration in original) (quoting *Katzenbach*, 383 U.S. at 313). But Congress soon determined that such measures were inadequate: case-by-case litigation, in addition to being expensive, was slow—slow to come to a result and slow to respond once a state switched from one discriminatory device to the next—and thus had "done little to cure the problem of voting discrimination." *Katzenbach*, 383 U.S. at 313. Determined to "rid the country of racial discrimination in voting," *id.* at 315, Congress passed the Voting Rights Act of 1965.

Unlike prior legislation, the 1965 Act combined a permanent, case-by-case enforcement mechanism with a set of more stringent, temporary remedies designed to target those areas of the country where racial discrimination in voting was concentrated. Section 2, the Act's main permanent provision, forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Applicable nationwide, section 2 enables individuals to bring suit against any state or jurisdiction to challenge voting practices that have a discriminatory purpose or result. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986).

Reaching beyond case-by-case litigation and applying only in certain "covered jurisdictions," section 5—the focus of this litigation—"prescribes remedies . . . which go into effect without any need for prior adjudication." *Katzenbach*, 383 U.S. at 327-28. Section 5 suspends "all changes in state election procedure until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *Nw. Austin*, 129 S. Ct. at 2509. A jurisdiction seeking to change its voting laws or procedures must either submit the change to the Attorney General or seek preclearance directly from the three-judge court. If it opts for the former and if the Attorney General lodges no objection within sixty days, the proposed law can take effect. 42 U.S.C. § 1973c(a). But if the Attorney General lodges an objection, the submitting jurisdiction may either request reconsideration, 28 C.F.R. § 51.45(a), or seek a de novo determination from the three-judge district court. 42 U.S.C. § 1973c(a). Either way, preclearance may be granted only if the jurisdiction demonstrates that the proposed change to its voting law neither "has the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color." *Id.*

Prior to section 5's enactment, states could stay ahead of plaintiffs and courts "'by passing new discriminatory voting laws as soon as the old ones had been struck down.'" *Beer v. United States*, 425 U.S. 130, 140, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976) (quoting H.R. Rep. No. 94-196, at 57-58 (1975)). But section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim." *Katzenbach*, 383 U.S. at 328. It did so by placing "the burden on covered jurisdictions to show their voting changes are nondiscriminatory *before* those changes can be put into effect." *Shelby Cnty.*, 811 F. Supp. 2d at 431. Section 5 thus "pre-empted the most powerful tools of black disenfranchisement," *Nw. Austin*, 129 S. Ct. at 2509, resulting in "undeniable" improvements in the protection of minority voting rights, *id.* at 2511.

Section 4(b) contains a formula that, as originally enacted, applied section 5's preclearance requirements to any state or political subdivision of a state that "maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election." *Shelby Cnty.*, 811 F. Supp. 2d at 432 (citing Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 ("1965 Act")). Congress chose these criteria carefully. It knew precisely which states it sought to cover and crafted the criteria to capture those jurisdictions. *Id.* (citing testimony before Congress in 2005-2006). Unsurprisingly, then, the jurisdictions originally covered in their entirety, Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, "were those southern states with the worst historical records of racial discrimination in voting." *Id.*

Because section 4(b)'s formula could be both over- and underinclusive, Congress incorporated two procedures for adjusting coverage over time. First, as it existed in 1965, section 4(a) allowed jurisdictions to earn exemption from coverage by obtaining from a three-judge district court a declaratory judgment that in the previous five years (i.e., before they became subject to the Act) they had used no test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." 1965 Act § 4(a). This "bailout" provision, as subsequently amended, addresses potential overinclusiveness, allowing jurisdictions with clean records to terminate their section 5 preclearance obligations. Second, section 3(c) authorizes federal courts to require preclearance by any non-covered state or political subdivision found to have violated the Fourteenth or Fifteenth Amendments. 42 U.S.C. § 1973a(c). Specifically, courts presiding over voting discrimination suits may "retain jurisdiction for such period as [they] may deem appropriate" and order that during that time no voting change take effect unless either approved by the court or unopposed by the Attorney General. *Id.* This judicial "bail-in" provision addresses the formula's potential underinclusiveness.

As originally enacted in 1965, section 5 was to remain in effect for five years. In *South Carolina v. Katzenbach*, the Supreme Court sustained the constitutionality of section 5, holding that its provisions "are a valid means for carrying out the commands of the Fifteenth Amendment." 383 U.S. at 337. Congress subsequently renewed the temporary provisions, including sections 4(b) and 5, in 1970 (for five years), then in 1975 (for seven years), and again in 1982 (for twenty-five years). In each version, "[t]he coverage formula [in section 4(b)] remained the same, based on the use of voting-eligibility tests [or devices] and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972." *Nw. Austin*, 129 S. Ct. at 2510. In 1975 Congress made one significant change to section 4(b)'s scope: it amended the definition of "test or device" to include the practice of providing only English-language voting materials in jurisdictions with significant non-English-speaking populations. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-02 (codified at 42 U.S.C. § 1973b(f)(3)). Although not altering the basic coverage formula, this change expanded section 4(b)'s scope to encompass jurisdictions with records of voting discrimination against "language minorities." *See Briscoe v. Bell*, 432 U.S. 404, 405, 97 S. Ct. 2428, 53 L. Ed. 2d 439 (1977). The Supreme Court sustained the constitutionality of each extension, respectively, in *Georgia v. United States*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973), *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), and *Lopez v. Monterey County*, 525 U.S. 266, 119 S. Ct. 693, 142 L. Ed. 2d 728 (1999).

Significantly for the issue before us, the 1982 version of the Voting Rights Act made bailout substantially more permissive. Prior to 1982, bailout was extremely limited: no jurisdiction could bail out if it had used discriminatory voting tests or practices when it first became subject to section 5, even if it had since eliminated those practices. *Shelby Cnty.*, 811 F. Supp. 2d at 434. By contrast, after 1982 the Act allowed bailout by any jurisdiction with a "clean" voting rights record over the previous ten years. *Id.* The 1982 reauthorization also permitted a greater number of jurisdictions to seek bailout. Previously, "only covered states (such as Alabama) or separately-covered political subdivisions (such as individual North Carolina counties) were eligible to seek bailout." *Id.* After 1982, political subdivisions within a covered state could bail out even if the state as a whole was ineligible. *Id.*

Setting the stage for this litigation, Congress extended the Voting Rights Act for another twenty-five years in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ("2006 Act"). In doing so, it acted on the basis of a legislative record "over 15,000 pages in length, and includ[ing] statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination." *Shelby Cnty.*, 811 F. Supp. 2d at 435 (internal quotation marks omitted). Congress also amended section 5 to overrule the Supreme Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461, 479-80, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003) (which held that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances" and that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice"), and *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*") (which held that "the 'purpose' prong of § 5 covers only retrogressive dilution"). *See* 2006 Act § 5 (codified at 42 U.S.C. § 1973c(b)-(d)).

The 2006 Act's constitutionality was immediately challenged by "a small utility district" subject to its provisions. *See Nw. Austin*, 129 S. Ct. at 2508. After finding the district ineligible for bailout, the three-judge district court concluded that the reauthorized Voting Rights Act was constitutional. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 283 (D.D.C. 2008). On appeal, the Supreme Court identified two "serious . . . questions" about section 5's continued constitutionality, namely, whether the "current burdens" it imposes are "justified by current needs," and whether its "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2512-13. But invoking the constitutional avoidance doctrine, *id.* at 2508, 2513, the Court interpreted the statute to allow any covered jurisdiction, including the utility district bringing suit in that case, to seek bailout, thus avoiding the need to resolve the "big question," *id.* at 2508: Did Congress exceed its constitutional authority when it reauthorized section 5? Now that question is squarely presented.

II.

Shelby County filed suit in the U.S. District Court for the District of Columbia, seeking both a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing them. *Shelby Cnty.*, 811 F. Supp. 2d at 427. Unlike the utility district in *Northwest Austin*, Shelby County never sought bailout, and for good reason. Because the county had held several special elections under a law for which it failed to seek preclearance and because the Attorney General had recently objected to annexations and a redistricting plan proposed by a city within Shelby County, the County was clearly ineligible for bailout. *See id.* at 446 n.6. As the district court—Judge John D. Bates—recognized, the "serious constitutional questions" raised in *Northwest Austin* could "no longer be avoided." *Id.* at 427.

Addressing these questions in a thorough opinion, the district court upheld the constitutionality of the challenged provisions and granted summary judgment for the Attorney General. After reviewing the extensive legislative record and the arguments made by Shelby County, the Attorney General, and a group of defendant-intervenors, the district court concluded that "Section 5 remains a 'congruent and proportional remedy' to the 21st century problem of voting discrimination in covered jurisdictions." *Id.* at 428. Responding to the Supreme Court's concerns in *Northwest Austin*, the district court found the record evidence of contemporary discrimination in covered jurisdictions "plainly adequate to justify section 5's strong remedial and preventative measures," *id.* at 492 (internal quotation marks omitted), and to support Congress's predictive judgment that failure to reauthorize section 5 "'would leave minority citizens with the inadequate remedy of a Section 2 action,'" *id.* at 498 (quoting H.R. Rep. No. 109-478, at 57 (2006)). This evidence consisted of thousands of pages of testimony, reports, and data regarding racial disparities in voter registration, voter turnout, and electoral success; the nature and number of section 5 objections; judicial preclearance suits and section 5 enforcement actions; successful section 2 litigation; the use of "more information requests" and federal election observers; racially polarized voting; and section 5's deterrent effect. *Id.* at 465-66.

As to section 4(b), the district court acknowledged that the legislative record "primarily focused on the persistence of voting discrimination in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions." *Id.* at 507. Nonetheless, the district court pointed to "several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement"—including the disproportionate number of successful section 2 suits in covered jurisdictions and the "continued prevalence of voting discrimination in covered jurisdictions notwithstanding the considerable deterrent effect of Section 5." *Id.* at 506-07. Thus, although observing that Congress's reauthorization "ensured that Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of voting discrimination," *id.* at 506, the district court found this continued focus justified by *current* evidence that discrimination remained concentrated in those juridictions. *See id.* (explaining that Congress did not renew the coverage formula to punish past sins, but rather because it found "substantial evidence of contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conduct"). Finally, the district court emphasized that Congress had based reauthorization not on "a perfunctory review of a few isolated examples of voting discrimination by covered jurisdictions," but had "'approached its task seriously and with great care.'" *Id.* at 496 (quoting *Nw. Austin*, 573 F. Supp. 2d at 265). Given this, the district court concluded that Congress's predictive judgment about the continued need for section 5 in covered jurisdictions was due "substantial deference," *id.* at 498 (internal quotation marks omitted), and therefore "decline[d] to overturn Congress's carefully considered judgment," *id.* at 508. Our review is de novo. *See McGrath v. Clinton*, 666 F.3d 1377, 1379 (D.C. Cir. 2012) ("We review the district court's decision to grant summary judgment de novo.").

On appeal, Shelby County reiterates its argument that, given the federalism costs section 5 imposes, the provision can be justified only by contemporary evidence of the kind of "'unremitting and ingenious defiance'" that existed when the Voting Rights Act was originally passed in 1965. Appellant's Br. 8 (quoting *Katzenbach*, 383 U.S. at 309). Insisting that the legislative record lacks "evidence of a systematic campaign of voting discrimination and gamesmanship by the covered jurisdictions," Shelby

County contends that section 5's remedy is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure. *Id.* at 8-9; *see also City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). In addition, Shelby County argues, section 4(b) contains an "obsolete" coverage formula that fails to identify the problem jurisdictions, and because the jurisdictions it covers are not uniquely problematic, the formula is no longer rational "'in both practice and theory.'" Appellant's Br. 11-12 (quoting *Katzenbach*, 383 U.S. at 330).

III.

Northwest Austin sets the course for our analysis, directing us to conduct two principal inquiries. First, emphasizing that section 5 "authorizes federal intrusion into sensitive areas of state and local policymaking that imposes substantial federalism costs," the Court made clear that "[p]ast success alone . . . is not adequate justification to retain the preclearance requirements." 129 S. Ct. at 2511. Conditions in the South, the Court pointed out, "have unquestionably improved": racial disparities in voter registration and turnout have diminished or disappeared, and "minority candidates hold office at unprecedented levels." *Id.* Of course, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.* at 2511-12. But "the Act imposes current burdens," and we must determine whether those burdens are "justified by current needs." *Id.* at 2512.

Second, the Act, through section 4(b)'s coverage formula, "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* (internal quotation marks omitted). And while equal sovereignty "'does not bar . . . remedies for local evils,'" *id.* (omission in original) (quoting *Katzenbach*, 383 U.S. at 328-29), the Court warned that section 4(b)'s coverage formula may "fail[] to account for current political conditions"—that is, "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.* These concerns, the Court explained, "are underscored by the argument" that section 5 may require covered jurisdictions to adopt race-conscious measures that, if adopted by noncovered jurisdictions, could violate section 2 of the Act or the Fourteenth Amendment. *Id.* (citing *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.")). To be sure, such "[d]istinctions can be justified in some cases." *Id.* But given section 5's serious federalism costs, *Northwest Austin* requires that we ask whether section 4(b)'s "disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*

Before addressing *Northwest Austin's* two questions, we must determine the appropriate standard of review. As the Supreme Court noted, the standard applied to legislation enacted pursuant to Congress's Fifteenth Amendment power remains unsettled. *See id.* at 2512-13 (noting, but declining to resolve the parties' dispute over the appropriate standard of review). Reflecting this uncertainty, Shelby County argues that the "congruence and proportionality" standard for Fourteenth Amendment legislation applies, *see City of Boerne*, 521 U.S. at 520, whereas the Attorney General insists that Congress may use "any rational means" to enforce the Fifteenth Amendment, *see Katzenbach*, 383 U.S. at 324. Although the Supreme Court declined to resolve this issue in *Northwest Austin*, the questions the Court raised—whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem—seem to us the very questions one would ask to determine whether section 5 is "congruen[t] and proportional[] [to] the injury to be prevented," *City of Boerne*, 521 U.S. at 520. We thus read *Northwest Austin* as sending a powerful signal that congruence and proportionality is the appropriate standard of review. In any event, if section 5 survives the arguably more rigorous "congruent and proportional" standard, it would also survive *Katzenbach's* "rationality" review.

Of course, this does not mean that the Supreme Court's prior decisions upholding the Voting Rights Act are no longer relevant. Quite to the contrary, *Katzenbach and City of Rome* tell us a great deal about "[t]he evil that § 5 is meant to address," *Nw. Austin*, 129 S. Ct. at 2512, as well as the types of evidence that are probative of "current needs," *id.* Moreover, *City of Boerne* relied quite heavily on *Katzenbach* for the proposition that section 5, as originally enacted and thrice extended, was a model of congruent and proportional legislation. *See City of Boerne*, 521 U.S. at 525-26, 530 (relying on *Katzenbach* to explain how the Court evaluates remedial legislation under the Fourteenth and Fifteenth Amendments); *see also id.* at 532-33 (describing characteristics of the Voting Rights Act, as analyzed by *Katzenbach* and *City of Rome*, that made it congruent and proportional).

We can likewise seek guidance from the Court's Fourteenth Amendment decisions applying the congruent and proportional standard to other legislation. In those cases, the Court made clear that the record compiled by Congress must contain evidence of state "conduct transgressing the Fourteenth Amendment's substantive provisions," *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1333, 182 L. Ed. 2d 296 (2012), and that invasions of state interests based on "abstract generalities," *id.* at 1337, or "supposition and conjecture," *id.* at 1336, cannot be sustained. Once satisfied that Congress has identified a pattern of constitutional violations, however, the Court has deferred to Congress's judgment, even in the face of a rather sparse legislative record. In *Nevada Department of Human Resources v. Hibbs*, for example, the Court upheld the constitutionality of the family-care provision of the Family and Medical Leave Act, which allows eligible employees to take up to twelve weeks of unpaid leave, and "creates a private right of action to seek both equitable relief and money damages against any employer (including a public agency)." 538 U.S. 721, 724, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003) (internal quotation marks omitted). Although evidence of discriminatory leave policies by state governments was hardly extensive, *see Tennessee v. Lane*, 541 U.S. 509, 528-29, 124 S. Ct. 1978, 158 L. Ed. 2d 820 & n.17 (2004) (describing the limited evidence relied upon in *Hibbs*, "little of which concerned unconstitutional state conduct"), the Court deferred to Congress's "reasonabl[e] conclu[sions]," *Hibbs*, 538 U.S. at 734, and held that the evidence was "weighty enough to justify" prophylactic legislation, *id.* at 735. Similarly, in *Lane* the Court considered whether Congress had authority under the Fourteenth Amendment to pass Title II of the Americans with Disabilities Act, which prohibits public entities, including states, from discriminating on the basis of disability in their services, programs, and activities. 541 U.S. at 513. Looking into the record and noting the long history of state discrimination against disabled individuals, the Court found it "not difficult to perceive the harm that Title II is designed to address." *See id.* at 524-25. It held, again with great deference to Congress's take on the evidence, that the record, "including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services," made "clear beyond peradventure" that Title II was appropriate prophylactic legislation, *id.* at 529and this despite the fact that the record included only two reported decisions finding unconstitutional state action of the precise type at issue, *see id.* at 544 (Rehnquist, C.J., dissenting). By contrast, the Court has found that Congress exceeded its Fourteenth Amendment authority where the legislative record revealed a "virtually complete absence" of evidence of unconstitutional state conduct. *Id.* at 521 (majority opinion) (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999)); *see also City of Boerne*, 521 U.S.

at 530 (legislative record "lack[ed] examples of modern instances" of the targeted constitutional violations); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

We read this case law with two important qualifications. First, we deal here with racial discrimination in voting, one of the gravest evils that Congress can seek to redress. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) ("[The right to vote] is regarded as a fundamental political right, because preservative of all rights."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) ("racial classifications [are] constitutionally suspect and subject to the most rigid scrutiny" (citation omitted) (internal quotation marks omitted)). When Congress seeks to combat racial discrimination in voting—protecting both the right to be free from discrimination based on race and the right to be free from discrimination in voting, two rights subject to heightened scrutiny—it acts at the apex of its power. *See Hibbs*, 538 U.S. at 736 (noting that it is "easier for Congress to show a pattern of unconstitutional violations" when it enforces rights subject to heightened scrutiny); *Lane*, 541 U.S. at 561-63 (Scalia, J., dissenting) ("Giving [Congress's enforcement powers] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the [Reconstruction Amendments] a priority of attention that [the Supreme] Court envisioned from the beginning, and that has repeatedly been reflected in [the Court's] opinions."). Expressly prohibited by the Fifteenth Amendment, racial discrimination in voting is uniquely harmful in several ways: it cannot be remedied by money damages and, as Congress found, lawsuits to enjoin discriminatory voting laws are costly, take years to resolve, and leave those elected under the challenged law with the benefit of incumbency.

Second, although the federalism costs imposed by the statutes at issue in *Hibbs* and *Lane* (abrogating sovereign immunity to allow suits against states for money damages) are no doubt substantial, the federalism costs imposed by section 5 are a great deal more significant. To be sure, in most cases the preclearance process is "routine" and "efficient[]," resulting in prompt approval by the Attorney General and rarely if ever delaying elections. *See Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Propery Rights of the S. Comm. on the Judiciary*, 109th Cong. 312-13 (2006) (testimony of Donald M. Wright, North Carolina State Board of Elections) (stating that most preclearance submissions "take only a few minutes to prepare" and that the Justice Department cooperates with jurisdictions to ensure that "preclearance issue[s] d[o] not delay an election"). But section 5 sweeps broadly, requiring preclearance of every voting change no matter how minor. Section 5 also places the burden on covered jurisdictions to demonstrate to the Attorney General or a three-judge district court here in Washington that the proposed law is not discriminatory. Given these significant burdens, in order to determine whether section 5 remains congruent and proportional we are obligated to undertake a review of the record more searching than the Supreme Court's review in *Hibbs* and *Lane*.

Although our examination of the record will be probing, we remain bound by fundamental principles of judicial restraint. Time and time again the Supreme Court has emphasized that Congress's laws are entitled to a "presumption of validity." *City of Boerne*, 521 U.S. at 535. As the Court has explained, when Congress acts pursuant to its enforcement authority under the Reconstruction Amendments, its judgments about "what legislation is needed . . . are entitled to much deference." *Id.* (internal quotation marks omitted). Even when applying intermediate scrutiny, the Court has accorded Congress deference "out of respect for its authority to exercise the legislative power," and in recognition that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195, 196, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) (internal quotation marks omitted) (rejecting a First Amendment challenge to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act). And critically for our purposes, although *Northwest Austin* raises serious questions about section 5's constitutionality, nothing in that opinion alters our duty to resolve those questions using traditional principles of deferential review. Indeed, the Court reiterated not only that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [a court] is called on to perform,'" *Nw. Austin*, 129 S. Ct. at 2513 (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48, 48 S. Ct. 105, 72 L. Ed. 206, 1928-1 C.B. 324 (1927) (Holmes, J., concurring)), but also that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it," *id.*

A.

Guided by these principles, we begin with *Northwest Austin's* first question: Are the current burdens imposed by section 5 "justified by current needs"? 129 S. Ct. at 2512. The Supreme Court raised this question because, as it emphasized and as Shelby County argues, the conditions which led to the passage of the Voting Rights Act "have unquestionably improved[,] . . . no doubt due in significant part to the Voting Rights Act itself." *Id.* at 2511. Congress also recognized this progress when it reauthorized the Act, finding that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated." H.R. Rep. No. 109-478, at 12. The dissent's charts nicely display this progress. Racial disparities in voter registration and turnout have "narrowed considerably" in covered jurisdictions and are now largely comparable to disparities nationwide. *Id.* at 12-17; *see also* Dissenting Op. at 12-13 figs.I & II. Increased minority voting, in turn, has "resulted in significant increases in the number of African-Americans serving in elected offices." H.R. Rep. No. 109-478, at 18; *see also* Dissenting Op. at 15 fig.III. For example, in the six states fully covered by the 1965 Act, the number of African Americans serving in elected office increased from 345 to 3700 in the decades since 1965. H.R. Rep. No. 109-478, at 18.

But Congress found that this progress did not tell the whole story. It documented "continued registration and turnout disparities" in both Virginia and South Carolina. *Id.* at 25. Virginia, in particular, "remain[ed] an outlier," S. Rep. No. 109-295, at 11 (2006): although 71.6 percent of white, non-Hispanic voting age residents registered to vote in 2004, only 57.4 percent of black voting age residents registered, a 14.2-point difference. U.S. Census Bureau, Reported Voting and Registration of the Total Voting-Age Population, at tbl.4a, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (last visited May 9, 2012). Also, although the number of African Americans holding elected office had increased significantly, they continued to face barriers to election for statewide positions. Congress found that not one African American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina. In other covered states, "'often it is only after blacks have been first appointed to a vacancy that they are able to win statewide office as incumbents.'" H.R. Rep. No. 109-478, at 33 (quoting Nat'l Comm'n on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005, at 38 (2006) ("Nat'l Comm'n Report")).

Congress considered other types of evidence that, in its judgment, "show[ed] that attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future." *Id.* at 21. It heard accounts of specific instances of racial discrimination in voting. It heard analysis and opinions by experts on all sides of the issue. It considered, among other things, six distinct categories of evidence: (1) Attorney General objections issued to block proposed voting changes that would, in the Attorney General's judgment, have the purpose or effect of discriminating against minorities; (2) "more information requests" issued when the Attorney General believes that the information submitted by a covered jurisdiction is insufficient to allow a preclearance determination; (3) successful lawsuits brought under section 2 of the Act; (4) federal observers dispatched to monitor elections under section 8 of the Act; (5) successful section 5 enforcement actions filed against covered jurisdictions for failing to submit voting changes for preclearance, as well as requests for preclearance denied by the United States District Court for the District of Columbia; and (6) evidence that the mere existence of section 5 deters officials from even proposing discriminatory voting changes. Finally, Congress heard evidence that case-by-case section 2 litigation was inadequate to remedy the racial discrimination in voting that persisted in covered jurisdictions.

Before delving into the legislative record ourselves, we consider two arguments raised by Shelby County that, if meritorious, would significantly affect how we evaluate that record.

First, Shelby County argues that section 5 can be sustained only on the basis of current evidence of "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment."

Appellant's Br. 23. According to the County, the preclearance remedy may qualify as congruent and proportional only "when it addresses a coordinated campaign of discrimination intended to circumvent the remedial effects of direct enforcement of Fifteenth Amendment voting rights." *Id.* at 7. We disagree. For one thing, how could we demand evidence of gamesmanship of the sort present at the time of *Katzenbach* given that section 5 preclearance makes such tactics virtually impossible? Equally important, Shelby County's argument rests on a misreading of *Katzenbach*. Although the Court did describe the situation in 1965 as one of "unremitting and ingenious defiance of the Constitution," *Katzenbach*, 383 U.S. at 309, nothing in *Katzenbach* suggests that such gamesmanship was necessary to the Court's judgment that section 5 was constitutional. Rather, the critical factor was that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *Id.* at 328; *see also id.* at 313-15 (explaining why laws facilitating case-by-case litigation had "proved ineffective"). In *City of Rome*, the Court, while recognizing that "undeniable" progress had been made, sustained section 5's constitutionality without ever mentioning gamesmanship of any kind, 446 U.S. at 181-82; it relied instead on racial disparities in registration, the low number of minority elected officials, and the number and nature of Attorney General objections, *id.* at 180-81. Reinforcing this interpretation of *Katzenbach* and *City* of Rome, the Supreme Court explained in *City of Boerne* that "[t]he [Voting Rights Act's] new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation," 521 U.S. at 526 (citation omitted). The Court reiterated the point in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 373, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001): "In [enacting the Voting Rights] Act . . . Congress also determined that litigation had proved ineffective . . . ."

This emphasis on the inadequacy of case-by-case litigation makes sense: if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions, then Congress might have no justification for requiring states to preclear their voting changes. Put another way, what is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate. Given this, the question before us is not whether the legislative record reflects the kind of "ingenious defiance" that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate. If it has, then section 5's "substantial federalism costs" remain justified because preclearance is still needed to remedy continuing violations of the Fifteenth Amendment.

Second, Shelby County urges us to disregard much of the evidence Congress considered because it involves "vote dilution, going to the weight of the vote once cast, not access to the ballot." Appellant's Br. 26. Specifically, the County faults Congress for relying on selective annexations, certain redistricting techniques, at-large elections, and other practices that do not prevent minorities from voting but instead "dilute minority voting strength," 2006 Act § 2(b)(4)(A). According to the County, because the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment," *Bossier II*, 528 U.S. at 334 n.3, we may not rely on such evidence to sustain section 5 as a valid exercise of Congress's Fifteenth Amendment enforcement power.

It is true that neither the Supreme Court nor this court has ever held that intentional vote dilution violates the Fifteenth Amendment. But the Fourteenth Amendment prohibits vote dilution intended "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *City of Mobile v. Bolden*, 446 U.S. 55, 66, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980); *see also, e.g., Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). Although the Court's previous decisions upholding section 5 focused on Congress's power to enforce the Fifteenth Amendment, the same "congruent and proportional" standard, refined by the inquiries set forth in *Northwest Austin*, appears to apply "irrespective of whether Section 5 is considered [Fifteenth Amendment] enforcement legislation, [Fourteenth Amendment] enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments." *Shelby Cnty.*, 811 F. Supp. 2d at 462 (footnote omitted); *see also City of Boerne*, 521 U.S. at 518 (suggesting that Congress's "power to enforce the provisions of the Fifteenth Amendment" is "parallel" to its power to enforce the Fourteenth Amendment). Indeed, when reauthorizing the Act in 2006, Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. *See* H.R. Rep.

No. 109-478, at 90 ("[T]he Committee finds the authority for this legislation under amend. XIV, § 5 and amend. XV, § 2."); *id.* at 53 & n.136 (stating that Congress is acting under its Fourteenth and Fifteenth Amendment powers in reauthorizing the Voting Rights Act). Accordingly, like Congress and the district court, we think it appropriate to consider evidence of unconstitutional vote dilution in evaluating section 5's validity. *See City of Rome*, 446 U.S. at 181 (citing Congress's finding that "[a]s registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength" as evidence of the continued need for section 5 (internal quotation marks omitted)).

Consideration of this evidence is especially important given that so-called "second generation" tactics like intentional vote dilution are in fact decades-old forms of gamesmanship. That is, "as African Americans made progress in abolishing some of the devices whites had used to prevent them from voting," both in the late nineteenth century and again in the 1950s and 1960s, "[o] fficials responded by adopting new measures to minimize the impact of black reenfranchisement." *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 141-43 (2006) ("*Evidence of Continued Need*"). These measures—"well-known" tactics such as "'pack[ing]'" minorities into a single district, spreading minority voters thinly among several districts, annexing predominately white suburbs, and so on—were prevalent "forms of vote dilution" then, and Congress determined that these persist today. *Id.* Specifically, Congress found that while "first generation barriers"—flagrant attempts to deny access to the polls that were pervasive at the time of *Katzenbach*—have diminished, "second generation barriers" such as vote dilution have been "constructed to prevent minority voters from fully participating in the electoral process." 2006 Act § 2(b)(2) (congressional findings). Although such methods may be "more subtle than the visible methods used in 1965," Congress concluded that their "effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 6.

Having resolved these threshold issues, we return to the basic question: Does the legislative record contain sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy? Reviewing the record ourselves and focusing on the evidence most probative of ongoing constitutional violations, we believe it does.

To begin with, the record contains numerous "examples of modern instances" of racial discrimination in voting, *City of Boerne*, 521 U.S. at 530. Just a few recent examples:

- Kilmichael, Mississippi's abrupt 2001 decision to cancel an election when "an unprecedented number" of African Americans ran for office, H.R. Rep. No. 109-478, at 36-37 (internal quotation marks omitted);

- Webster County, Georgia's 1998 proposal to reduce the black population in three of the education board's five single-member districts after the school district elected a majority black school board for the first time, *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong. 830-31 (2006) ("*History, Scope, and Purpose*");

- Mississippi's 1995 attempt to evade preclearance and revive a dual registration system "initially enacted in 1892 to disenfranchise Black voters" and previously struck down by a federal court, H.R. Rep. No. 109-478, at 39;

- Washington Parish, Louisiana's 1993 attempt to reduce the impact of a majority-African American district by "immediately creat[ing] a new at-large seat to ensure that no white incumbent would lose his seat," *id.* at 38;

- Waller County, Texas's 2004 attempt to reduce early voting at polling places near a historically black university and its threats to prosecute students for "illegal voting," after two black students announced their intent to run for office, *Evidence of Continued Need* 185-86.

The legislative record also contains examples of overt hostility to black voting power by those who control the electoral process. In Mississippi, for instance, state legislators opposed an early 1990s redistricting plan that would have increased the number of black majority districts, referring to the plan publicly as the "black plan" and privately as the "nigger plan," *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22 (2006) ("*Modern Enforcement*") (internal quotation marks omitted); *see also* S. Rep. No. 109-295, at 14. In Georgia, the state House Reapportionment Committee Chairman "told his colleagues on numerous occasions, 'I don't want to draw nigger districts,'" H.R. Rep. No. 109-478, at 67 (quoting *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982)). The district court pointed to numerous additional examples of intentional discrimination in the legislative record. *See Shelby Cnty.*, 811 F. Supp. 2d at 472-76, 477-79, 480-81, 481-85, 485-87; *see also Nw. Austin*, 573 F. Supp. 2d at 258-62, 289-301.

In addition to these examples of flagrant racial discrimination, several categories of evidence in the record support Congress's conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed. We explore each in turn.

First, Congress documented hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes that he found would have a discriminatory purpose or effect. Significantly, Congress found that the absolute number of objections has not declined since the 1982 reauthorization: the Attorney General interposed at least 626 objections during the twenty-two years from 1982 to 2004 (an average of 28.5 each year), compared to 490 interposed during the seventeen years from 1965 to 1982 (an average of 28.8 each year). *Evidence of Continued Need* 172; *see also* S. Rep. No. 109-295, at 13-14 (finding 754 objections between 1982 and the first half of 2006).

Formal objections were not the only way the Attorney General blocked potentially discriminatory changes under section 5. Congress found that between 1990 and 2005, "more information requests" (MIRs) prompted covered jurisdictions to withdraw or modify over 800 proposed voting changes. *Evidence of Continued Need* 2553, 2565; H.R. Rep. No. 109-478, at 40-41. Although MIRs take no position on the merits of a preclearance request, Congress had evidence indicating that the Attorney General sometimes uses them to "send signals to a submitting jurisdiction about the assessment of their proposed voting change" and to "promot[e] compliance by covered jurisdictions." *Evidence of Continued Need* 2541. Congress found that because "[t]he actions taken by a jurisdiction [in response to an MIR] are often illustrative of [its] motives," the high number of withdrawals and modifications made in response to MIRs constitutes additional evidence of "[e]fforts to discriminate over the past 25 years." H.R. Rep. No. 109-478, at 40-41.

Shelby County contends that section 5 objections and MIRs, however numerous, "do[] not signal intentional voting discrimination" because they represent only the Attorney General's opinion and need not be based on discriminatory intent. Appellant's Br. 30-31; *see also id.* at 32. Underlying this argument is a fundamental principle with which we agree: to sustain section 5, the record must contain "evidence of a pattern of constitutional violations," *Hibbs*, 538 U.S. at 729, and voting changes violate the constitution only if motivated by discriminatory animus, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997) ("*Bossier I*"). Although not all objections rest on an affirmative finding of intentional discrimination, the record contains examples of many that do. *See Nw. Austin*, 573 F. Supp. 2d at 289-301 (appendix providing examples of objections based on discriminatory intent). Between 1980 and 2004, the Attorney General issued at least 423 objections based in whole or in part on discriminatory intent. *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 180-81 (2005) ("*Preclearance Standards*"). Moreover, in the 1990s, before the Supreme Court limited the Attorney General's ability to object based on discriminatory but nonretrogressive intent, *see Bossier II*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (limiting the scope of section 5's purpose prong in a decision overturned by the 2006 Act), "the purpose prong of Section 5 had become the dominant legal basis for objections," *Preclearance Standards* 177, with seventy-four percent of objections based in whole or in part on discriminatory intent, *id.* at 136. Although it is true that objections represent "only one side's opinion," Appellant's Br. 30, Congress is entitled to rely upon the Attorney

General's considered judgment "when it prescribes civil remedies . . . under [section] 2 of the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 330 (explaining that "Congress obviously may avail itself of information from any probative source," including evidence "adduced by the Justice Department"). In fact, in *City of Rome* the Supreme Court considered objections to be probative evidence of unconstitutional voting discrimination. *See* 446 U.S. at 181.

Shelby County also points out that the percentage of proposed voting changes blocked by Attorney General objections has steadily declined—from a height of 4.06 percent (1968-1972) to 0.44 percent (1978-1982) to 0.17 percent (1993-1997) and to 0.05 percent (1998-2002). *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 219 (2006) ("*Introduction to the Expiring Provisions*"). But the most dramatic decline in the objection rate—which, as the district court observed, "has always been low," *Shelby Cnty.*, 811 F. Supp. 2d at 470—occurred in the 1970s, before the Supreme Court upheld the Act for a third time in *City of Rome*. *See Introduction to the Expiring Provisions* 219. Also, the average number of objections per year has not declined, suggesting that the level of discrimination has remained constant as the number of proposed voting changes, many likely quite minor, has increased. *See* H.R. Rep. No. 109-478, at 22 (showing increase in the annual number of voting changes submitted for preclearance, from 300-400 per year in the early 1970s to 4000-5000 per year in the 1990s and 2000s). As the district court pointed out, there may be "many plausible explanations for the recent decline in objection rates." *See Shelby Cnty.*, 811 F. Supp. 2d at 471. Even in the six years from 2000 to 2006, after objection rates had dropped to their lowest, Attorney General objections affected some 660,000 minority voters. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 58 (2006) ("*Continuing Need*"). Ultimately, Congress believed that the absolute number of objections represented the better indicator of the extent of discrimination in covered jurisdictions. This judgment —whether to accord greater weight to absolute numbers or to objection rates—is precisely the kind that a legislature is "far better equipped" than a court to evaluate, *Turner Broad.*, 520 U.S. at 195 (internal quotation marks omitted).

As for MIRs, we agree with Shelby County that they are less probative of discrimination than objections. An MIR does not represent a judgment on the merits, and submitting jurisdictions might have many reasons for modifying or withdrawing a proposed change in response to one. But the record contains evidence from which Congress could "reasonabl[y] infer[]," *id.* (internal quotation marks omitted), that at least some withdrawals or modifications reflect the submitting jurisdiction's acknowledgement that the proposed change was discriminatory. *See Evidence of Continued Need* 178 (stating that a jurisdiction's decision to withdraw a proposed changes in response to an MIR "is frequently a tacit admission of one or more proposed discriminatory changes"); *id.* at 809-10 (explaining that after the Attorney General requested more information on a redistricting plan containing only two majority-black districts, the jurisdiction withdrew the proposal and ultimately adopted a redistricting plan with three majority-black districts); H.R. Rep. No. 109-478, at 41 (explaining that Monterey County's proposal to reduce the number of polling places received preclearance only after the County withdrew five polling place consolidations in response to an MIR). Given this, Congress reasonably concluded that some of the 800-plus withdrawals and modifications in response to MIRs "reflect[]" "[e]fforts to discriminate over the past 25 years." H.R. Rep. No. 109-478, at 40.

The second category of evidence relied on by Congress, successful section 2 litigation, reinforces the pattern of discrimination revealed by objections and MIRs. The record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from discriminatory voting practices in at least 825 counties. *Evidence of Continued Need* 208, 251. Shelby County faults the district court for relying on evidence of successful section 2 litigation "even though 'a violation of Section 2 does not require a showing of unconstitutional discriminatory intent.'" Appellant's Br. 34 (quoting *Shelby Cnty.*, 811 F. Supp. 2d at 481). The County's premise is correct: although the Constitution prohibits only those voting laws motivated by discriminatory intent, section 2 prohibits all voting laws for which "'based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class.'" *Bartlett v. Strickland*, 556 U.S. 1, 10-11, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (quoting 42 U.S.C. § 1973(b)). In practice, however, this "results test," as applied in section 2 cases, requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence. *Compare Gingles*, 478 U.S. at 36-37 (listing factors considered under the results test), *with Rogers v. Lodge*, 458 U.S. 613, 623-27, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982) (relying on virtually identical factors to affirm a finding of intentional discrimination). Also, as the district court pointed out, "courts will avoid deciding constitutional questions" if, as is the case in virtually all successful section 2 actions, the litigation can be resolved on narrower grounds. *Shelby Cnty.*, 811 F. Supp. 2d at 482; *see also, e.g., White v. Alabama*, 74 F.3d 1058, 1071 n.42 (11th Cir. 1996) ("Because we dispose of the district court's judgment on the ground that it violates the Voting Rights Act, we need not, and indeed, should not, discuss whether the judgment violates the Equal Protection Clause."). This explains why the legislative record contains so few published section 2 cases with judicial findings of discriminatory intent, *see* Dissenting Op. at 26; *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 986-87 (2005) ("*Impact and Effectiveness*") (report by Ellen Katz et al.)—courts have no need to find discriminatory intent once they find discriminatory effect. But Congress is not so limited. Considering the evidence required to prevail in a section 2 case and accounting for the obligation of Article III courts to avoid reaching constitutional questions unless necessary, we think Congress quite reasonably concluded

that successful section 2 suits provide powerful evidence of unconstitutional discrimination. In addition, as with Attorney General objections, we cannot ignore the sheer number of successful section 2 cases—653 over 23 years, averaging more than 28 each year. This high volume of successful section 2 actions is particularly dramatic given that Attorney General objections block discriminatory laws before they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions. *See Continuing Need* 26 (explaining that section 5 "makes the covered jurisdiction[s] much 'cleaner' than they would have been without Section 5 coverage").

Third, Congress relied on evidence of "the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." 2006 Act § 2(b)(5). Specifically, 300 to 600 observers were dispatched annually between 1984 and 2000, H.R. Rep. No. 109-478, at 44, amounting to 622 separate dispatches (most or all involving multiple observers) to covered jurisdictions, *Evidence of Continued Need* 180-82; *see also* 42 U.S.C. § 1973f(a)(2) (authorizing dispatch of federal observers to covered jurisdictions based upon either "written meritorious complaints from residents, elected officials, or civic participation organizations," or the Attorney General's judgment that observers are necessary to enforce the Fourteenth or Fifteenth Amendment). Of these, sixty-six percent were concentrated in five of the six states originally covered by section 5—Alabama, Georgia, Louisiana, Mississippi, and South Carolina. H.R.

Rep. No. 109-478, at 44. In some instances, monitoring by federal observers "bec[ame] the foundation of Department of Justice enforcement efforts," as in Conecuh County, Alabama, and Johnson County, Georgia, where reports by federal observers enabled the federal government to bring suit against county officials for discriminatory conduct in polling locations, ultimately resulting in consent decrees. *Id.; see also Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 42-43 (2006) ("*Sections 6 and 8*"). As Congress saw it, this continued need for federal observers in covered jurisdictions is indicative of discrimination and "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations." H.R. Rep. No. 109-478, at 44.

Shelby County insists that the Attorney General's decision to dispatch federal observers "indicates only that . . . there might be conduct with the effect of disenfranchising minority citizens, which might or might not be purposeful discrimination." Appellant's Br. 35-36. As the district court explained, however, "observers are not assigned to a particular polling location based on sheer speculation; they are only dispatched if 'there is a *reasonable* belief that minority citizens are at risk of being disenfranchised.'" *Shelby Cnty.*, 811 F. Supp. 2d at 486 (quoting H.R. Rep. No. 109-478, at 44). Indeed, the Justice Department conducts pre-election investigations in order to identify jurisdictions where federal observers are likely to be necessary. *See Sections* 6 *and* 8, at 37-39 (explaining that the Justice Department conducts pre-election surveys and field investigations to identify jurisdictions where federal observers will be needed). The record shows that federal observers in fact witnessed discrimination at the polls, sometimes in the form of intentional harassment, intimidation, or disparate treatment of minority voters. *See id.* at 30-31 (describing discriminatory treatment and harassment of minorities by poll officials in Alabama); *id.* at 34 (describing discriminatory treatment of minority voters in Texas and Arizona); *id.* at 43 (describing the exclusion of African Americans from service as poll workers in Johnson County, Georgia). Thus, although the deployment of federal observers is hardly conclusive evidence of unconstitutional discrimination, we think Congress could reasonably rely upon it as modest, additional evidence of current needs.

Fourth, Congress found evidence of continued discrimination in two types of preclearance-related lawsuits. Examining the first of these—actions brought to enforce section 5's preclearance requirement—Congress noted that "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government's knowledge." H.R. Rep. No. 109-478, at 41. Between 1982 and 2004, at least 105 successful section 5 enforcement actions were brought against such jurisdictions. *Evidence of Continued Need* 250. Shelby County believes that successful section 5 enforcement actions are "not reliable evidence of intentional voting discrimination" because "[t]he most that a section 5 enforcement action can establish . . . is that a voting change—and quite possibly a nondiscriminatory voting change—was not properly submitted for preclearance." Appellant's Br. 34. But the legislative record does contain evidence that at least some of the 105 successful section 5 enforcement suits were initiated in response to attempts by covered jurisdictions to implement purposefully discriminatory laws without federal oversight. *See Shelby Cnty.*, 811 F. Supp. 2d at 480 (describing section 5 actions against Mississippi and Waller County, Texas, "in which the unprecleared voting changes appeared to have been motivated by discriminatory animus"); *Evidence of Continued Need* 176 (explaining that after a section 5 enforcement suit forced Mississippi to submit its dual registration law for preclearance, the Attorney General objected based on the law's racially discriminatory purpose and effect). Therefore, Congress could reasonably have concluded that such cases, even if few in number, provide at least some evidence of continued willingness to evade the Fifteenth Amendment's protections, for they reveal continued efforts by recalcitrant jurisdictions not only to enact discriminatory voting changes, but to do so in defiance of section 5's preclearance requirement.

In addition to section 5 enforcement suits, Congress found evidence of continued discrimination in "the number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia." 2006 Act § 2(b)(4)(B). The number of unsuccessful judicial preclearance actions appears to have remained roughly constant since 1966: twenty-five requests were denied or withdrawn between 1982 and 2004, compared to seventeen between 1966 and 1982. *Evidence of Continued Need* 177-78, 275. Shelby County does not contest the relevance of this evidence.

Finally, and bolstering its conclusion that section 5 remains necessary, Congress "f[ound] that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 24. In Congress's view, "Section 5's strong deterrent effect" and "the number of voting changes that have never gone forward as a result of [that effect]" are "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes" that had actually been proposed. *Id.* As Congress explained, "'[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.'" *Id.* (quoting Nat'l Comm'n Report 57). For this reason, the mere existence of section 5 "'encourage[s] the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.'" *Id.* (quoting Laughlin McDonald, The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union 15 (2006)). Congress considered testimony that section 5 has had just this effect on state and local redistricting processes. *See* H.R. Rep. No. 109-478, at 24 (describing section 5's "critical" influence on the Georgia legislature's redistricting process, which culminated in a plan that was precleared with no objection by the Attorney General (internal quotation marks omitted)); *Evidence of Continued Need* 362-63 (explaining how concerns about obtaining preclearance prevented Fredericksburg, Virginia, from eliminating an African American majority district). In other words, Congress had "some reason to believe that without [section 5's] deterrent effect on potential misconduct," the evidence of continued discrimination in covered jurisdictions "might be considerably worse." S. Rep. No. 109-295, at 11.

Shelby County argues that Congress's finding of deterrence reflects "'outdated assumptions about racial attitudes in the covered jurisdictions'" that we should not "indulge[]." Appellant's Br. 38 (quoting *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in judgment in part and dissenting in part)). We agree that evaluating section 5's deterrent effect raises sensitive and difficult issues. As the dissent rightly points out, the claimed effect is hard to measure empirically and even harder to consider judicially. Dissenting Op. at 24. We also agree with the dissent that section 5 could not stand based on claims of deterrence alone, nor could deterrence be used in some hypothetical case to justify renewal "to the crack of doom," *id*. But the difficulty of quantifying the statute's deterrent effect is no reason to summarily reject Congress's finding that the evidence of racial discrimination in voting would look worse without section 5—a finding that flows from record evidence unchallenged by the dissent. As explained above, Congress's deterrent effect finding rests on evidence of current and widespread voting discrimination, as well as on testimony indicating that section 5's mere existence prompts state and local legislators to conform their conduct to the law. And Congress's finding—that is, a finding about how the world would have looked absent section 5—rests on precisely the type of fact-based, predictive judgment that courts are ill-equipped to second guess. *See Turner Broad.*, 520 U.S. at 195 ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress." (internal quotation marks omitted)).

This brings us, then, to Congress's ultimate conclusion. After considering the entire record, including

- 626 Attorney General objections that blocked discriminatory voting changes;
- 653 successful section 2 cases;
- over 800 proposed voting changes withdrawn or modified in response to MIRs;
- tens of thousands of observers sent to covered jurisdictions;
- 105 successful section 5 enforcement actions;
- 25 unsuccessful judicial preclearance actions;
- and section 5's strong deterrent effect, i.e., "the number of voting changes that have never gone forward as a result of Section 5," H.R. Rep. No. 109-478, at 24;

Congress found that serious and widespread intentional discrimination persisted in covered jurisdictions and that "case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy." *Id.* at 57. In reaching this conclusion, Congress considered evidence that section 2 claims involve "intensely complex litigation that is both costly and time-consuming." *Modern Enforcement 96; see also Introduction to the Expiring Provisions* 141 (describing a Federal Judicial Center study finding that voting rights cases require nearly four times more work than an average district court case and rank as the fifth most work-intensive of the sixty-three types of cases analyzed); *City of Boerne*, 521 U.S at 526 (noting the "slow costly character of case-by-case litigation" under section 2). It heard from witnesses who explained that "it is incredibly difficult for minority voters to pull together the resources needed" to pursue a section 2 lawsuit, particularly at the local level and in rural communities. *Modern Enforcement 96; see also History, Scope, and Purpose* 84 (explaining that voters "in local communities and particularly in rural areas . . . do not have access to the means to bring litigation under Section 2"). Such testimony is particularly significant given that the vast majority of section 5 objections (92.5 percent from 2000 to 2005) pertained to local voting changes. *See* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 Neb. L. Rev. 605, 612-13 (2005); *see also id.* at 616 ("[S]ection 2 cases are much less likely to be filed when it comes to redistricting in smaller jurisdictions[.]"). Congress also heard testimony that during the time it takes to litigate a section 2 action

—often several years—proponents of a discriminatory law may enjoy its benefits, potentially winning elections and gaining the advantage of incumbency before the law is overturned. *Impact and Effectiveness* 43-44. Given all of this, and given the magnitude and persistence of discrimination in covered jurisdictions, Congress concluded that case-by-case litigation—slow, costly, and lacking section 5's prophylactic effect—"would be ineffective to protect the rights of minority voters." H.R. Rep. No. 109-478, at 57.

According to Shelby County, "[e]valuation of the probative evidence shows there is no longer systematic resistance to the Fifteenth Amendment in the covered jurisdictions that cannot be solved through case-by-case litigation." Appellant's Br. 38. Congress, however, reached a different conclusion, and as explained above, the County has offered no basis for thinking that Congress's judgment is either unreasonable or unsupported by probative evidence. The dissent accuses us of "overstat[ing] the inadequacies of § 2, such as cost and the consequences of delay." Dissenting Op. at 8. But the conclusion that section 2 is inadequate is Congress's, not ours. The dissent believes that the costs of section 2 actions can "be assumed by the Department of Justice," *id.*, but it cites nothing in the record to support such speculation. The dissent also believes that "courts may as always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." *Id.* at 8-9. But Congress knows that plaintiffs can seek preliminary injunctions and reasonably determined that this possibility—that plaintiffs with few resources litigating a fact-intensive section 2 case will be able to satisfy the heavy burden required for preliminary injunctive relief—was insufficient to alleviate its concerns about the inadequacy of section 2 actions.

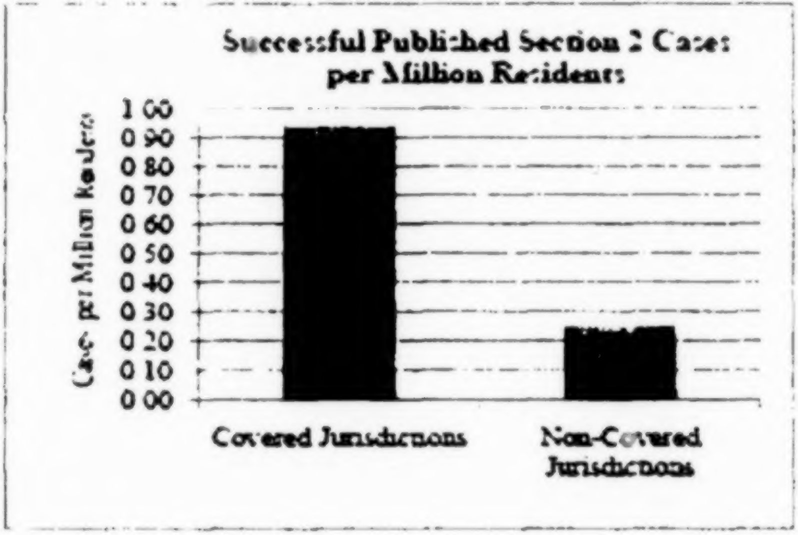
The point at which section 5's strong medicine becomes unnecessary and therefore no longer congruent and proportional turns on several critical considerations, including the pervasiveness of serious racial discrimination in voting in covered jurisdictions; the continued need for section 5's deterrent and blocking effect; and the adequacy of section 2 litigation. These are quintessentially legislative judgments, and Congress, after assembling and analyzing an extensive record, made its decision: section 5's work is not yet done. Insofar as Congress's conclusions rest on predictive judgments, we must, contrary to the dissent's approach, apply a standard of review even "more deferential than we accord to judgments of an administrative agency." *Turner Broad.*, 520 U.S. at 195. Given that we may not "displace [an agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951), we certainly cannot do so here. Of course, given the heavy federalism costs that section 5 imposes, our job is to ensure that Congress's judgment is reasonable and rests on substantial probative evidence. *See Turner Broad.*, 520 U.S. at 195 ("In reviewing the constitutionality of a statute . . . [o]ur sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." (internal quotation marks omitted)). After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference.

B.

Having concluded that section 5's "current burdens" are indeed justified by "current needs," we proceed to the second *Northwest Austin* inquiry: whether the record supports the requisite "showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 129 S. Ct. at 2512. Recall that this requirement stems from the Court's concern that "[t]he Act . . . differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'" *Id.* "The evil that § 5 is meant to address," the Court observed, "may no longer be concentrated in the jurisdictions singled out [by section 4(b)] for preclearance." *Id.*

Before examining the record ourselves, we emphasize that the Act's disparate geographic coverage—and its relation to the problem of voting discrimination—depends not only on section 4(b)'s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout. Bailout functions as an integral feature of section 4's coverage scheme: jurisdictions are subject to section 5 only if (1) they are captured by section 4(b), and (2) they have not bailed out, meaning that they have failed to demonstrate a clean voting record as defined in section 4(a). *See* 42 U.S.C. §§ 1973b(a), 1973c(a). In addition, jurisdictions not captured by section 4(b) but which nonetheless have serious, recent records of voting discrimination, may be "bailed in"—i.e., subjected to section 5 preclearance—pursuant to section 3(c). *See* 42 U.S.C. § 1973a(c). Therefore, the question before us is whether the statute as a whole, not just the section 4(b) formula, ensures that jurisdictions subject to section 5 are those in which unconstitutional voting discrimination is concentrated.

The most concrete evidence comparing covered and noncovered jurisdictions in the legislative record comes from a study of section 2 cases published on Westlaw or Lexis between 1982 and 2004. *Impact and Effectiveness* 964-1124 (report by Ellen Katz *et al.*). Known as the Katz study, it reached two key findings suggesting that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance," *Nw. Austin*, 129 S. Ct. at 2512. First, the study found that of the 114 published decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. Thus, although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982. *Impact and Effectiveness* 974; *see also* H.R. Rep. No. 109-478, at 53. When the Katz data is adjusted to reflect these population differences (based on the Census Bureau's 2004 population estimates, the most recent data then available to Congress), the rate of successful section 2 cases in covered jurisdictions (.94 per million residents) is nearly four times the rate in non-covered jurisdictions (.25 per million residents), as illustrated in the chart below. *See* Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls; U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/counties/totals/2004/CO-EST2004-01.html (last visited May 9, 2012); U.S. Census Bureau, Population Estimates: Minor Civil Divisions: 2000 to 2004, available at http://www.census.gov/popest/data/cities/totals/2004/SUB-EST2004-5.html (last visited May 9, 2012).

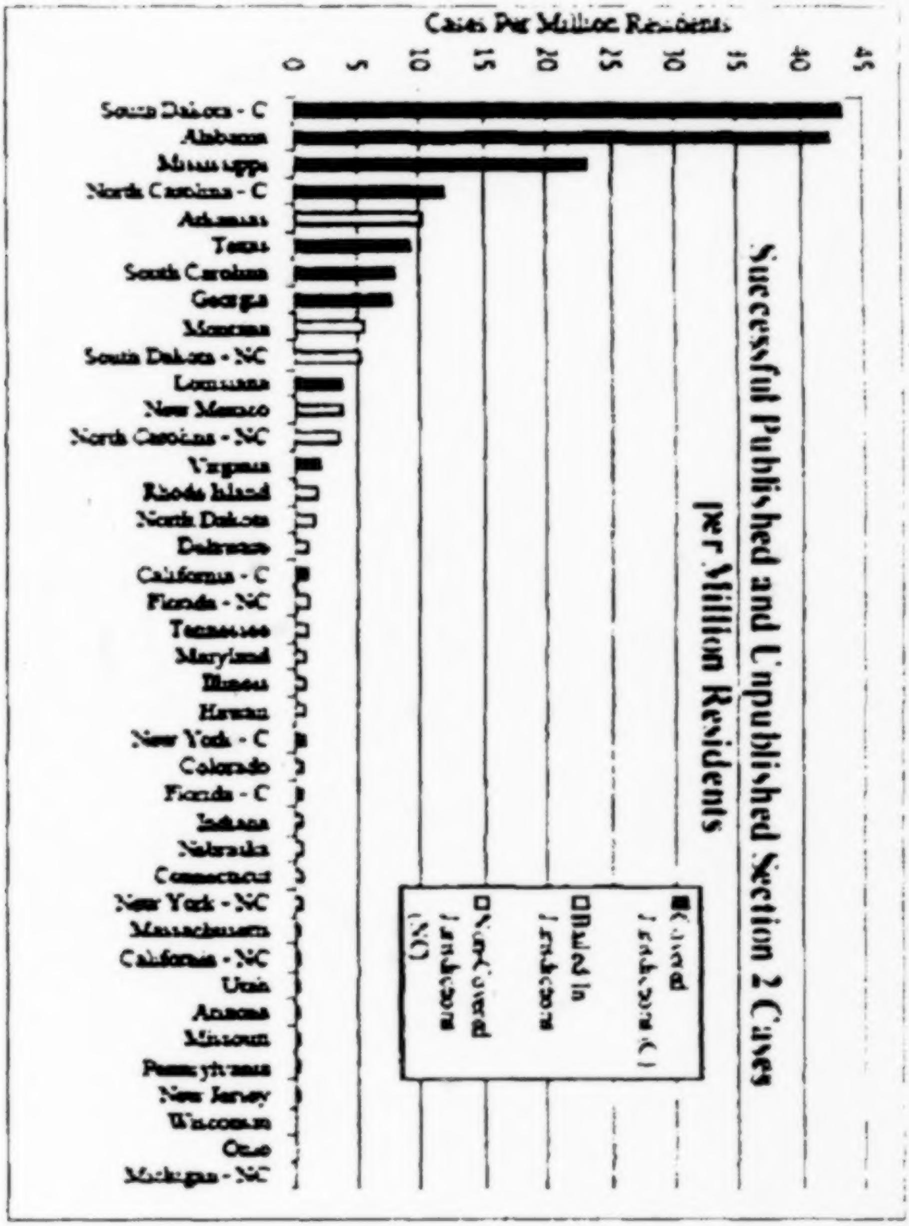


Second, the study found higher success rates in covered jurisdictions than in non-covered jurisdictions. Specifically, 40.5 percent of published section 2 decisions in covered jurisdictions resulted in favorable outcomes for plaintiffs, compared to only 30 percent in non-covered jurisdictions. *Impact and Effectiveness* 974.

The difference between covered and non-covered jurisdictions becomes even more pronounced when unpublished section 2 decisions—primarily court-approved settlements—are taken into account. As the Katz study noted, published section 2 lawsuits "represent only a portion of the section 2 claims filed or decided since 1982" since many claims were settled or otherwise resolved without a published opinion. *Id.* at 974. According to data compiled by the National Commission on the Voting Rights Act and Justice Department historian Peyton McCrary, there have been at least 686 unpublished successful section 2 cases since 1982, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. *See* Decl. of Dr. Peyton McCrary 13 ("McCrary Decl."). Of these, approximately 81 percent were filed in covered jurisdictions. *Id.* When this data is broken down state-by-state, separately identifying covered and non-covered portions of partially covered states, the concentration of successful section 2 cases in the covered jurisdictions is striking. Of the eight states with the highest number of successful published and unpublished section 2 cases per million residents—Alabama, Mississippi, Arkansas, Texas, South Carolina, Georgia, and the covered portions of South Dakota and North Carolina—all but one are covered. *See* Supp. Decl.

of Dr. Peyton McCrary 3-7; U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/historical/2000s/vintage _2004/state.html (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/counties/totals/2004/CO-EST2004-01.html (last visited May 9, 2012); U.S. Census Bureau, Population Estimates: Minor Civil Divisions: 2000 to 2004, *available at* http://www.census.gov/popest/data/cities/totals/2004/SUB-EST2004-5.html (last visited May 9, 2012). The only exception is Arkansas, which, though not captured by section 4(b), was subjected to partial preclearance pursuant to a 1990 federal court order, i.e., "bailed in." *See Jeffers v. Clinton*, 740 F. Supp. 585, 601-02 (E.D. Ark. 1990). Similarly, of the fourteen states with the highest number of successful published and unpublished section 2 cases per million residents —the eight listed above, plus Montana, Louisiana, New Mexico, Virginia, and the non-covered portions of South Dakota and North Carolina—eleven are either covered, including the seven states originally covered by the 1965 Act, or were bailed in for some period (Arkansas and New Mexico). *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2010 & nn.100-01 (2010) (discussing bail-in of Arkansas and New Mexico). This data is displayed in the chart on the following page.

Appendix A


Successful Published and Unpublished Section 2 Cases per Million Residents
Cases Per Million Residents
0
5
10
15
20
25
30
35
40
45
■ Covered Jurisdictions (C)
□ Bailed in Jurisdictions
□ Non-Covered Jurisdictions (NC)
South Dakota - C
Alabama
Mississippi
North Carolina - C
Arkansas
Texas
South Carolina
Georgia
Montana
South Dakota - NC
Louisiana
New Mexico
North Carolina - NC
Virginia
Rhode Island
North Dakota
Delaware
California - C
Florida - NC
Tennessee
Maryland
Illinois
Hawaii
New York - C
Colorado
Florida - C
Indiana
Nebraska
Connecticut
New York - NC
Massachusetts
California - NC
Utah
Arizona
Missouri
Pennsylvania
New Jersey
Wisconsin
Ohio
Michigan - NC

Shelby County objects to the use of unpublished section 2 data, pointing out that although Congress considered the National Commission's analysis of unpublished cases in *covered* jurisdictions, the legislative record does not contain McCrary's analysis of unpublished cases in *non-covered* jurisdictions. We agree that there are reasons to approach this data with caution: McCrary prepared his analysis after the 2006 reauthorization, and because his data regarding unpublished cases in non-covered jurisdictions was collected separately from the data on unpublished cases in covered jurisdictions, we cannot be certain that the data collection methods were identical. That said, the Supreme Court has considered post-enactment evidence to find at least one law congruent and proportional, *see Lane*, 541 U.S. at 524-25 nn. 6-9 & 13 (citing articles and cases published ten or more years after the Americans with Disabilities Act was enacted, as well as recent versions of statutes and regulations), and here a majority of the unpublished cases from non-covered jurisdictions (as well as all from covered jurisdictions) appears in the legislative record, *see* McCrary Decl. 10. Also, while the Katz data on published cases is necessarily underinclusive, *see Impact and Effectiveness* 974 (explaining that the published cases analyzed by the Katz study "represent only a portion" of all section 2 actions), Shelby County has identified no errors or inconsistencies in the data analyzed by McCrary. Indeed, McCrary points out that even if his methodology identified only half of the unpublished cases in non-covered jurisdictions, "there would still be *393 more* settlements resolved favorably for minority voters in" covered jurisdictions. McCrary Decl. 11. For these reasons, although we would not rely solely on the combined published and unpublished data, we think it provides helpful additional evidence that corroborates the disparities in the level of discrimination between covered and non-covered jurisdictions revealed by the published data.

The section 2 data, moreover, does not tell the whole story. As explained above, Congress found that section 5, which operates only in covered jurisdictions, deters or blocks many discriminatory voting laws before they can ever take effect and become the target of section 2 litigation. "Section 5's reach in preventing discrimination is broad. Its strength lies not only in the number of discriminatory voting changes it has thwarted, but can also be measured by the submissions that have been withdrawn from consideration, the submissions that have been altered by jurisdictions in order to comply with the [Voting Rights Act], or in the discriminatory voting changes that have never materialized." H.R. Rep. No. 109-478, at 36. Accordingly, if discrimination were evenly distributed throughout the nation, we would expect to see fewer successful section 2 cases in covered jurisdictions than in non-covered jurisdictions. *See Continuing Need* 26 (explaining that section 5 "makes the covered jurisdiction[s] much 'cleaner' than they would have been without Section 5 coverage"). Yet we see substantially more.

Shelby County makes two main arguments in response to this evidence. First, citing *Katzenbach's* finding that the coverage formula was "rational in both practice and theory," 383 U.S. at 330, it contends that section 4(b) is irrational because it relies on "decades-old data." Appellant's Br. 59. "It cannot be constitutional," Shelby County insists, "to rely on decades-old voting data to establish current voting discrimination." *Id.* In addition, the County claims that in 1965 Congress was concerned with "first-generation" barriers—tests and devices that denied access to the ballot—and crafted the coverage formula to capture states that erected such barriers and had low registration rates. But in 2006, although Congress was more concerned with "second-generation" barriers—vote dilution techniques that weaken "minority voting effectiveness"—it retained a coverage formula aimed at first-generation problems. Thus, Shelby County concludes, "[t]here is a serious mismatch between the conduct targeted by Congress and the factors that trigger coverage under Section 4(b)." *Id.* at 60.

This argument rests on a misunderstanding of the coverage formula. As the district court explained, the election years that serve as coverage "triggers" under section 4(b) "were never selected because of something special that occurred in those years." *Shelby Cnty.*, 811 F. Supp. 2d at 505. Instead, Congress identified the jurisdictions it sought to cover—those for which it had "evidence of actual voting discrimination," *Katzenbach*, 383 U.S. at 329—and then worked backward, reverse-engineering a formula to cover those jurisdictions. *See id.* (explaining that "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act" and that it "eventually evolved" a formula "to describe these areas"). The coverage formula relied on tests and devices "because of their long history as a tool for perpetrating the evil," and voting rates because "widespread disenfranchisement must inevitably affect the number of actual voters." *Id.* at 330. In other words, Congress chose the section 4(b) criteria not because tests, devices, and low participation rates were all it sought to target, but because they served as accurate proxies for pernicious racial discrimination in voting. The question, then, is not whether the formula relies on old data or techniques, but instead whether it, together with bail-in and bailout, continues to identify the jurisdictions with the worst problems. If it does, then even though the formula rests on decades-old factors, the statute is rational in theory because its "disparate geographic coverage" remains "sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2512.

Of course, Shelby County's real argument is that the statute fails this test, i.e., that it no longer actually identifies the jurisdictions "uniquely interfering with the right Congress is seeking to protect through preclearance." Appellant's Br. 62. The County points out that Congress never made a finding that racial discrimination in voting was "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 129 S. Ct. at 2512. The County also argues that the Katz study is at best inconclusive, for some non-covered states, such as Illinois and the non-covered portions of New York, had more successful published section 2 lawsuits than did several covered states. In any event, it claims, "aggregated statistics showing slightly more Section 2 litigation with 'favorable outcomes' in covered jurisdictions as a group is not a rational basis for subjecting individually-targeted States to another 25 years of preclearance." Appellant's Br. 70.

Shelby County's first point—that Congress failed to make a finding—is easily answered. Congress did not have to. *United States v. Lopez*, 514 U.S. 549, 562, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Congress "normally is not required to make formal findings" in order to legislate). The proper question is whether the record contains sufficient evidence to demonstrate that the formula continues to target jurisdictions with the most serious problems. *See Nw. Austin*, 129 S. Ct. at 2512. This presents a close question. The record on this issue is less robust than the evidence of continued discrimination, *see supra* Part III.A, although this is in part due to the difficulty of comparing jurisdictions that have been subject to two very different enforcement regimes, i.e., covered jurisdictions are subject to both sections 2 and 5 while non-covered jurisdictions are subject only to section 2. And although the Katz data in the aggregate does suggest that discrimination is concentrated in covered jurisdictions, just three covered states—Alabama, Louisiana, and Mississippi—account for much of the disparity. The covered states in the middle of the pack—North Carolina, South Carolina, Virginia, Texas, and Georgia—are about on par with the worst non-covered jurisdictions. And some covered states—Alaska and Arizona—had no successful published section 2 cases at all.

As explained above, however, this data presents an incomplete picture of covered jurisdictions. When we consider the Katz data in conjunction with other record evidence, the picture looks quite different. For instance, although Georgia had only three successful published section 2 cases between 1982 and 2004, during that time the state had 66 successful unpublished section 2 cases, 83 section 5 objections, and 17 successful section 5 enforcement actions. *Evidence of Continued Need* 250-51, 272. In addition, between 1990 and 2005, jurisdictions in Georgia withdrew 90 proposed voting changes in response to MIRs. *Id.* at 2566. South Carolina is similar. Although the state had only 3 successful published section 2 cases, it had 30 successful unpublished section 2 cases, 74 section 5 objections, and 10 successful section 5 enforcement actions, as well as 26 voting changes withdrawn in response to MIRs and 51 changes that could not lawfully be implemented for failure to respond to MIRs. *Id.* at 250-51, 272, 2566. South Carolina, moreover, is one of the covered states that not only has continued racial disparities in voter registration and turnout, but that has never elected an African American to statewide office. *See supra* p. 22. Accordingly, even if only a relatively small portion of objections, withdrawn voting changes, and successful section 5 enforcement actions correspond to unconstitutional conduct, and even if there are substantially more successful unpublished section 2 cases in non-covered jurisdictions than the McCrary data reveals, these middle-range covered jurisdictions appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests. In fact, the discrepancy between covered and non-covered jurisdictions is likely even greater given that, as Congress found, the mere existence of section 5 deters unconstitutional behavior in the covered jurisdictions. That is, the middle-range covered states appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary. Had section 5 not been in effect, one would expect significantly more discrimination in North Carolina, South Carolina, Virginia, Texas, and Georgia, all covered by section 5, than in the non-covered states with the worst records. *See* S. Rep. No. 109-295, at 11 (suggesting that "without the Voting Rights Act's deterrent effect," the evidence of discrimination in the covered jurisdictions "might be considerably worse").

To be sure, the coverage formula's fit is not perfect. But the fit was hardly perfect in 1965. Accordingly, *Katzenbach's* discussion of this issue offers a helpful guide for our current inquiry, particularly when we consider all probative record evidence of recent discrimination—and not just the small subset of section 2 cases relied upon by the dissent, *see* Dissenting Op. at 25-26. In 1965, the formula covered three states in "which federal courts ha[d] repeatedly found substantial voting discrimination" —Alabama, Louisiana, and Mississippi, *Katzenbach*, 383 U.S. at 329, the same three states that, notwithstanding more than forty years of section 5 enforcement, still account for the highest rates of published successful section 2 litigation, as well as large numbers of unpublished successful section 2 cases, section 5 objections, federal observer coverages, and voting changes withdrawn or modified in response to MIRs. But the 1965 formula also "embrace[d] two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the

Justice Department and the Civil Rights Commission." *Id.* at 329-30. Today, the middle-range covered jurisdictions —North Carolina, South Carolina, Virginia, Texas, and Georgia—look similar: although the legislative record contains fewer judicial findings of racial discrimination in these states, it contains at least fragmentary evidence, in part based on Attorney General objections, that these states continue to engage in unconstitutional racial discrimination in voting. Finally, the 1965 formula swept in several other jurisdictions—including Alaska, Virginia, and counties in Arizona, Hawaii, and Idaho—for which Congress apparently had no evidence of actual voting discrimination. *See id.* at 318, 329-30. Today, the Act likewise encompasses jurisdictions for which there is some evidence of continued discrimination—Arizona and the covered counties of California, Florida, and New York, *see Evidence of Continued Need* 250-51, 272—as well as jurisdictions for which there appears little or no evidence of current problems—Alaska and a few towns in Michigan and New Hampshire.

Critically, moreover, and as noted above, in determining whether section 5 is "sufficiently related to the problem that it targets," we look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout. Bail-in allows jurisdictions not captured by section 4's coverage formula, but which nonetheless discriminate in voting, to be subjected to section 5 preclearance. Thus, two non-covered states with high numbers of successful published and unpublished section 2 cases—Arkansas and New Mexico—were subjected to partial preclearance under the bail-in provision. *See Jeffers*, 740 F. Supp. at 601-02; Crum, 119 Yale L.J. at 2010 & n.101 (citing *Sanchez v. Anaya*, No. 82-0067M, slip op. at 8 (D.N.M. Dec. 17, 1984)). Federal courts have also bailed in jurisdictions in several states, including Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee. *See Crum*, 119 Yale L.J. at 2010 & nn.102-08.

Bailout plays an even more important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting. As the Supreme Court explained in *City of Boerne*, the availability of bailout "reduce[s] the possibility of overbreadth" and helps "ensure Congress' means are proportionate to [its] ends." 521 U.S. at 533; *see also Katzenbach*, 383 U.S. at 329 ("Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."). As of May 9, 2012, having demonstrated that they no longer discriminate in voting, 136 jurisdictions and sub-jurisdictions had bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts. U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited May 9, 2012) ("DOJ Bailout List"). In fact, by ruling in *Northwest Austin* that any jurisdiction covered by section 5 could seek bailout—a development unmentioned by the dissent—the Supreme Court increased significantly the extent to which bailout helps "ensure Congress' means are proportionate to [its] ends," *Boerne*, 521 U.S. at 533. *See Nw. Austin*, 129 S. Ct. at 2516 (holding that "all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit"). Not surprisingly, then, the pace of bailout increased after *Northwest Austin*: of the successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court issued its decision in 2009. *See* DOJ Bailout List, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_ list. Also, the Attorney General "has a number of active bailout investigations, encompassing more than 100 jurisdictions and subjurisdictions from a range of States." Br. for Att'y Gen. as Appellee at 47-48, *LaRoque v. Holder*, No. 11-5349, 679 F.3d 905, 2012 U.S. App. LEXIS 10026 (D.C. Cir. May 18, 2012).

The importance of this significantly liberalized bailout mechanism cannot be overstated. Underlying the debate over the continued need for section 5 is a judgment about when covered jurisdictions—many with very bad historic records of racial discrimination in voting—have changed enough so that case-by-case section 2 litigation is adequate to protect the right to vote. Bailout embodies Congress's judgment on this question: jurisdictions originally covered because of their histories of discrimination can escape section 5 preclearance by demonstrating a clean record on voting rights for ten years in a row. *See* 42 U.S.C. § 1973b(a)(1) (bailout criteria). As the House Report states, "covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. Rep. No. 109-478, at 25. Bailout thus helps to ensure that section 5 is "sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512.

Shelby County complains that bailout helps only "at the margins," Appellant's Br. 53; *see also* Dissenting Op. at 29, and the dissent emphasizes that only about 1 percent of covered jurisdictions and subjurisdictions have applied for bailout, Dissenting Op. at 29. But absent evidence that there are "clean" jurisdictions that would like to bail out but cannot meet the standards, the low bailout rate tells us nothing about the effectiveness of the bailout provision. *See Shelby Cnty.*, 811 F. Supp. 2d at 500-01 (describing "several plausible explanations for th[e] failure to seek bailout," including "the minimal administrative cost associated with preclearance, and the fact that covered jurisdictions see no need to avoid the preclearance requirement"). As the dissent concedes, since 1982 no bailout application has been denied, Dissenting Op. at 29, and Congress considered evidence that the bailout criteria "are easily proven for jurisdictions that do not discriminate in their voting practices." *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005). The dissent speculates that "opaque standards" may prevent bailouts, Dissenting Op. at 29, but neither it nor Shelby County specifically challenges Congress's definition of what constitutes a clean jurisdiction or how the Attorney

General is applying the bailout criteria. In fact, as noted above, Shelby County never even tried to bail out and has brought only a facial challenge. If something about the bailout criteria themselves or how the Attorney General is applying them is preventing jurisdictions with clean records from escaping section 5 preclearance, those criteria can be challenged in a separate action brought by any adversely affected jurisdiction. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (explaining that in a facial challenge, "[t]he fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

This, then, brings us to the critical question: Is the statute's "disparate geographic coverage . . . sufficiently related to the problem that it targets"? *Nw. Austin*, 129 S. Ct. at 2512. Of course, if the statute produced "a remarkably bad fit," Dissenting Op. at 25, then we would agree that it is no longer congruent and proportional. But as explained above, although the section 4(b) formula relies on old data, the legislative record shows that it, together with the statute's provisions for bail-in and bailout—hardly "tack[ed] on," *id.* at 30 (internal quotation marks omitted), but rather an integral part of the coverage mechanism—continues to single out the jurisdictions in which discrimination is concentrated. Given this, and given the fundamental principle that we may not "strik[e] down an Act of Congress except upon a clear showing of unconstitutionality," *Salazar v. Buono*, 130 S. Ct. 1803, 1820, 176 L. Ed. 2d 634 (2010) (plurality opinion), we see no principled basis for setting aside the district court's conclusion that section 5 is "sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512.

C.

We turn, finally, to the dissent's argument that section 5 "requires a jurisdiction not only to engage in some level of race-conscious decisionmaking, but also on occasion to sacrifice principles aimed at depoliticizing redistricting." Dissenting Op. at 4; *see also Nw. Austin*, 129 S. Ct. at 2512 (explaining that "federalism concerns are underscored by the argument that . . . 'considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5'" and that "[a]dditional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere" (quoting *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring))). According to the dissent, this concern and the burden imposed by section 5 are aggravated by the amendments to section 5 Congress added in conjunction with the 2006 reauthorization. Dissenting Op. at 5-7; *see also* 2006 Act § 5.

The dissent's thoughtful arguments face a serious obstacle. Shelby County neither challenges the constitutionality of the 2006 amendments or even argues that they increase section 5's burdens, nor does it argue that section 5 requires covered jurisdictions to undertake impermissible considerations of race. These issues, in other words, are entirely unbriefed, and as we have repeatedly made clear, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177, 230 U.S. App. D.C. 80 (D.C. Cir. 1983). Where, as here, "counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, important questions of far-reaching significance are involved." *Id.* (internal quotation marks omitted).

Even were they not forfeited, the dissent's concerns would not have satisfied the standards for mounting a facial constitutional challenge. Such a challenge, the Supreme Court has made clear, is "the most difficult . . . to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Yet the amendments, as well as the Supreme Court's concern that section 5 may sometimes require otherwise impermissible race-conscious decisionmaking, are implicated only in a subset of cases. Specifically, the amendment overturning *Bossier II* is implicated only in cases involving a discriminatory but non-retrogressive purpose, *see* 42 U.S.C. § 1973c(c); the amendments overturning *Georgia v. Ashcroft*, like the Supreme Court's concern about race-conscious decisionmaking, are implicated primarily in redistricting cases where section 5 seems to require consideration of race as a "'predominant factor.'" *See Nw. Austin*, 129 S. Ct. at 2512 (quoting *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)); 42 U.S.C. § 1973c(b), (d). In other words, even assuming the dissent is correct, it would not have established that "no set of circumstances exists under which the Act would be valid," *Salerno*, 481

U.S. at 745. Indeed, addressing the dissent's arguments would lead us into the very kind of "speculation" and "anticipat[ion]" of constitutional questions that require courts to "disfavor[]" facial challenges. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (internal quotation marks omitted).

IV.

In *Northwest Austin*, the Supreme Court signaled that the extraordinary federalism costs imposed by section 5 raise substantial constitutional concerns. As a lower federal court urged to strike this duly enacted law of Congress, we must proceed with great caution, bound as we are by Supreme Court precedent and confined as we must be to resolve only the precise legal question before us: Does the severe remedy of preclearance remain "congruent and proportional"? The legislative record is by no means unambiguous. But Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust Congress with ensuring that the right to vote—surely among the most important guarantees of political liberty in the Constitution—is not abridged on account of race. In this context, we owe much deference to the considered judgment of the People's elected representatives. We affirm.

So ordered.

Williams, *Senior Circuit Judge*, dissenting: Section 5 of the Voting Rights Act imposes rather extraordinary burdens on "covered" jurisdictions—nine states (and every jurisdiction therein), plus a host of jurisdictions scattered through several other states. See Voting Section, U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/ab out/vot/sec_5/covered.php (last visited May 9, 2012) (listing the covered jurisdictions). Unless and until released from coverage (a process discussed below), each of these jurisdictions must seek the Justice Department's approval for every contemplated change in election procedures, however trivial. See 42 U.S.C. § 1973c. Alternatively, it can seek approval from a three-judge district court in the District of Columbia. See *id.* Below I'll address the criteria by which the Department and courts assess these proposals; for now, suffice it to say that the act not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.

Section 4(b) of the act states two criteria by which jurisdictions are chosen for this special treatment: whether a jurisdiction had (1) a "test or device" restricting the opportunity to register or vote and (2) a voter registration or turnout rate below 50%. See 42 U.S.C. § 1973b(b). But § 4(b) specifies that the elections for which these two criteria are measured must be ones that took place *several decades ago*. The freshest, most recent data relate to conditions in November 1972—34 years before Congress extended the act for another 25 years (and thus 59 years before the extension's scheduled expiration). See *id.* The oldest data—and a jurisdiction included because of the oldest data is every bit as covered as one condemned under the newest—are another eight years older. See *id.*

Of course sometimes a skilled dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder. As I will try to show below, Congress hasn't proven so adept. Whether the criteria are viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?), they seem to me defective. They are not, in my view, "congruent and proportional," as required by controlling Supreme Court precedent. My colleagues find they are. I dissent.

* * *

Although it is only the irrational coverage formula of § 4(b) that I find unconstitutional, it is impossible to assess that formula without first looking at the burdens § 5 imposes on covered jurisdictions. Any answer to the question whether § 4(b) is "sufficiently related to the problem it targets," *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 2512, 174 L. Ed. 2d 140 (2009), that is, whether it is "congruent and proportional," must be informed by the consequences triggered by § 4(b). (I agree with the majority that *Northwest Austin* "send[s] a powerful signal that congruence and proportionality is the appropriate standard of review." Maj. Op. at 16.)[1] The greater the burdens imposed by § 5, the more accurate the coverage scheme must be. If, for example, § 5 merely required covered jurisdictions to notify the Justice Department of an impending change in voting procedures, without giving the Department power to delay or thwart implementation, even a rather loose coverage formula would likely appear proportional.

But § 5 requires much more than notice. For covered jurisdictions, it mandates anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes. See 42 U.S.C. § 1973c(a). Since its inception, even supporters of the Voting Rights Act have recognized that the preclearance regime was particularly "strong medicine" for a particularly extreme problem. *Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 110 (1965) (statement of Rep. Chelf). When it first upheld the VRA, the Supreme Court recognized it as a "complex scheme of stringent remedies" and § 5 in particular as an "uncommon exercise of congressional power." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 334, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). And only a few years ago the Supreme Court reminded us that the federalism costs of § 5 are "substantial." *Northwest Austin*, 129 S. Ct. at 2511.

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[1] Given such a standard, I cannot understand how we could apply *Salerno's* "no set of circumstances" test, see Maj. Op. at 61-62, quite apart from the test's questionable continued vitality, see, *e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). Suppose Congress had actually designed the coverage formula by having the chair of the Senate Judiciary Committee throw darts at a map and had included every jurisdiction where a dart landed. Would we be expected to reject a facial challenge simply on a showing that the behavior of *one* covered jurisdiction was so blatantly unconstitutional as to cry out for application of § 5?

A critical aspect of those costs is the shifted burden of proof (a matter I'll discuss below in the realm of its most significant application). So too is the section's broad sweep: § 5 applies to any voting change proposed by a covered jurisdiction, without regard to kind or magnitude, and thus governs many laws that likely could never "deny or abridge" a "minority group's opportunity to vote." See 42 U.S.C. § 1973c(a); *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969) ("The legislative history on the whole supports the view that Congress intended to reach any state enactment, which altered the election law of a covered State in even a minor way."). This obvious point is underscored by the miniscule and declining share of covered jurisdictions' applications that draw Justice Department objections—with only five objections for every *ten thousand* submissions between 1998 and 2002. See Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 192 & fig.3 (2005) (noting that the Department's objection rate has "been falling steadily" ever since the early years of the VRA and equaled 0.05% between 1998 and 2002). In the vast majority of cases, then, the overall effect of § 5 is merely to delay implementation of a perfectly proper law.

Of course the most critical features of § 5 are the substantive standards it applies to the covered jurisdictions. Whether a proposed voting change can be precleared turns on whether it would have a retrogressive effect on minority voters. See *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976). In practice this standard requires a jurisdiction not only to engage in some level of race-conscious decisionmaking, but also on occasion to sacrifice principles aimed at depoliticizing redistricting. Suppose a covered jurisdiction sought to implement what we may loosely call "good government" principles. It might, for example, delegate the task of redistricting to a computer programmed to apply criteria such as compactness, contiguity, conformity to existing political boundaries, and satisfaction of one person, one vote requirements. Despite these worthy goals, the resulting plan, if it happened to reduce the number of majority-minority districts, would fail preclearance, as the government acknowledged at oral argument. See Tr. of Oral Arg. at 37-38. As Justice Kennedy cautioned in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003), "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment . . . seem to be what save it under § 5." *Id.* at 491 (Kennedy, J., concurring); see also *Miller v. Johnson*, 515 U.S. 900, 927, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (noting that Justice Department's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act . . . into tension with the Fourteenth Amendment").

Unfortunately, when Congress passed the 2006 version of the VRA, it not only disregarded but flouted Justice Kennedy's concern. New subsections (b) and (d) were added to § 5 to overturn *Georgia v. Ashcroft*, thereby restricting the flexibility of states to experiment with different methods of maintaining (and perhaps even expanding) minority influence. The *Georgia* Court had prescribed a holistic approach to § 5, instructing courts confronting a proposed voting change "not [to] focus solely on the comparative ability of a minority group to elect a candidate of its choice,"[2] 539 U.S. at 480 (majority opinion), but also to consider the "extent to which a new plan changes the minority group's opportunity to participate in the political process" writ large, *id.* at 482. *Georgia* thus gave covered jurisdictions an opportunity to make trade-offs between concentrating minority voters in increasingly safe districts and spreading some of those voters out into additional districts; the latter choice, the Court pointed out, might increase the "substantive representation" they enjoy and lessen the risks of "isolating minority voters from the rest of the State" and of "narrowing [their] political influence to only a fraction of political districts." *Id.* at 481; see also Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1729 (2004) (expressing concern that § 5's "narrow focus on securing the electability of minority candidates could compromise the range of political accords available to minority voters and thereby, under conditions of mature political engagement, actually thwart minority political gains"); David Epstein & Sharyn O'Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 Am. J. Pol. Sci. 367, 390-

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[2] The discourse revolving around § 5 invariably assumes that members of a minority have virtually identical interests and preferences. I follow that pattern here, reserving for the end of the opinion consideration of how such an assumption relates to the real world and to the 15th Amendment.

92 (1999) (noting that overreliance on majority-minority districts means that "moderate senators will likely be replaced by extremists," undermining the ability to create "biracial coalitions [which] are a key to passing racially progressive policies"). In so doing, the Court recognized that a minority group might in fact "achieve greater overall representation . . . by increasing the number of representatives sympathetic to the interests of minority voters," rather than merely by electing the maximum possible number of representatives dependent on securing a majority of minority votes. 539 U.S. at 483.

As amended, the act forecloses this choice. Preclearance now has an exclusive focus—whether the plan diminishes the ability of minorities (always assumed to be a monolith) to "elect their preferred candidates of choice," irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns. See 42 U.S.C. § 1973c(b); *id.* § 1973c(d); see also *Texas v. United States*, — F. Supp. 2d —, 831 F. Supp. 2d 244, 2011 U.S. Dist. LEXIS 147586, 2011 WL 6440006, at *4 (D.D.C. Dec. 22, 2011) (interpreting the amended law to overturn *Georgia*). The amended § 5 thus not only mandates race-conscious decisionmaking, but a particular brand of it. In doing so, the new § 5 aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination.

Another 2006 amendment makes the § 5 burden even heavier. Section 5 prohibits preclearance of laws that have the "purpose" of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The Court had interpreted "purpose" to be consistent with § 5's effects prong, so that the term justified denying preclearance *only* to changes with a "retrogressive" purpose, rather than changes with either that or a discriminatory purpose. See *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*"). The 2006 amendments reversed that decision, specifying that "purpose" encompassed "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). This broadening of the § 5 criteria may seem unexceptionable, but the Court had previously found that assigning covered jurisdictions the burden of proving the *absence* of discriminatory purpose was precisely the device that the Department had employed in its pursuit of maximizing majority-minority districts at any cost: "The key to the Government's position, which is plain from its objection letters if not from its briefs to this court . . . , is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create [an additional] majority-minority district." *Miller*, 515 U.S. at 924. By inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have, at worst, restored "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting," *id.* at 927, and at best, "exacerbate[d] the substantial federalism costs that the preclearance procedure already exacts," *Bossier II*, 528 U.S. at 336.

The majority correctly notes that Shelby did not argue that either of these amendments is unconstitutional. See Maj. Op. at 61. Neither do I. Appellant does argue however that § 4(b) is unconstitutional, that is, that § 4(b) is not a congruent and proportional response to the problem currently posed by voting discrimination. To answer that question one must necessarily first assess the severity of the consequences of coverage under § 4(b) (i.e., subjection to § 5 as it exists today). See *supra* at p. 2.

Whether Congress is free to impose § 5 on a select set of jurisdictions also depends in part, of course, on possible shortcomings in the remedy that § 2 provides for the country as a whole. That section creates a right to sue *any* jurisdiction to stop voting practices that "result[] in a denial or abridgement" of the right to vote "on account of race or color." 42 U.S.C. § 1973(a). Doubtless the section is less drastic a remedy than § 5 (and thus by some criteria less effective). But it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay. Compare Maj. Op. at 41-42. Unlike in most litigation, plaintiffs' costs for § 2 suits can in effect be assumed by the Department of Justice by its either exercising its authority to bring suit itself, see, e.g., *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), or by intervening in support of the plaintiff, as it often does. See, e.g., *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983). So far as Departmental resource constraints are concerned, narrowing § 5's reach would, as a matter of simple arithmetic, enable it to increase § 2 enforcement with whatever resources it stopped spending on § 5. For those cases where the Justice Department still fails to intervene, § 2 provides for reimbursement of attorney and expert fees for prevailing parties. See 42 U.S.C. § 1973l(e). Finally, as to the risk that discriminatory practices may take hold before traditional litigation has run its course, courts may as always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay. See *Perry v. Perez*, 132 S. Ct. 934, 942, 181 L. Ed. 2d 900 (2012).

Indeed, the ubiquitous availability of § 2 is of course a reminder that § 5 was created for the specific purpose of overcoming state and local resistance to federal antidiscrimination policy. When the Supreme Court first upheld the act in 1966, it found that § 5 was necessary because "case-by-case litigation," now governed by § 2, was "inadequate to combat the widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328. While § 2 was tailored to redress actual instances of discrimination, § 5 was crafted to overcome a "century of systematic resistance to the Fifteenth Amendment" and ongoing "obstructionist tactics." *Id.*

But life in the covered jurisdictions has not congealed in the 48 years since the first triggering election (or the 40 years since the most recent). "[C]urrent burdens . . . must be justified by current needs," *Northwest Austin*, 129 S. Ct. at 2512, and the burden imposed by § 5 has only grown heavier in those same years.

In order for § 4(b) to be congruent and proportional then, the disparity in current evidence of discrimination between the covered and uncovered jurisdictions must be proportionate to the severe differential in treatment imposed by § 5. Put another way, a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5's harsh remedy, even if one might find § 5 appropriate for a subset of that group.

* * *

I now turn to assessing the evidence used to justify the § 4(b) coverage formula. The parties have offered no sophisticated statistical analysis of voting discrimination in the covered and uncovered jurisdictions, and what follows does not purport to fill the sophistication gap.

The data considered are drawn from the evidence the parties have cited, as well as the more general set compiled by Congress, especially data the Supreme Court has previously found important. For instance, when it upheld the preclearance regime in 1980, the Supreme Court noted both the "significant disparity" that still existed between African—American and white voter registration rates, and the fact that the number of black elected officials in covered jurisdictions "fell far short of being representative" of the number of African-Americans residing in covered jurisdictions. *City of Rome v. United States*, 446 U.S. 156, 180-81, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980). Beyond voter registration and black elected officials, the parties point us to comparative, state-by-state data detailing the number of federal observers sent into states to oversee elections, plus the number of successful § 2 lawsuits. I take each of these in turn.

Voter Registration and Turnout

Section 4(b)'s coverage formula is keyed to two indicators of voter access: voter turnout and the use of tests and devices in voter registration. See 42 U.S.C. § 1973b(b). In 1966 the Supreme Court characterized the VRA as "specifically designed" to remedy the "misuse of tests and devices" that characterized the "widespread and persistent discrimination" at the time. *Katzenbach*, 383 U.S. at 331. Section 5 was thus meant, at the very least, to ensure that members of minority groups had equal access to the voting booth.

Figures I and II[3] focus on this central problem. The two charts compare white and black registration and turnout rates in the 2004 election, using state-by-state estimates from the U.S. Census Bureau. See U.S. Census Bureau, Reported Voting and Registration of the Total Voting-Age Population, at tbl.4a, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html. Each chart takes the number of non-Hispanic whites who registered or turned out as a proportion of the total citizen voting-age population ("CVAP") and compares that ratio to the same ratio for the black population, i.e., it displays *the ratio of these two ratios* for each state. Thus the greater the ratio (and the further to the left on the chart), the greater the racial disparity. The chart excludes states where the Census Bureau was unable to make reliable estimates of black registration and turnout rates (presumably because the black population was too small to get a sufficient sample).[4]

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[3] All the charts exclude Michigan and New Hampshire, both partially covered states, because the few small townships covered constitute only a minute portion of those states and, as far as I can tell, have never been the subject of a § 5 action.

[4] The only covered jurisdictions excluded are Alaska, New Hampshire, and South Dakota. Of those, only Alaska is a fully covered state. The other states excluded for want of data are Hawaii, Idaho, Iowa, Kansas, Maine, Montana, Nebraska, New Mexico, North Dakota, Oregon, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

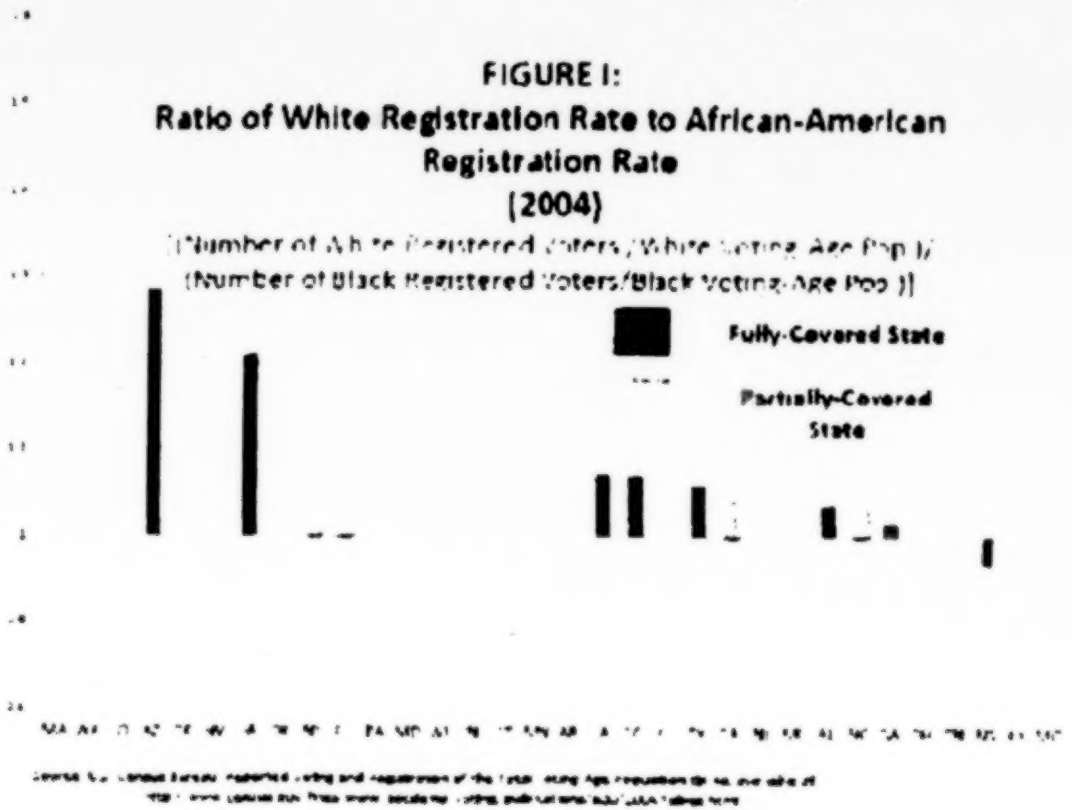

FIGURE I:
Ratio of White Registration Rate to African-American Registration Rate
(2004)
[(Number of White Registered Voters/White Voting-Age Pop.)/
(Number of Black Registered Voters/Black Voting-Age Pop.)]

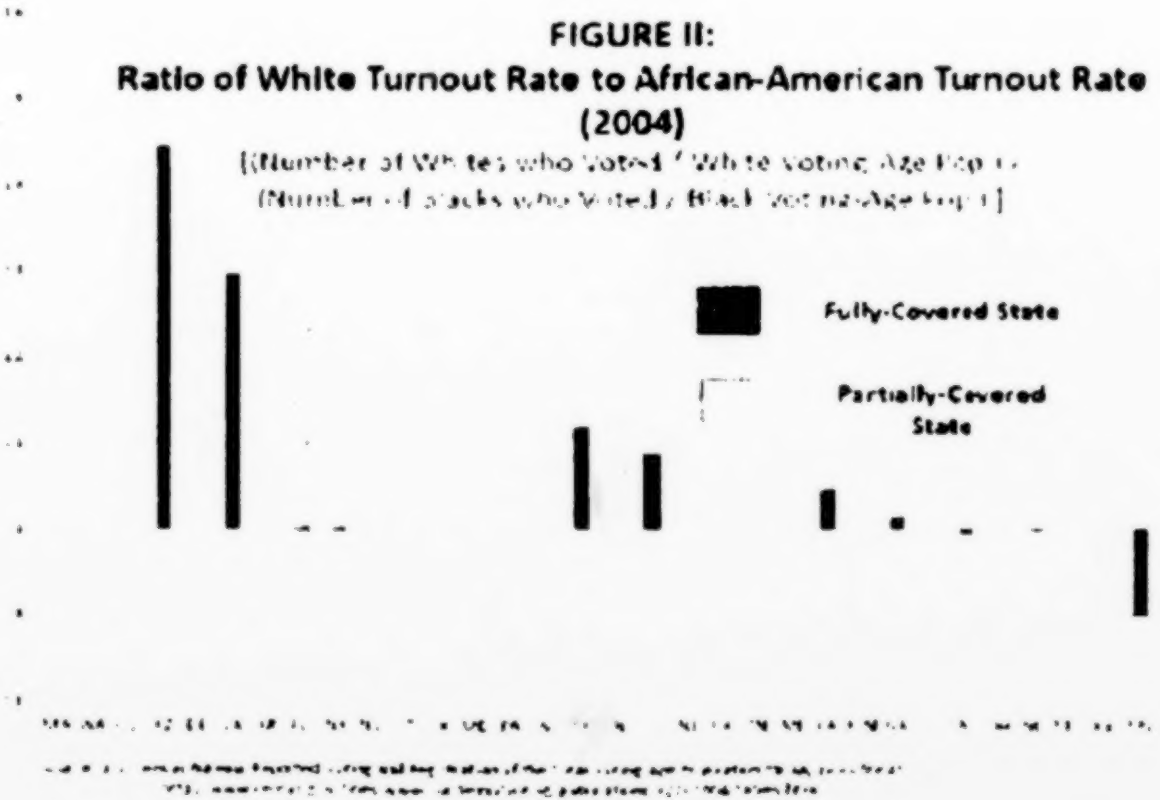

FIGURE II:
Ratio of White Turnout Rate to African-American Turnout Rate (2004)

[(Number of Whites who Voted / White Voting Age Pop.) / (Number of Blacks who Voted / Black Voting Age Pop.)]

There appears to be no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exists, it appears to be negative—condemnation under § 4(b) is a marker of higher black registration and turnout. Most of the worst offenders—states where in 2004 whites turnedout or were registered in significantly higher proportion than African-Americans—are not covered. These include, for example, the three worst—Massachusetts, Washington, and Colorado. And in Alabama and Mississippi, often thought of as two of the worst offenders, African-Americans turned out in greater proportion than whites.

Black Elected Officials

The other metric that the *Rome* Court considered was the number of black elected officials. Figure III uses U.S. Census Bureau data from 2000 and a state-by-state breakdown of such officials from that same year and displays the number of African-Americans who had been elected to office as a proportion of their share of the total CVAP in a given state. See David A Bostis, Joint Ctr. for Pol. & Econ. Studies, *Black Elected Officials: A Statistical Summary 2000, available at* http://www.jointcenter.org/research/black-elected-officials-a-statistical-summary-2000; U.S. Census Bureau, Voting-Age Population and Voting-Age Citizens, at tbls.1-1 & 1-3, *available at* http://www.census.gov/population/www/cen2000/briefs/phc-t31/index.html. Thus, the higher the percentage (and accordingly the further to the right on the chart), the closer African-Americans' share of elected positions is to equaling their share of the CVAP. States where the African-American share of CVAP was less than 3% are excluded.

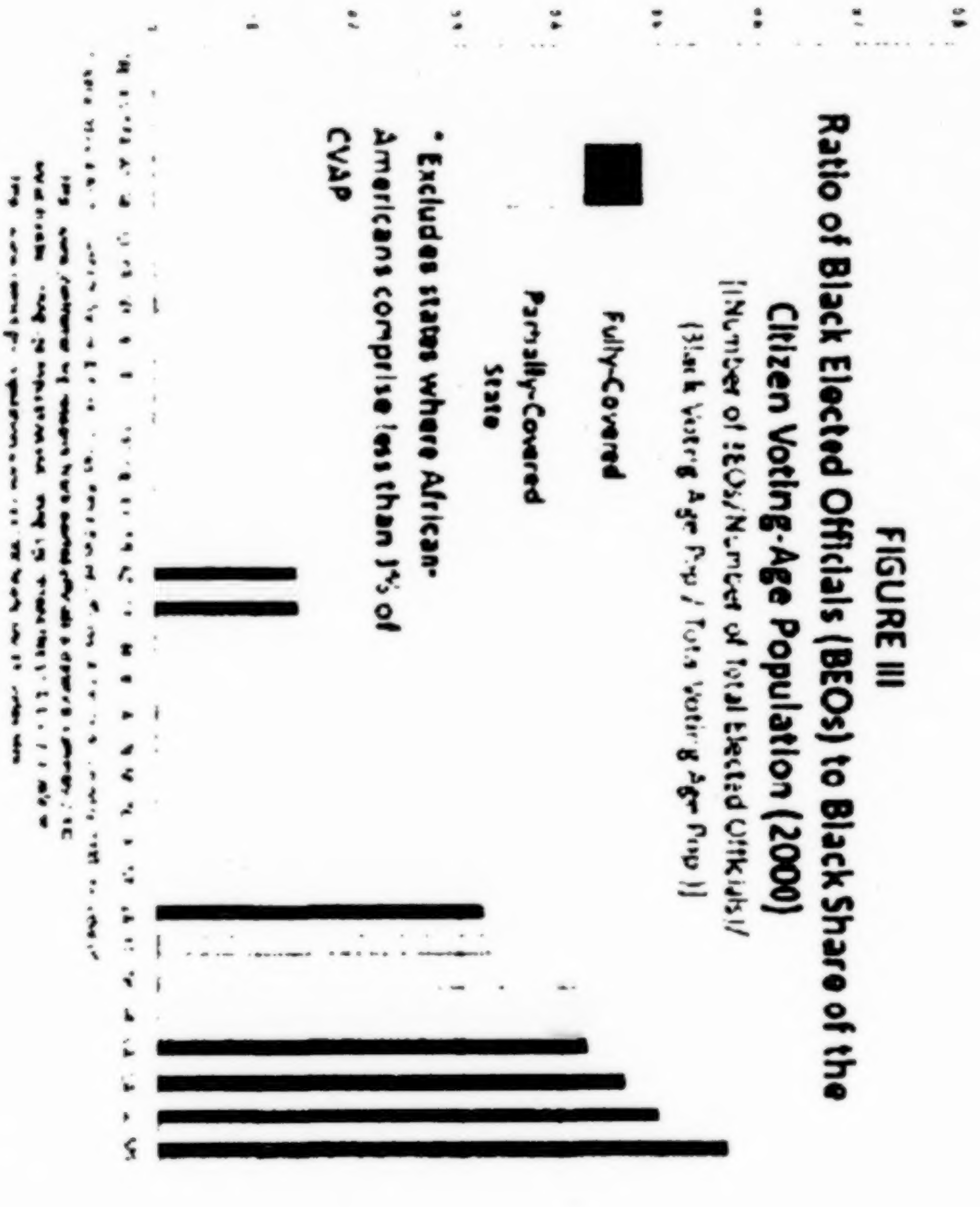

FIGURE III

Ratio of Black Elected Officials (BEOs) to Black Share of the Citizen Voting-Age Population (2000)

[(Number of BEOs/Number of Total Elected Officials)/ (Black Voting Age Pop / Total Voting Age Pop)]

Again the results are the inverse of § 4(b)'s presuppositions. Covered jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones. Of the ten states with the highest proportion of black elected officials relative to population, eight are covered states, with the top five all being fully covered states (Virginia, Louisiana, South Carolina, Mississippi, and Alabama). Nor can the poor scores achieved by some uncovered states be chalked up to small black populations. Illinois, Missouri, Delaware and Michigan, where African-Americans comprise at least 10% of the CVAP, all fall to the left (i.e., on the worse side) of every one of the states fully covered by § 4(b). While the relatively high number of black officeholders in covered states might be taken as a testament to § 5's *past* success, no one could credibly argue that the numbers are proof of the coverage scheme's continued rationality.

In upholding § 5, the district court acknowledged that the number of black elected officials had increased but found the nature of the positions insufficient, pointing particularly to the nationwide disparity between the black proportion of the population (11.9%) and the number of black officials elected to *statewide* office (5%). *Shelby County v. Holder*, 811 F. Supp. 2d 424, 468-69 (D.D.C. 2011). It is unclear how this supports singling out the covered jurisdictions. Of the 35 black officials holding statewide elective office in the whole country in 2000 (including 2 from the U.S. Virgin Islands), nearly a third (11) came from fully covered states, Bostis, *supra*, at 24 tbl.7A, a proportion roughly equivalent to these jurisdictions' share of the nation's African-American citizen voting-age population (about 33%), see U.S. Census Bureau, Voting-Age Population and Voting-Age

Citizens, *supra*, at tbl.1-3. Of course one might expect that the higher average African-American share of the population in the covered states would lead to a higher share of statewide elected officials. But if on that account one thinks there has been a shortfall in the covered states, it might be caused in part by the Justice Department's policy of maximizing majority-minority districts, with the concomitant risks of "isolating minority voters from the rest of the State" and "narrowing [their] political influence to only a fraction of political districts." *Georgia v. Ashcroft*, 539 U.S. 461, 481, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003). If African-American candidates primarily face solidly African-American constituencies, and thus develop political personas pitched overwhelmingly to the Democratic side of the aisle, it would hardly be surprising that they might face special obstacles seeking statewide office (assuming, of course, racially-polarized voting, as § 5 does). See Epstein, *supra*, at 390-92.

Federal Observers

Section 8 of the VRA authorizes the Department to send federal observers to covered jurisdictions in order to enter polling places and monitor elections if "necessary to enforce the guarantees of the 14th or 15th amendment." 42 U.S.C. § 1973f(a)(2)(B). Additionally, § 3(a) permits a court to authorize the appointment of federal observers in any political subdivision, whether covered or uncovered, if the court finds it "appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment." *Id.* § 1973a(a); see also *id.* § 1973f(a)(1). In an extensive report, the National Commission on the Voting Rights Act mapped the number of occasions these observers had been assigned to states in the 22-year period between the prior VRA authorization (1982) and the 2004 election. See Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 61 & Map 10B (Feb. 2006) ("Nat'l Comm'n Report"). Figure IV shows the state-by-state distribution of observer coverages per million minority residents, where the minority population is calculated by subtracting the non-Hispanic white population from the total 2004 population, as estimated by the U.S. Census Bureau. See U.S. Census Bureau, Annual Estimates of the Population for Race Alone and Hispanic or Latino Origin for the United States and States: July 1, 2004, *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html.

Superficially, Figure IV supports § 4(b), indicating that observers are being sent to covered states more often than to uncovered ones. Six of the "worst" eight states are covered ones. But a number of factors undermine any serious inference. First, the National Commission report explains that it has captured "each occasion when federal observers are detailed to a jurisdiction *covered by Section 5 or Section 203*." Nat'l Comm'n Report at 60 (emphasis added). The apparent implication is that the Commission didn't purport to collect data for jurisdictions not covered by either of those sections; if so, the data are useless for comparative purposes. Indeed, testimony before Congress suggests that the Civil Rights Division simply doesn't use "observers" for uncovered states, preferring instead to send its own staff lawyers to monitor elections "[i]n areas of the country where Federal observers cannot be sent" (presumably meaning, "cannot be sent without the necessity and deterrent of getting court approval"). *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 109th Cong. 196 (2005) (statement of Bernard Schlozman). In fact, when calling this to Congress's attention, a Department official noted that the "the great bulk of . . . recent enforcement cases since, say 1993, have involved jurisdictions (e.g., Massachusetts, California, New York, New Jersey, Florida, Washington, and Pennsylvania) where there is no statutory authority to send Federal observers." *Id.*

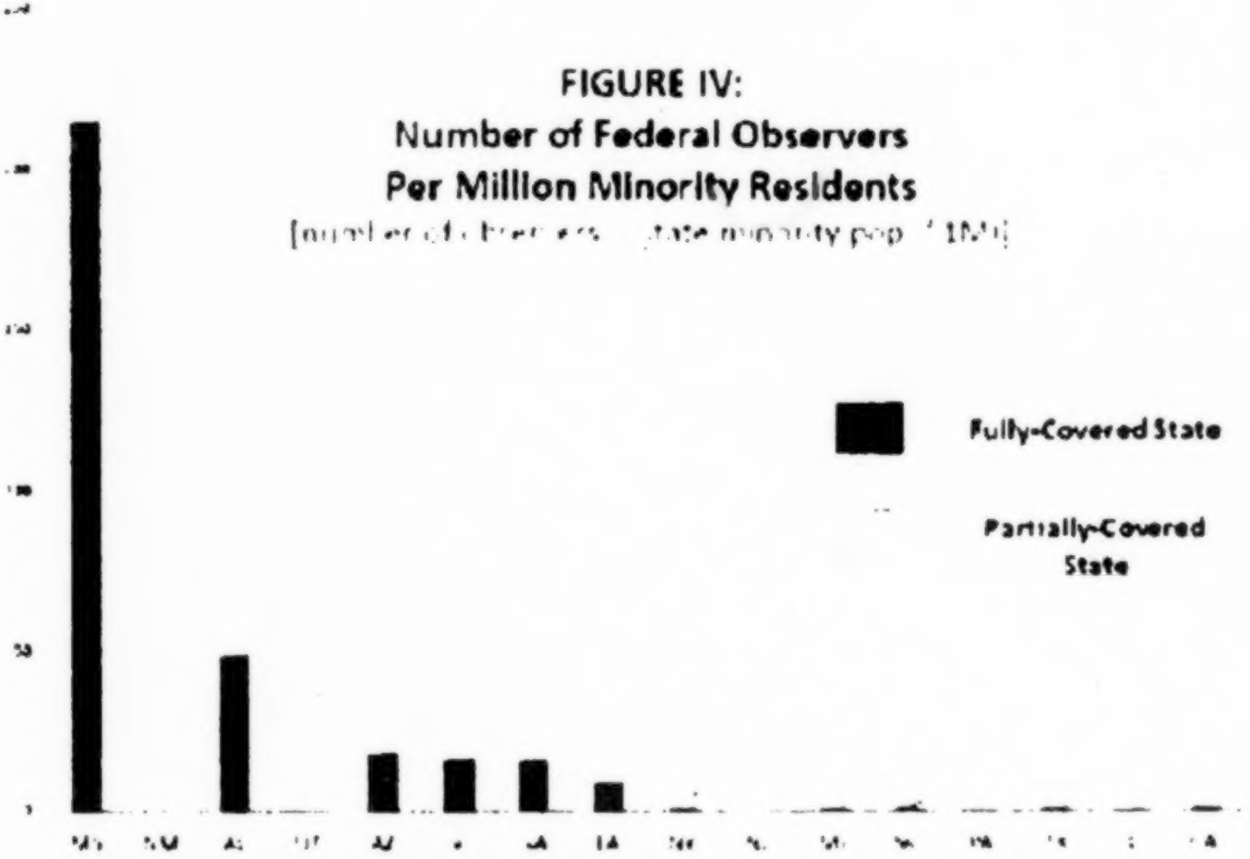

FIGURE IV:
Number of Federal Observers
Per Million Minority Residents

[illegible]

Even if we were to assume the National Commission's figures to be complete, and thus that every federal observer between 1982 and 2004 was sent to a jurisdiction already covered under *some* part of the VRA (either § 5 or § 203), this suggests another limitation on the data's relevance: The same Department that administers § 5 preclearance also decides where to send observers, so it is unsurprising that the covered states, which are already in the Department's sights, would also receive the most observers. Finally, § 3 forces the Justice Department to go to court for authorization to assign observers to uncovered areas, while § 8 imposes no such hurdle for the covered ones, undermining further the data's already questionable value.

Successful Section 2 Lawsuits

The final metric for which comparative data exist is reported, successful § 2 lawsuits. Appellees point us to a comprehensive list of reported, post-1982 § 2 cases compiled by Professor Ellen Katz and the Voting Rights Initiative at the University of Michigan Law School. See Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006) ("Katz Master List"), *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls. Relying on these data, the district court noted that more than 56% of successful § 2 suits from 1982 to 2006 have been filed in covered jurisdictions, although those jurisdictions comprise only a quarter of the nation's population. See *Shelby County*, 811 F. Supp. 2d at 506.

But the persuasive power of this statistic dissolves when we disaggregate the data by state. Figure V looks at each state's number of successful § 2 lawsuits between 1982 and 2005, per million residents, using the same 2004 U.S. Census Bureau population estimates used above. Because Professor Katz's database helpfully informs us whether each lawsuit was located in a covered or uncovered jurisdiction, it is possible to break out the covered portions of partially covered states from the uncovered portions:[5] A "(C)" below the state's abbreviation indicates that the data pertain only to the covered portion of that state, and an "(NC)" indicates the opposite. Because one successful case in a covered portion of South Dakota in 24 years produced a ratio of 43 cases for every hypothetical million residents, the covered portions of South Dakota are excluded in order to avoid distorting the chart's scale.

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5. In order to separately calculate the populations of the covered portions of partially covered states (namely, New York, California, North Carolina, and Florida), Chart V uses the county-specific population estimates from the U.S. Census Bureau. See U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1 2004, http://www.census.gov/pope st/data/counties/totals/2004/CO-EST2004-01.html (linking to county-specific data for these states and others); Voting Section, U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 9, 2012).

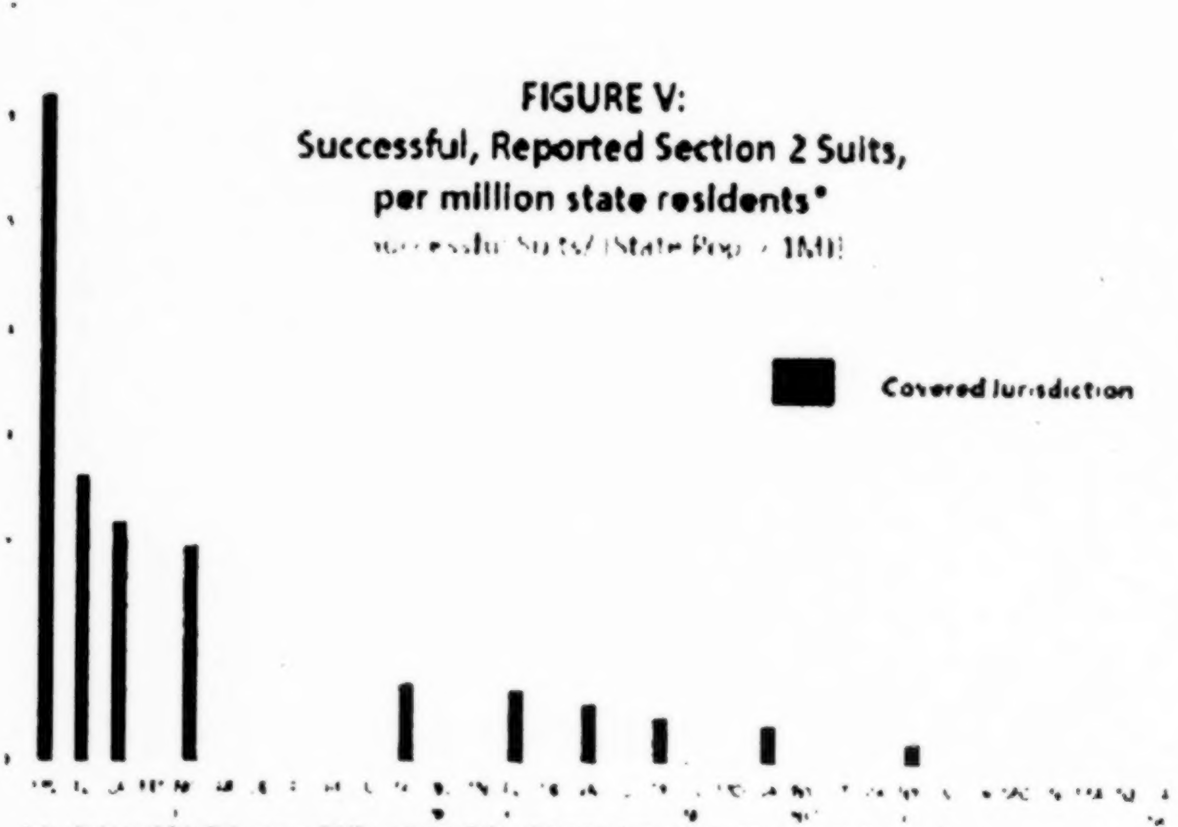

**FIGURE V:
Successful, Reported Section 2 Suits,
per million state residents***

Successful Suits/(State Pop / 1M)

[illegible]

Like the federal observer data discussed above, Figure V suggests that a more narrowly tailored coverage formula —capturing only Mississippi, Alabama, and Louisiana, and possibly the covered portions of South Dakota and North Carolina—might be defensible. But beyond these, the covered jurisdictions appear indistinguishable from their uncovered peers. The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions: the six covered states appearing to the right, plus two fully covered states—Arizona and Alaska—which do not appear on the chart at all because there has been *not one* successful § 2 suit in those states in the whole 24-year period. Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered (five if we add back in the covered portion of South Dakota). A formula with an error rate of 50% or more does not seem "congruent and proportional."

To bolster these numbers, the majority relies on an account of purportedly successful, but unreported § 2 cases, numbers that it rightly notes one should "approach . . . with caution." Maj. Op. at 50. Indeed, beyond the serious concerns about these data already elucidated by the majority (e.g., completely different groups gathered the data regarding covered and uncovered jurisdictions), we also have almost no information for how Mr. McCrary and his staff identified particular cases as "successful" or not. All we know is that he required "some evidence" that the case was "resolved" under § 2 and "some reference" to settlement. Joint Appendix 95. And the inference of "success" from evidence of possible settlements seems exceptionally weak, for both the unreported cases in the covered jurisdictions compiled by the National Commission and those from the uncovered jurisdictions compiled by Mr. McCrary. It overlooks not only the range of outcomes embraced in the concept of settlement but also the strategic factors, including legal fees and reputational risk, that go into a jurisdiction's decision to settle.

Additionally, defenders of the coverage scheme point to two circumstances that might also artificially reduce § 2 figures for the covered states, namely the "blocking" effect of actual § 5 vetoes, and the deterrent effect of jurisdictions' having to seek preclearance. As to blocking, there seems little basis to infer that many of the 626 objections spread over 24 years were substitutes for successful § 2 suits. Any such inference is undermined by the Department's ability to almost costlessly "Just Say No," the allocation of the burden of proof to the jurisdiction, the legal fees that fighting the Department will entail, and the difference in the substantive standards governing § 2 and § 5 proceedings.

As to the imputed deterrence, it is plainly unquantifiable. If we assume that it has played a role, how much should we inflate the covered states' figures to account for it, and which covered states? Given much weight, the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin's* insistence that "current burdens . . . must be justified by current needs," 129 S. Ct. at 2512, would mean little if § 5's supposed deterrent effect were enough to justify the current scheme. See Tr. of Oral Arg. at 28, *Northwest*

Austin Municipal Utility Dist. No. One v. Holder, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) (No. 08-322) (statement of Chief Justice Roberts) ("Well, that's like the old—you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. . . . Well, there are no elephants, so it must work.").

* * *

To recap, of the four metrics for which comparative data exist, one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress's concerns. Given the drastic remedy imposed on covered jurisdictions by § 5, as described above, I do not believe that such equivocal evidence can sustain the scheme.

The Supreme Court's initial review of the formula in 1966 provides a model for evaluating such an imperfect correlation. It assessed the evidence of discrimination before it and divided the covered jurisdictions into three categories: (1) a group for which "federal courts have repeatedly found substantial voting discrimination"; (2) another group "for which there was more fragmentary evidence of recent voting discrimination"; and (3) a third set consisting of the "few remaining States and political subdivisions covered by the formula," for which there was little or no such evidence of discrimination, but whose use of voting tests and low voter turnout warranted inclusion, "at least in the absence of proof that they have been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In that original review, the Supreme Court placed three states (Alabama, Mississippi, and Louisiana) in category one, another three (Georgia, South Carolina, and the covered portions of North Carolina) in category two, and finally two fully covered states (Virginia and Alaska) plus a few counties in Hawaii, Idaho, and Arizona, in category three.

The evidence adduced above yields a far worse fit than the data reviewed in *Katzenbach*. Indeed, one would be hard-pressed to put any of the covered jurisdictions into *Katzenbach's* first category. Based on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a "substantial" amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*. In terms of successful § 2 law suits, only three covered states—Mississippi, Louisiana, and Alabama—plus uncovered Montana—have more than two successful suits per million residents over the past quarter-century (excluding of course the covered portion of South Dakota, which scores high only because with such a small population the *one* suit there produces a high ratio per hypothetical million); in fact, these three states are the only ones with more than 10 successful suits in the 24 years between 1982 and 2006.[6] See Katz Master List. And of course, even this number may be artificially large since a successful § 2 suit does not necessarily entail a finding of unconstitutional behavior (i.e., intentionally discriminatory acts); indeed, the Katz Study itself reports only 12 findings of intentional discrimination in the covered jurisdictions over the same two-and-a-half decades, and on my reading of the cases Professor Katz lists, there are even fewer. See, e.g., *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983) (listed in both the Senate and Katz reports as a case finding discriminatory intent, but the case finds such intent only as to an electoral system enacted *in 1876*).

Even assuming that these small numbers would qualify as "fragmentary evidence" adequate to place those three in *Katzenbach's* second category, that leaves six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully covered states (Virginia and Alaska) were not included in either category one or two. See *Katzenbach*, 383 U.S. at 318, 329-30. A coverage scheme that allows two or three of the worst offenders to drag down other covered jurisdictions, whose continued inclusion is merely a combination of historical artifact and Congress's disinclination to update the formula, can hardly be thought "congruent and proportional." See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 208-09 (2007)

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[6] I exclude North Carolina here because four of its ten successful suits were located in uncovered portions of the state. See Katz Master List.

(concluding that any "debate over the coverage formula" would "likely have led to the complete unraveling" of the VRA's 2006 reauthorization campaign); *id.* at 208 ("The most one can say in defense of the formula is that it is the best of the politically feasible alternatives . . . ."). Congress's inability to agree on a currently coherent formula is not a good reason for upholding its extension of an anachronism.

Moreover, the Court in 1966 relied on rather a natural inference from the data available. The tight relationship between the two trigger criteria (i.e., voter turnout and the use of voting "tests and devices") and evidence of discrimination in the states in categories one and two, made it logical to suppose that Congress reasonably inferred a comparable fit for the remaining covered jurisdictions for which direct evidence of discrimination was missing (i.e., those in category three). But today the trigger criteria have lost any inherent link to the key concern. The newest triggering data hark back to 1972, 34 years before the current formula was enacted, and nearly 60 years before the current act expires. Indeed, if the formula were to be updated to use more recent election data, it would cover only Hawaii. See 152 CONG. REC. H5131, H5181 (daily ed. July 13, 2006).

More critically, the Court's acceptance of the § 4(b) formula in 1966 was explicitly based on certain reasonable understandings of § 5's focus. Explaining why it saw no serious problem in the challengers' claim of underinclusiveness—§ 4(b)'s exclusion of localities *not* employing "tests or devices" but showing evidence of voting discrimination by other means—the Court observed that Congress had learned that persistent discrimination "has typically entailed the misuse of tests and devices, and this was the evil *for which the new remedies were specifically designed.*" *Katzenbach*, 383 U.S. at 331 (emphasis added). Despite § 5's language imposing preclearance on all manner of voting rules not within the act's definition of "tests or devices," the Court understandably saw the act as focused on, or in its words "specifically designed" for, rooting out "the misuse of tests and devices." But § 5 litigation no longer centers at all on "tests and devices." Instead, the majority of § 5 objections today concern redistricting. See Peyton McCrary et al., *The Law of Preclearance: Enforcing Section 5, in* THE FUTURE OF THE VOTING RIGHTS ACT 20, 25 tbl.2.1 (David Epstein et al. eds., 2006) (redistricting objections comprised only 17% of Justice Department objections in the 1970s; in the '90s, they constituted 52% of all objections). Accordingly, quite apart from the trigger criteria's hopeless fossilization, the intrinsic link between them and their consequences has ceased to exist.

Nor is the coverage formula materially helped by the VRA's bailout provision. Although *Katzenbach* did note that § 4(a)'s bailout provision might alleviate concerns about overinclusiveness, see 383 U.S. at 331, its ability to act as a reliable escape hatch is questionable. In its original form, § 4(a) essentially permitted bailout for any jurisdiction that had not used a voting "test or device" in the previous five years. See Voting Rights Act of 1965, Pub. L. 89-110, § 4(a), 79 Stat. 437, 438. This in effect *excluded* any covered jurisdiction whose record was not clean as of the date of initial enactment, and until 1982 the later reenactments' language continued that effect (i.e., allowed access to bailout only for those jurisdictions with clean records as of the VRA's initial adoption). While the majority correctly notes that the 1982 amendments relaxed that constraint, see Maj. Op. at 9, those same amendments tightened the remaining substantive standards. A covered jurisdiction can now obtain bailout if, and only if, it can demonstrate that, during the preceding *ten* years, it has (simplifying slightly): (1) effectively engaged in no voting discrimination (proven by the absence of any judicial finding of discrimination or even a Justice Department "objection" (unless judicially overturned)); (2) faithfully complied with § 5 preclearance; (3) "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process"; and (4) engaged in "constructive efforts to eliminate intimidation and harassment of persons exercising rights protected" under the act and "in other constructive efforts, such as the expanded opportunity for convenient registration." 42 U.S.C. § 1973b(a)(1). Perhaps because of these opaque standards, actual bailouts have been rare; only 136 of the more than 12,000 covered political subdivisions (i.e., about 1%) have applied for bailout (all successfully). Appellant's Reply Br. 37; Voting Section, U.S. Dep't of Justice, Terminating Coverage Under the Act's Special Provisions, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited May 9, 2012) (listing successful bailouts). Moreover, a successful action under § 4(a) does not actually end federal oversight of bailed-out jurisdictions; for a decade after bailout, the court "retain[s] jurisdiction" just in case the Justice Department or "any aggrieved person" wishes to file a motion "alleging that conduct has occurred which . . . would have precluded" bailout in the first place. 42 U.S.C. § 1973b(a)(5).

All of this suggests that bailout may be only the most modest palliative to § 5's burdens. One scholar hypothesizes that bailout may "exist[] more as a fictitious way out of coverage than [as] an authentic way of shoring up the constitutionality of the coverage formula." Persily, *supra*, at 213. In fairness, the same scholar also entertains various other explanations, including the possibility that the eligible jurisdictions are just the ones for whom § 5 poses only a very light burden, see *id.* at 213-14, and ultimately concludes that no one knows which theory "best explains the relative absence of bailouts," *id.* at 214. Regardless of the reason for the trivial number of bailouts, irrational rules—here made so by their encompassing six states and numerous additional jurisdictions not seriously different from the uncovered states—cannot be saved "by tacking on a waiver procedure" such as bailout. *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561, 267 U.S. App. D.C. 253 (D.C. Cir. 1988); cf. *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 571, 360 U.S. App. D.C. 202 (D.C. Cir. 2004).

Finally the government argues that because the VRA is meant to protect the fundamental right of racial minorities (i.e., a suspect classification), a heightened level of deference to Congress is in order. Appellees' Br. 22-23. Purportedly supporting this proposition is Chief Justice Rehnquist's statement in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003), that when a statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, "it [is] easier for Congress to show a pattern of state constitutional violations." *Id.* at 736. But the passage simply makes the point that where a classification is presumptively invalid (e.g., race), an inference of *unlawful* discrimination follows almost automatically from rules or acts that differentiate on the presumptively forbidden basis, whereas for classifications judged under the "rational basis" test, such as disability or age, "Congress must identify, *not just the existence of age—or disability-based state decisions*, but a widespread pattern of irrational reliance on such criteria." *Id.* at 735 (emphasis added). This special element of race or other presumptively unconstitutional classifications has no bearing on review of whether Congress's remedy "fits" the proven pattern of discrimination. To hold otherwise would ignore completely the "vital principles necessary to maintain separation of powers and the federal balance" that the Court held paramount in *Boerne* (which of course also involved a fundamental right, namely the right to practice one's religion). *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

* * *

A current political dispute—state adoptions of voter identification requirements—highlights the oddity of § 4(b). In 2005, the state of Indiana enacted a law requiring its citizens to present a government-issued photo identification before voting. Against a variety of legal challenges, the Supreme Court upheld the law. See

Crawford v. Marion County Election Bd., 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). In 2011, Texas and South Carolina both passed similar laws. See Gina Smith, *Haley Signs Voter ID Bill into Law*, THE STATE, May 18, 2011; Sommer Ingram, *Gov. Rick Perry Signs Voter ID Bill into Law*, ASSOC. PRESS, May 27, 2011, available at http://www.yumasun.com/articles/perry-51036-monitortx-rick-austin.html. But because of those states' inclusion under § 4(b), they had to look to Justice Department attorneys in Washington to seek further approval. In the end, the Department blocked both laws. See Jerry Markon, *S.C.'s Voter ID Law Rejected*, WASH. POST, Dec. 24, 2011, at A4; Daniel Gilbert, *Election 2012: Texas Law Requiring Voter IDs Is Blocked*, WALL ST. J., Mar. 13, 2012, at A4.

Why should voter ID laws from South Carolina and Texas be judged by different criteria (at a minimum, a different burden of persuasion, which is often critical in cases involving competing predictions of effect) from those governing Indiana? A glimpse at the charts shows that Indiana ranks "worse" than South Carolina and Texas in registration and voting rates, as well as in black elected officials (Figures I, II and III). As to federal observers, Indiana appears clearly "better"—it received *none* (Figure IV). As to successful § 2 suits South Carolina and Texas are "worse" than Indiana, but all three are below the top ten offenders, which include five uncovered states (Figure V). This distinction in evaluating the different states' policies is rational?

Despite a congressional record of over 15,000 pages and 22 hearings, *Shelby County*, 811 F. Supp. 2d at 496, there is little to suggest that § 4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination. To the extent that the answer is, as the district court suggested, that Congress wished to "continue to focus on those jurisdictions with the worst *historical* records of voting discrimination," *id.* at 506, such an overwhelming focus on historical practices appears foreclosed by *Northwest Austin's* requirement that current burdens be justified by current needs.

It goes without saying that racism persists, as evidenced by the odious examples offered by the majority, see Maj. Op. at 27-29. But without more evidence distinguishing current conditions in the covered jurisdictions from those in the uncovered ones, § 4(b)'s coverage formula appears to be as obsolete in practice as one would expect, in a dynamic society, for markers 34-to-59 years old. Accordingly, I dissent.

* * *

The analysis above is my sole basis for finding § 4(b) of the VRA unconstitutional and thus for dissenting from the court's opinion. I need not and do not reach the constitutionality of § 5 itself. But before concluding, I want to address a critical aspect of § 5, and of some of the cases interpreting earlier versions of that section. I address it first simply as a matter of language—specifically the use of language to obscure reality—and then in relation to the words and political philosophy of the 15th Amendment.

Though unnecessary to my dissent's outcome, the troubling tension between the act's encouragement of racial gerrymandering and the ideals embodied in the 15th Amendment seems worthy of attention.

Section 5(b) makes unlawful any voting practice or procedure with respect to voting "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect *their preferred candidates of choice*." 42 U.S.C. 1973c(b) (emphasis added). And of course similar phrasing has been included in § 2 since 1982. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b)) (prohibiting policies that prevent minority groups' equal opportunity "to elect representatives of their choice.").

The language (or a close equivalent) seems to have originated in one of the Court's earliest opinions on § 5, though only as an offhand phrase in its explanation of how a shift from district to at-large voting might dilute minority impact: "Voters who are members of a racial minority might well be in the majority in one district, but a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). But the use of such language became troubling in *Georgia v. Ashcroft*, where the Court said that in the application of § 5 "a court should not focus *solely* on the comparative ability of a minority group to elect a candidate of its choice." 539 U.S. 461, 480, 123 S. Ct. 2498, 156 L. Ed.

2d 428 (2003) (emphasis added). The "solely" of course indicates *approval* of such a consideration as one among several criteria for compliance with § 5.

Implied from the statutory "their" is necessarily a "they." In the context of a statute speaking of impingements on citizens' voting "on account of race or color," and indeed in the universally accepted understanding of the provision, the "they" are necessarily members of minority groups. But in what sense do minority groups as such have a "preferred candidate"? Individuals, of course, have preferred candidates, but groups (unless literally monolithic) can do so only in the limited sense that a *majority* of the group may have a preferred candidate. Thus, when the provision is translated into operational English, it calls for assuring "the ability of a *minority group's majority* to elect their preferred candidates."

This raises the question of what happened to the minority group's *own minority*—those who dissent from the preferences of the minority's majority?

Of course in any polity that features majority rule, some people are bound to be outvoted on an issue or a candidate and thus to "lose"—on that round of the ongoing political game. Such losses are a necessary function of any system requiring less than unanimity (which would be hopelessly impractical). And in an open society that allows people freely to form associations, and to design those associations, some people obviously will be members of associations whose representatives from time to time express, in their name, opinions they do not share. But that again is a necessary function of having associations free to adopt a structure that empowers their leadership to speak with less than unanimous backing.

But the implied "they" of § 5 is not a polity in itself; nor is it an association freely created by free citizens. Quite the reverse: It is a group constructed artificially by the mandate of Congress, entirely on the lines of race or ethnicity.

On what authority has Congress constructed such groups? Purportedly the 15th Amendment to the Constitution. But that says that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

It is hard to imagine language that could more clearly invoke universal individual rights. It is "citizens" who are protected, and they are protected from any denial of their rights that might be based on the specified group characteristics—race, color, or previous condition of servitude. The members of Congress who launched the amendment, said Senator Willard Warner, "profess to give to each individual an equal share of political power." CONG. GLOBE, 40th Cong., 3d Sess. 861 (1869).

The 15th Amendment was a pivot point in the struggle for universal human rights. The roots of the struggle are deep and obscure. Many trace the concept to the three great monotheistic religions, Judaism, Christianity, e.g., MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS (2004) (noting the contributions of these three traditions, among others). No matter how spotty the actual performance of those religions' adherents may have been over the centuries, the idea of a single God, claiming the allegiance of all mankind, surely implies a recognition of the dignity and worth of all humans, undistorted by local group loyalties historically linked to local gods. Perhaps the Enlightenment, though in tension with organized religion, has a better title; it is clearly the immediate root of the French Declaration of the Rights of Man and of the Citizen. But at all events the 15th Amendment states a clear national commitment to universal, individual political rights regardless of race or color.

Of course conventional political discourse often uses such terms as "the black vote," "the youth vote," "the senior vote," etc. But those who use these terms—politicians, their consultants, pundits, journalists—know perfectly well that they are oversimplifications, used to capture general political tendencies, *not* a justification for creating or assuming a political entity that functions through a demographic group's "majority." The Supreme Court has recognized that these generalizations are no such justification. In *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), it confronted racial gerrymandering that took the form of including in one district persons separated by geographic and political boundaries and who "may have little in common with one another but the color of their skin." *Id*. at 647. Such a plan:

> bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes.

Id.

The pre-Enlightenment history of continental Europe included just such entities—"estates," whose members voted separately from those of the other estates. Most famously, separately elected representatives of the nobility, the clergy, and the "common" people gathered in 1789 in the French Estates-General. For the last time. By the middle of that year, the Estates-General had ceased to exist. By transforming itself into a National Assembly, it precipitated the French Revolution and the permanent abolition of voting by estates, ultimately throughout Europe. The 15th Amendment can be traced back to that basic development. Section 5's mandate to advance "the ability of any citizens of the United States on account of race or color . . . to elect *their preferred candidates of choice*" is a partial retreat to pre-Revolutionary times, an era perhaps now so long past that its implications are forgotten.

None of this is to suggest that the country need for a minute countenance deliberate voting rule manipulations aimed at reducing the voting impact of any racial group, whether in the form of restrictions on ballot access or of boundary-drawing. And in judicial proceedings to stamp out such manipulations, it would of course be no defense for the perpetrators to say that they sought only to downweight a minority's *majority*. But a congressional mandate to assure the electoral impact of any minority's majority seems to me more of a distortion than an enforcement of the 15th Amendment's ban on abridging the "right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude." Preventing intentional discrimination against a minority is radically different from actively encouraging racial gerrymandering in favor of the minority (really, the majority of the minority), as § 5 does. Assuming there are places in which a colorblind constitution does not suffice as a "universal constitutional principle," *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 788, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (opinion of Kennedy, J.), the voting booth should not be one of them.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DECIDED SEPTEMBER 21, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-0651 (JDB)

Shelby County, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity as
Attorney General of the United States,

Defendant.

September 21, 2011, Decided

JUDGES: JOHN D. BATES, United States District Judge.

OPINION BY: JOHN D. BATES

MEMORANDUM OPINION

Section 5 of the Voting Rights Act of 1965 ("the Act") prevents certain "covered" jurisdictions from implementing any change to voting practices or procedures unless and until the jurisdiction demonstrates to federal authorities that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Praised by some as the centerpiece of the most effective civil rights legislation ever enacted, Section 5 has been condemned by others as an impermissible federal encroachment on state sovereignty. In 2009, the Supreme Court addressed Congress's 2006 extension of Section 5 and, although avoiding the merits of a facial constitutional challenge to Section 5's "preclearance" obligation, nonetheless expressed concern about the provision's continued vitality, noting that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 2513, 174 L. Ed. 2d 140 (2009) ("*Nw. Austin II*").

Today, those serious constitutional questions can no longer be avoided. Shelby County, Alabama ("Shelby County" or "plaintiff"), a jurisdiction covered by Section 4(b) of the Act, 42 U.S.C. § 1973b(b), has brought this suit against the Attorney General ("defendant") seeking a declaratory judgment that Section 5 and Section 4(b) are facially unconstitutional, and a permanent injunction prohibiting defendant from enforcing these provisions. Compl. ¶¶ 1, 44(a)-(b). Specifically, Shelby County alleges that Section 4(b)'s coverage formula and Section 5's preclearance obligation for covered jurisdictions exceed

Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, and violate the principle of "equal sovereignty" embodied in the Tenth Amendment and Article IV of the U.S. Constitution. *Id.* ¶¶ 36-43.

This Court is mindful that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [it] is called on to perform.'" *Nw. Austin II*, 129 S. Ct. at 2513 (*quoting Blodgett v. Holden*, 275 U.S. 142, 147-48, 48 S. Ct. 105, 72 L. Ed. 206, 1928-1 C.B. 324 (1927) (Holmes, J., concurring)). That duty is all the more sensitive where, as here, the challenged statute seeks to enforce the core Fifteenth Amendment prohibition against denial of the franchise on the basis of race. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Yet 95 years after the Amendment's ratification, the struggle for the realization of this constitutional guarantee was far from complete. See H.R. Rep. No. 89-439, at 2439 (1965). In 1965, literacy tests, poll taxes, and other devices were still being "widely used" in certain regions of the country as part of "a calculated plan to deprive Negroes of their right to vote." *Id.* at 2443. When traditional litigation proved ineffective to counter "those determined to circumvent the guarantees of the 15th Amendment," *Id.* at 2441, Congress decided that "the wrong to our citizens is too serious -- the damage to our national conscience is too great not to adopt more effective measures than exist today," *Id.* at 2442. Hence, almost a century after the Fifteenth Amendment was ratified, Congress passed the Voting Rights Act of 1965 -- with Section 5 at its core -- in order "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." *Allen v. State Bd. of Elections*, 393 U.S. 544, 556, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). Congress reauthorized the Act three times (in 1970, 1975 and 1982), and the Supreme Court upheld each reauthorization against constitutional challenges. *See Nw. Austin II*, 129 S. Ct. at 2510.

Certainly, today Section 5's continued constitutionality "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). But the Supreme Court has also made clear that history alone cannot provide a valid basis for upholding Section 5 indefinitely; rather, "the Act imposes current burdens and must be justified by current needs." *Nw. Austin II*, 129 S. Ct. at 2512. This Court has now carefully reviewed the extensive 15,000-page legislative record that Congress amassed in support of its 2006 reauthorization of Section 5 and Section 4(b). It is, of course, Congress that is charged in the first instance under the Fifteenth Amendment with formulating the legislation needed to enforce it. *Id.* at 2513. Bearing in mind both the historical context and the extensive evidence of recent voting discrimination reflected in that virtually unprecedented legislative record, the Court concludes that "current needs" -- the modern existence of intentional racial discrimination in voting -- do, in fact, justify Congress's 2006 reauthorization of the preclearance requirement imposed on covered jurisdictions by Section 5, as well as the preservation of the traditional coverage formula embodied in Section 4(b). Applying the standard of review articulated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), this Court finds that Section 5 remains a "congruent and proportional remedy" to the 21st century problem of voting discrimination in covered jurisdictions.

BACKGROUND

I. The History of the Voting Rights Act of 1965

The Voting Rights Act of 1965 "was designed by Congress to banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308. Although the Fifteenth Amendment guaranteed African-American citizens the right to vote as early as 1870, southern states quickly responded by creating a series of voting qualifications and devices to perpetuate black disenfranchisement. *See Id.* at 310-311; *see also* H.R. Rep. No. 89-439, at 2439-40. None of this new voting legislation mentioned race on its face, but it was nonetheless "motivated entirely and exclusively by a desire to exclude the Negro from voting." H.R. Rep. No. 89-439, at 2443, 2451. Southern states imposed poll taxes, which disproportionately burdened African-Americans as a result of their comparatively lower incomes. *See Id.* at 2451-53. They enacted literacy requirements as a precondition to voting "based on the fact that as of 1890 . . . more than two-thirds of the adult Negroes [in southern states] were illiterate while less than one-quarter of the adult whites were unable to read or write." *Katzenbach*, 383 U.S. at 311. And they adopted alternate tests, such as grandfather clauses and property qualifications, in order to "assure that white illiterates would not be deprived of the franchise." *Id.*

Not only were these tests intentionally discriminatory in their design, but southern voting officials were given unfettered discretion to administer them in a discriminatory fashion. Officials would refuse to accept poll taxes from blacks seeking to pay them, or would withhold poll tax exemption certificates from otherwise-qualified black applicants. *See* H.R. Rep. No. 89-439, at 2452. They would provide whites with "easy versions" of literacy tests or excuse them altogether, but demand that blacks pass "difficult versions . . . without the slightest error." *Katzenbach*, 383 U.S. at 312-13. Other voting qualifications -- including the infamous "good-morals requirement" and "constitutional interpretation" tests -- were so inherently "vague and subjective" that they "constituted an open invitation to abuse at the hands of voting officials." *Id.*

In addition to these methods of direct disenfranchisement, southern officials before 1965 also enacted laws designed to dilute black voting strength, if and when blacks were able to register and cast ballots. Specifically, southern officials "gerrymandered election districts, instituted at-large elections, annexed or deannexed land as it fit their racial and partisan interests, and required huge bonds of officeholders." J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 678-79 (2008); *see also To Examine the Impact and Effectiveness* *of the Voting Rights Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1138 (Oct. 18, 2005) ("*Impact and Effectiveness*") (Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Princeton University Press 1994)). These tactics aimed at reducing the ability of blacks to elect candidates of their choice -- sometimes referred to as "[d] isenfranchisement by indirection" -- were widely employed throughout the South in the late nineteenth century, and they reemerged during the "Second Reconstruction" of the mid-twentieth century as well. *See* 1 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 142 (Mar. 8, 2006) (hereinafter, "1 *Evidence of Continued Need*") (National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (Feb. 2006) (hereinafter, "Nat'l Comm'n Report")); *see also An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 206 (May 9, 2006) ("*Introduction to Expiring Provisions*") (prepared statement of Chandler Davidson).

The Supreme Court eventually responded to these attempts to evade the requirements of the Reconstruction Amendments by striking down some of the most egregious practices used to impede blacks from effectively exercising their right to vote. *See Katzenbach*, 383 U.S. at 311-12 (internal citations omitted). The Court invalidated grandfather clauses in 1915, *see Guinn v. United States*, 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915); *Myers v. Anderson*, 238 U.S. 368, 35 S. CT. 932, 59 L. ED. 1349 (1915); outlawed the so-called "white primary" in 1944, *see Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944); and condemned racial gerrymandering in 1960, when the city of Tuskegee, Alabama, attempted to transform its square-shape into "a strangely irregular twenty-eight-sided figure," which had the effect of removing "from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident," *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).[1]

Congress also responded to southern states' sophisticated disenfranchisement strategies by enacting civil rights legislation in 1957, 1960, and 1964, which sought to "facilitat[e] case-by-case litigation against voting discrimination." *Katzenbach*, 383 U.S. at 313. But it soon became apparent that "case-by-case" litigation would not be sufficient to protect African-Americans' access to the ballot. *See* H.R. Rep. No. 89-439, at 2440-41. Not only was litigation expensive and slow, but even where it proved successful, southern officials would often ignore court orders, "close[] their registration offices to freeze the voting rolls," or "merely switch[] to discriminatory devices not covered by the federal decrees." *Katzenbach*, 383 U.S. at 314. As Congress explained, "[b]arring one contrivance too often has caused no change in result, only in methods." H.R. Rep. No. 89-439, at 2441. Hence, in 1965 Congress decided that "sterner and more elaborate measures" were needed to combat the "insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309.

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[1] Reversing the lower court's dismissal of the case, the Supreme Court emphasized that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion*, 364 U.S. at 342 (internal quotation marks and citation omitted).

To craft these measures effectively, the Senate and House Committees on the Judiciary held hearings for nine days, during which they discussed 122 proposed voting rights bills and heard testimony from 67 witnesses. *See Id.*; *see also* H.R. Rep. No. 89-439, at 2438. The House debated the legislation for three full days, while the Senate discussed the Act for almost a month. *See Katzenbach*, 383 U.S. at 308. Ultimately, when it came time to vote, "the verdict of both chambers was overwhelming": the Voting Rights Act of 1965 passed by a margin of 328-74 in the House, and 79-18 in the Senate. *Id.*; *see also* Voting Rights Act of 1965 ("1965 Act"), Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 et seq.).

The Act's basic prohibition against racial discrimination in voting is contained in Section 2, which provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. Although Section 2 echoes the language of the Fifteenth Amendment, at least since 1982 it has been interpreted to prohibit a broader category of conduct than that which the Amendment itself proscribes, as it forbids all electoral practices with discriminatory "results," not just those enacted with a discriminatory purpose. Compare *City of Mobile v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (holding that Section 2 merely restates "the prohibitions already contained in the Fifteenth Amendment" and that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation") with S. Rep. No. 97-417, at 28 (1982) (explaining Congress's intent to amend Section 2 in response to City of Mobile to make clear that a plaintiff can establish a Section 2 violation "without proving any kind of discriminatory purpose"). Other provisions of the Voting Rights Act ban poll taxes, 42 U.S.C. § 1973h, prohibit voter intimidation and coercion, 42 U.S.C. § 1973i(b), and establish civil and criminal sanctions for the deprivation of rights secured by the Act, 42 U.S.C. § 1973j.

In addition to these permanent provisions -- which apply nationwide -- the Act sets forth "a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant." *Katzenbach*, 383 U.S. at 315. These targeted provisions are temporary, and only apply to jurisdictions that are "covered" under Section 4(b). For example, Section 4(a) of the Act bans the use of voting tests in all covered jurisdictions, *see* 42 U.S.C. § 1973b(a), while Section 8 authorizes the Attorney General to send federal observers to enter polling places and monitor elections in covered jurisdictions when "necessary to enforce the guarantees of the 14th or 15th

Amendment," 42 U.S.C. § 1973f(a)(2); *see also* H.R. Rep. No. 109-478, at 91 (2006).[2]

Section 5, however, remains the most innovative -- and the most controversial -- of the Act's targeted, temporary provisions. Under Section 5, a covered jurisdiction cannot make any changes to its voting qualifications, standards, practices, or procedures unless those changes are first "submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *See Nw. Austin II*, 129 S. Ct. at 2509; 42 U.S.C. § 1973c. Preclearance under Section 5 will only be granted if a jurisdiction can show that its proposed voting change "neither 'has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.'" *Nw. Austin II*, 129 S. Ct. at 2509 (*quoting* 42 U.S.C. § 1973c(a)).

Section 5 constituted a direct response to the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976). Prior to 1965, such novel methods of minority disenfranchisement would continue to operate "until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory." *Id.* But with the passage of Section 5, Congress "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim," *Katzenbach*, 383 U.S. at 328. Rather than requiring minority voters to sue to challenge discriminatory voting practices after their implementation, Section 5 places the burden on covered jurisdictions to show their voting changes are nondiscriminatory before those changes can be put into effect. *See Id.*

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[2] Under Section 3(a) of the Act, federal observers may also be assigned to non-covered jurisdictions where it is deemed "appropriate to enforce the voting guarantees of the Fourteenth or fifteenth Amendment." *See* 42 U.S.C. § 1973a(a); *see also* H.R. Rep. No. 109-478, at 91.

If a jurisdiction covered by Section 5 chooses to submit its proposed electoral change to the Attorney General for preclearance, and the Attorney General does not interpose an objection to the change within 60 days, the change may be implemented as proposed. *See* 42 U.S.C. § 1973c(a); *see also City of Rome v. United States*, 446 U.S. 156, 170, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980). If the Attorney General does interpose an objection, the submitting jurisdiction "may at any time request the Attorney General to reconsider an objection," *see* 28 C.F.R. § 51.45(a), or it may institute a declaratory judgment action before a three-judge panel of this Court, seeking "*de novo* consideration of whether the method of election violates rights protected by the Voting Rights Act or the Constitution," *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 706-07 (D.D.C. 1983) (three-judge court); *see also City of Rome v. United States*, 450 F. Supp. 378, 381-82 (D.D.C. 1978) (three-judge court), *aff'd*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980) (explaining that "even if . . . the Attorney General objects to certain proposed electoral changes, the applicant-jurisdiction can always seek . . . a declaratory judgment from a three-judge court in this District . . ."); 28 C.F.R. § 51.11 (noting that "[s]ubmission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment"). However, if the jurisdiction does not receive federal preclearance from either the Attorney General or a three-judge panel of this Court, the change to its voting practice or procedure may not be implemented.

Section 4(b) establishes the formula that determines which jurisdictions are subject to Section 5's preclearance requirements (and the other temporary provisions of the Act). As originally enacted, a jurisdiction was "covered" under Section 4(b) if it maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election. *See* 1965 Act § 4(b).[3] Congress found that the combined presence of one of these "tests or devices" and low voter registration or turnout in a particular jurisdiction made it "a strong probability that low registration and voting are a result of racial discrimination in the use of such tests." H.R. Rep. No. 89-439, at 2444. The jurisdictions originally covered by this formula were Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.

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[3] A voting "test or device" was defined by statute as a requirement that a person "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." *Id.* § 4(c).

See 28 C.F.R. pt. 51 app. Thirty-nine counties in North Carolina and one county in Arizona also qualified for coverage as separately designated political subdivisions. *Id.*

It was no coincidence that the six states originally covered in their entirety by Section 4(b) -- and therefore subject to preclearance under Section 5 -- were those southern states with the worst historical records of racial discrimination in voting. The drafters of the Act purposefully designed its coverage formula "to pick up the core Southern states that had been bastions of Jim Crow." Introduction to the Expiring Provisions 221 (statement of Samuel Issacharoff). As one scholar has explained, "those who wrote the legislation knew the states they wanted to 'cover' and, by a process of trial and error, determined the participation level that would single them out." 1 *Voting Rights Act: Section 5 of the Act - History, Scope, and Purpose, Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 68 (Oct. 25, 2005) ("1 *History, Scope, & Purpose*") (Abigail Thernstrom, *Whose Votes Count? Affirmative Action and Minority Rights* (Harvard University Press 1987)). The reverse-engineered, percentage-based "trigger" for coverage under the Act was, in other words, "a formally neutral device for capturing a more historically based truth." *The Continuing Need for Section 5 Pre-Clearance, Hearing before the S. Comm. on the Judiciary*, 109th Cong. 99 (May 16, 2006) ("*Continuing Need*") (responses of Pamela S. Karlan to questions submitted by Senators Leahy, Kennedy, Kohl, Cornyn, and Coburn) ("Karlan Responses").

But Congress also recognized the potential that Section 4(b)'s coverage formula would be over- or under-inclusive, and hence created mechanisms whereby jurisdictions could "bail out" of or "bail-in" to Section 5's requirements. *See* 1965 Act § 4(a), § 3(c). In order to successfully "bail out" under the version of Section 4(a) now in effect, a jurisdiction must obtain a declaratory judgment from a three-judge court confirming that "for the previous ten years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations." *Nw. Austin II*, 129 S. Ct. at 2509. The jurisdiction must also show "that it has 'engaged in constructive efforts to eliminate intimidation and harassment of voters,' and similar measures." *Id.* (*quoting* 42 U.S.C. § 1973b(a)(1)(A)-(F)). By the same token, a court can require a jurisdiction to "bail-in" to the requirements of Section 5 if it finds that "violations of the Fourteenth or fifteenth Amendment justifying equitable relief have occurred within the territory of such State or political subdivision." 42 U.S.C. § 1973a(c). Specifically, a court presiding over a voting discrimination suit against a state or political subdivision may retain jurisdiction over the suit "for such a period as it may deem appropriate," and may, during that time, require that the defendant-jurisdiction be subject to preclearance. *Id.*

Shortly after Congress enacted the Voting Rights Act, South Carolina brought suit challenging the constitutionality of Section 5's preclearance requirement, Section 4(b)'s coverage formula, and several of the Act's other temporary provisions, on the grounds that they exceeded Congress's Fifteenth Amendment enforcement authority and violated "[t]he doctrine of the equality of the states." *Katzenbach*, 383 U.S. at 323, 328. Rejecting these arguments, the Supreme Court explained that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 325. Although recognizing that Section 5 "may have been an uncommon exercise of congressional power," the Court noted that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. With respect to the coverage formula in Section 4(b), the Court found that Congress had considered "reliable evidence of actual voting discrimination in a great majority of the States . . . affected by the . . . Act," and had created a formula that was "relevant to the problem of voting discrimination." *Id.* at 329. "No more was required," the Court said, "to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.* at 330.

Although Section 5 was originally intended to be in effect for only five years, Congress has reauthorized Section 5 on four occasions -- first in 1970 (for five years), then in 1975 (for seven years), again in 1982 (for 25 years), and most recently in 2006 (for 25 years). *See Nw. Austin II*, 129 S. Ct. at 2510. When Section 5 was reauthorized in 1970 and again in 1975, Section 4(b)'s coverage formula was amended each time, first to include (1) jurisdictions that maintained a voting test or device as of November 1, 1968, and had less than 50% voter registration or turnout in the 1968 presidential election; and then to add (2) jurisdictions that maintained a voting test or device as of November 1, 1972, and had less than 50% voter registration or turnout in the 1972 presidential election. *See* Pub. L. No. 91-285, 84 Stat. 314, 315 (1970) ("1970 Amendments"); Pub. L. No. 94-73, 89 Stat. 400, 401 (1975) ("1975 Amendments"). In the 1975 Amendments, Congress also added Section 4(f) to the Act, which bars voting discrimination against language minorities and expands the definition of "test or device" in Section 4 to include the provision of English-only voting materials in jurisdictions where more than 5% of the voting-age population are members of a single language minority. *See* 1975 Amendments § 203, 89 Stat. at 401-02 (codified as amended at 42 U.S.C. § 1973b(f)).

Five years after the enactment of the 1975 Amendments, the Supreme Court was again confronted with a challenge to the constitutionality of Section 5, and confirmed that the provision's reauthorization constituted a permissible exercise of Congress's Fifteenth Amendment enforcement authority. *See City of Rome*, 446 U.S. at 182. Just as Shelby County has argued here with respect to the 2006 reauthorization of Section 5, Rome, Georgia, argued there that "even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975, when Congress extended the Act for another seven years." 446 U.S. at 180. The Supreme Court, however, declined Rome's "invitation to overrule Congress' judgment that the 1975 extension was warranted." *Id.* Acknowledging the significant gains that had been made in minority political participation since 1965, the Court nonetheless expressed concern that "[a]s registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength." *Id.* at 181 (*quoting* H.R. Rep. No. 94-196, at 10-11 (1975)). The Court emphasized that the Voting Rights Act had been enacted to remedy nearly a century of racial discrimination in voting, and that the 1975 extension of the Act's temporary provisions occurred just ten years after the Act's passage. *Id.* at 182. Thus viewed, the Court found "Congress's considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination" to be both "unsurprising and unassailable." *Id.*

Two years after *City of Rome*, Congress reauthorized Section 4(b) and Section 5 a third time, and in so doing liberalized the procedures for bailout in several significant ways. Prior to 1982, only covered states (such as Alabama) or separately-covered political subdivisions (such as individual North Carolina counties) were eligible to seek bailout -- even though all political subdivisions within covered states were required to seek preclearance for their proposed electoral changes. *See Nw. Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 227-28 (D.D.C. 2008) ("*Nw. Austin I*"), *rev'd and remanded, Nw. Austin II*, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). After the 1982 Amendments, political subdivisions within covered states (such as, for example, Shelby County) could themselves petition for bailout. *See* Pub. L. No. 97-205 § 2(b)(2), 96 Stat. 131, 131 ("1982 Amendments") (codified as amended at 42 U.S.C. § 1973b(a)(1)). Moreover, the 1982 Amendments changed the substantive criteria for bailout so that jurisdictions with "clean" voting rights records over the previous ten years were bailout-eligible; under prior versions of the Act, there had been no such "bailout opportunity for jurisdictions that eliminated discriminatory voting tests and practices that [had been] used at the time of initial coverage." *Nw. Austin I*, 573 F. Supp. 2d at 228 (internal quotation marks and citation omitted) (brackets in original). In this manner, the 1982 Amendments created an incentive for "those jurisdictions with post-1965 histories of discrimination . . . to improve their voting rights records." *Id.*

The 1982 Amendments also extended the Act's temporary provisions for the longest period of time to date. Whereas the 1970 and 1975 Amendments had extended the Act's temporary provisions for only five and seven years, respectively, the 1982 Amendments extended Section 5 and Section 4(b) for a full 25 years. *See Nw. Austin II*, 129 S. Ct. at 2510. The 1982 Amendments did not, however, change the coverage formula in Section 4(b). *See* 1982 Amendments, 96 Stat. at 131-133.

II. The 2006 Reauthorization of Section 5 and Section 4(b)

As a result of the 25 year extension imposed by the 1982 Amendments, Section 5 and the Act's other temporary provisions were set to expire in 2007. Hence, in the fall of 2005, the House Committee on the Judiciary began to examine "the effectiveness of the temporary provisions of the VRA over the last 25 years" in order to determine whether another renewal of the Act's temporary provisions was warranted. *See* H.R. Rep. No.

109-478, at 5. The result was "one of the most extensive legislative records in the Committee on the Judiciary's history." *Id.*

From October 2005 through May 2006, the House Judiciary Committee held ten oversight hearings and two legislative hearings before the Subcommittee on the Constitution, at which it heard from 46 witnesses and assessed over 12,000 pages of testimony, documentary evidence, and statistical analyses. *Id.* The Subcommittee on the Constitution received and incorporated into the legislative record lengthy reports from several civil rights organizations and voting rights scholars, including: (1) a report by the ACLU's Voting Rights Project, assessing 293 cases involving allegations of voting discrimination since 1982, *see* 1 *Evidence of Continued Need* 378-1270 (Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Act Litigation, 1982-2006* (Mar. 2006)) (hereinafter, "ACLU Report"); (2) a report by the National Commission on the Voting Rights Act, compiling evidence of voting discrimination since 1982 based on testimony gathered at ten field hearings across the country, as well as "governmental, legal, media and scholarly sources," *see Id.* at 121 (Nat'l Comm'n Report); and (3) a study conducted by Professor Ellen Katz and the Voting Rights Initiative of the University of Michigan Law School, which analyzed 323 post-1982 lawsuits that raised claims under Section 2 of the Voting Rights Act, *see Impact and Effectiveness* 974 (Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (Nov. 2005)) (hereinafter, "Katz Study").

The Senate Judiciary Committee held nine of its own hearings to discuss the reauthorization of the Act's temporary provisions, at which it, too, received testimony from 46 witnesses, including experienced civil rights litigators, law professors, and Department of Justice attorneys. *See* S. Rep. No. 109-295, at 2-4, 10 (2006). All told, the legislative record compiled by the two houses is over 15,000 pages in length, and includes "statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination." *See Id.* at 10. On the basis of this extensive record, Congress determined that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th Amendment." *See* Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577, 578 (2006) ("2006 Amendments"). Despite the effectiveness of Section 5 in deterring some attempts at voting discrimination, the House Judiciary Committee found that "instances of discrimination and efforts to discriminate against minority voters continue, thus justifying reauthorization of the VRA's temporary provisions." H.R. Rep. No. 109-478, at 24-25.

As evidence of continued discrimination in voting, Congress pointed to the "hundreds of objections" to voting changes that were interposed by the Attorney General since 1982; the number of voting changes withdrawn from consideration after so-called "more information requests" from the Attorney General; the number of "section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982," in which the Department has sought to compel jurisdictions to submit their voting changes for preclearance; the number of requests for preclearance that have been denied by three-judge panels of this Court; the "continued filing of section 2 cases" in covered jurisdictions; the existence of racially polarized voting "in each of the jurisdictions covered by the expiring provisions" of the Act; and "the tens of thousands of Federal observers dispatched to monitor polls" in covered jurisdictions. *See* 2006 Amendments § 2(b)(3)-(4), (8), 120 Stat. at 577-78. Such evidence, Congress found, "demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Amendments § 2(b)(9), 120 Stat. at 578.

Hence, Congress passed H.R. 9 -- entitled the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 -- which reauthorized Section 5 (and the coverage formula in Section 4(b)) for another 25 years. *See* 2006 Amendments § 4; 42 U.S.C. § 1973b(a)(8). The congressional support for the Act's 2006 reauthorization was even more "overwhelming" than it had been for the Act's passage in 1965. Whereas the 1965 Act passed by a vote of 328 to 74 in the House and 79 to 18 in the Senate, *see Katzenbach*, 383 U.S. at 309, the 2006 Amendments passed by a vote of 390 to 33 in the House and 98 to 0 in the Senate, *see* 152 Cong. Rec. H5207 (daily ed. July 13, 2006); 152 Cong. Rec. S8012 (daily ed. July 20, 2006). President George W. Bush then signed the bill into law on July 27, 2006. *See* 120 Stat. at 581.

In addition to extending the operation of Section 5, the 2006 Amendments made two substantive changes to the Act's preclearance standard. First, Congress clarified its intent with respect to the meaning of the word "purpose" in Section 5 in response to the Supreme Court's decision in *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*"). Section 5, by its terms, only allows a voting change to be precleared if the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *See* 42 U.S.C. § 1973c(a). Prior to *Bossier II*, this provision was interpreted to bar preclearance of voting changes that either (1) were enacted with a discriminatory purpose; or (2) had a discriminatory, *retrogressive* effect -- i.e., changes that worsened the position of minority voters relative to the status quo. *See Bossier II*, 528 U.S. at 324 (explaining that a redistricting plan only has a prohibited discriminatory "effect" under Section 5 if it is retrogressive); *Beer*, 425 U.S. at 141 (noting that "the purpose of s[ection] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). In *Bossier II*, however, the Supreme Court -- for the first time -- held that the "purpose" prong of Section 5 only prohibits electoral changes that are enacted with a discriminatory and retrogressive purpose. *See* 528 U.S. at 341. In other words, after *Bossier II*, a redistricting plan that was passed for purely discriminatory reasons (such as to purposefully avoid the creation of a new majority-minority district), but that was not intended to make minority voters any worse off than they had been under the preexisting plan (which, say, had no majority-minority districts), would not run afoul of Section 5's "purpose" prong. *See Id.* (holding that Section 5 "does not prohibit preclearance of a redistricting plan with a discriminatory but nonretrogressive purpose").

Bossier II thus had the effect of reading the "purpose" prong "almost entirely out of Section 5." *See Voting Rights Act: Section 5 - Preclearance Standards, Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 12 (Nov. 1, 2005) (hereinafter, "*Preclearance Standards*") (prepared statement of Mark A. Posner) (hereinafter, "Posner Prepared Statement"). As was the case prior to *Bossier II*, if a jurisdiction enacted an electoral change that reduced the ability of minority voters to elect candidates of their choice, the change would be denied preclearance under Section 5's "effects" prong (because it would have a retrogressive effect). Under *Bossier II*, then, the "purpose" prong would only serve as an independent bar to discriminatory voting changes where a jurisdiction "intend[ed] to cause retrogression, but then, somehow, messe[d] up and enact[ed] a voting change that [did] not actually cause retrogression to occur (the so-called 'incompetent retrogressor')." *Id.*

In 2006, the House Judiciary Committee explained that *Bossier II*'s limitation of the "purpose" prong had been inconsistent with Congress's intent that Section 5 prevent not only purposefully retrogressive discriminatory voting changes, but also those "[v]oting changes that 'purposefully' keep minority groups 'in their place.'" *See* H.R. Rep. No. 109-478, at 68. Accordingly, as part of the 2006 Amendments, Congress restored the pre-*Bossier II* "purpose" standard by adding a provision to the statute that defined "purpose" in Section 5 to mean "any discriminatory purpose." *See* 2006 Amendments § 5(c), 120 Stat. at 581; 42 U.S.C. § 1973c(c) (emphasis added).

In a similar vein, Congress also responded to the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003), which had altered the preexisting standard for determining whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. Prior to *Georgia v. Ashcroft*, the standard for assessing whether an electoral change violated the Section 5 "effects" test was "whether the ability of minority groups to participate in the political process and to elect their choices to office is . . . diminished . . . by the change affecting voting." *Beer*, 425 U.S. at 141 (*quoting* H.R. Rep. No. 94-196, at 10). In *Georgia v. Ashcroft*, however, the Court endorsed a less rigid, "totality of the circumstances" analysis for examining retrogressive effects, explaining that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." 539 U.S. at 479. In reauthorizing the Act in 2006, Congress expressed concern that the *Georgia v. Ashcroft* framework had introduced "substantial uncertainty" into the administration of a statute that was "specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation." *See* H.R. Rep. No. 109-478, at 70 (internal quotation marks and citation omitted). Hence, in an attempt to restore the simpler, "ability to elect" analysis articulated in *Beer*, *see Id.* at 71, Congress added new language to the Act, stating that all voting changes that diminish the ability of minorities "to elect their preferred candidates of choice" should be denied preclearance under Section 5. *See* 2006 Amendments § 5(b), 120 Stat. at 581; 42 U.S.C. § 1973c(b).

For present purposes, even more significant than the substantive changes that Congress made in 2006 to Section 5's preclearance standard were the proposed changes that Congress considered -- but ultimately, did not make -- to Section 4(b)'s coverage formula. During the 2006 reauthorization hearings, there was extensive discussion of the potential need to revise the Act's coverage formula to take account of changed circumstances since 1975, when the formula had last been updated. Several Senators asked members of the academic community whether they believed Section 4(b)'s "trigger" should be based on voter registration and turnout data from the 2000 and 2004 presidential elections, rather than data from the 1964, 1968, and 1972 elections. *See, e.g.*, *Continuing Need* 48-49 (responses of Anita S. Earls to questions submitted by Senators Coburn, Cornyn, Leahy, and Kohl) ("Earls Responses"); *Id.* at 76, 85-86 (responses of Ronald Keith Gaddie to questions submitted by Senators Kohl, Cornyn, and Coburn) ("Gaddie Responses"); *Id.* at 99-100, 103-04 (Karlan Responses); *Id.* at 110-12 (responses of Richard H. Pildes to questions submitted by Senators Specter, Cornyn, Coburn, and Kohl) ("Pildes Responses");

Introduction to Expiring Provisions 36, 38 (responses of Richard L. Hasen to questions submitted by Senators Specter, Cornyn, and Sessions) ("Hasen Responses"); *Id.* at 76 (responses of Samuel Issacharoff to questions submitted by Senators Specter, Sessions, and Cornyn) ("Issacharoff Responses").

Many voting rights scholars expressed the view that some sort of "updated trigger is called for." *See, e.g.*, *Continuing Need* 85 (Gaddie Responses); *Introduction to Expiring Provisions* 36 (Hasen Responses) (explaining that "*Congress should update the coverage formula* based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*"); *Introduction to Expiring Provisions* 13 (statement of Samuel Issacharoff) (noting that a trigger based on "voter turnout figures from 1964 . . . risks appearing constitutionally antiquated by the proposed next expiration date of 2032"). But almost all agreed that updating the formula on the basis of voter turnout and registration data from the 2000 and 2004 presidential elections would be ill-advised. As one law professor explained, such a proposal "rest[s] on a fundamental misperception of the triggers," since Congress "did *not* pick the 1964, 1968, or 1972 elections as triggers because it thought something distinctive happened in any of those elections." *See Continuing Need* 99 (Karlan Responses). Rather, the use of election data from those years -- in conjunction with the presence of a prohibited voting test or device -- had served only as a proxy for identifying those "jurisdictions that had a long, open, and notorious history of disenfranchising minority citizens and diluting their voting strength whenever they did manage to register and cast ballots." *Id.*; *see also Continuing Need* 110 (Pildes Responses). For this reason, most scholars who testified before Congress were skeptical as to whether "tinkering with the coverage dates is necessarily the best way to make the Act more current." *Introduction to Expiring Provisions* 76 (Issacharoff Responses); *see also Continuing Need* 110 (Pildes Responses) (stating that "[m]echanically updating the coverage formula in this way would . . . not tie coverage appropriately to where problems are occurring today").

Nevertheless, the only Amendment that was ultimately offered as a possible means of making Section 4(b)'s coverage formula more "current" proposed to do just that. Specifically, Representative Charlie Norwood of Georgia introduced an Amendment that would have created a "rolling test" for coverage based on voter turnout in the three most recent presidential elections. *See* H. R. Rep. No. 109-554, at 2 (2006). Under the Norwood Amendment, a jurisdiction would only be subject to preclearance if it had "a discriminatory test in place or voter turnout of less than 50% in any of the three most recent presidential elections." *See Id.*

The House's reaction to the Norwood Amendment was overwhelmingly negative. Representative James Sensenbrenner, Chairman of the House Judiciary Committee, decried the Amendment, claiming that it "not only guts the bill, but turns the Voting Rights Act into a farce." *See* 152 Cong. Rec. H5181 (daily ed. July 13, 2006). Although over 1,000 counties still would have been subject to preclearance under the Norwood Amendment's proposed formula, Hawaii would have been the only state covered in its entirety -- even though Hawaii has no discernible history of voting discrimination. *See* 152 Cong. Rec. H5179-81. Opponents of the Amendment condemned such results as evidence of the Amendment's "absurdity," and expressed concern that by severing Section 4(b)'s "connection to jurisdictions with proven discriminatory histories," the Amendment would place Section 5 in constitutional jeopardy. *See* 152 Cong. Rec. H5181.

Ultimately, the Norwood Amendment was defeated, and the existing coverage formula in Section 4(b) remained intact. *See* 152 Cong. Rec. H5204; *see also* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 254-55 (2007) (describing the debate over the Norwood Amendment). Under that formula, which remains in existence today, a jurisdiction is subject to preclearance if it maintained a voting test or device in 1964, 1968, or 1972, and had voter turnout or registration below 50% in that year's presidential election. *See* 42 U.S.C. § 1973b(b). Currently, there are 16 states covered in whole or in part by Section 4(b), and therefore subject to preclearance under Section 5. *See* 28 C.F.R. pt. 51, app. Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered in their entirety, while portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota are also covered. *Id.*

III. Northwest Austin

Shortly after the 2006 Amendments became effective, a Texas municipal utility district brought suit, seeking to bail out of the Act's requirements or, in the alternative, to challenge Section 5 on its face as "an unconstitutional overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment." *See Nw. Austin I*, 573 F. Supp. 2d at 230 (internal quotation marks and citation omitted). Because the plaintiff-district sought a declaratory judgment that it was eligible for bailout, a three-judge panel of this Court was convened to hear the case. *See Id.* (*citing* 42 U.S.C. § 1973b(a)(5)). The court first concluded that the district was not a "political subdivision" under Section 14(c)(2) of the Act, and thus could not petition for bailout pursuant to Section 4(a), which only authorizes states and "political subdivisions" to seek bailout. *See Id.* at 230-35; *see also* § 1973b(a)(1).

The court then proceeded to address the merits of the plaintiff's facial constitutional challenge to the 2006 reauthorization of Section 5. *Nw. Austin I*, 573 F. Supp. 2d at 235-79. The court began by identifying the types of evidence of voting discrimination upon which Congress had relied in deciding to reauthorize Section 5 in 2006, which included evidence of (1) racial disparities in voter registration and turnout; (2) the number of minority elected officials; (3) objections to proposed voting changes under Section 5; (4) "more information requests" by the Attorney General in response to Section 5 preclearance submissions; (5) judicial preclearance suits brought by covered jurisdictions; (6) Section 5 enforcement actions brought by the Attorney General; (7) Section 2 litigation; (8) the dispatch of federal election observers; (9) racially polarized voting; and (10) Section 5's deterrent effect. *Id.* at 247. In a lengthy opinion replete with citations to the legislative record, the court analyzed each of these categories of evidence to determine whether there was sufficient proof of "contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years." *Id.* at 265. Concluding that the legislative record did, in fact, contain "extensive contemporary evidence of intentional discrimination," *Id. at* 266, the court decided there was "no basis for overturning Congress's judgment that preclearance - 'a vital prophylactic tool[]' remains necessary," *Id.* at 279 (*quoting* H.R. Rep. No. 109-478, at 21).

On appeal, however, the Supreme Court reversed and remanded. In a decision that has since been criticized by some as "a questionable application of the doctrine of 'constitutional avoidance,'" *see* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181 (2009); *see also* Ellen Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 Fla. L. Rev. 991, 992-93 (2009) (describing the Court's "statutory construction" of the bailout provision in *Nw. Austin II* as "contrived"), Justice Roberts, writing for an eight-justice majority, sidestepped the "big question" of Section 5's constitutionality by instead resolving the case on narrower, statutory grounds, *see Nw. Austin II*, 129 S. Ct. at 2508. Specifically, the Court found that the plaintiff-district qualified as a "political subdivision" eligible to petition for bailout -- even though it did not register voters and was therefore not a political subdivision as that term is defined in Section 14(c)(2) of the Act. *See* 42 U.S.C. § 1973l(c)(2) (defining "political subdivision" to include "any county or parish" or "any other subdivision of a State which conducts registration for voting").

According to the Court, "the statutory definition of 'political subdivision' in § 14(c)(2) does not apply to every use of the term 'political subdivision' in the Act." *Nw. Austin II*, 129 S. Ct. at 2515. Rather, the Court explained, the phrase "political subdivision" in Section 4(a) has a "broader" meaning than that set forth in Section 14(c)(2), and hence "all political subdivisions - not only those described in § 14(c)(2) - are eligible to file a bailout suit" under Section 4(a). *Id.* at 2515-17 (emphasis added). As a political subdivision of Texas "in the ordinary sense of the term," the plaintiff-district was thus eligible to seek bailout. *Id.* at 2513. And because the district had framed its constitutional challenge to the 2006 reauthorization of Section 5 "as being 'in the alternative' to its statutory argument" for bailout, the majority saw no need to resolve the merits of the district's constitutional challenge. *Id.*

But the majority did take the opportunity to voice some concerns about the constitutionality of Section 5 and Section 4(b), and thereby presaged future challenges to Section 5 like that raised here by Shelby County. The Court in *Nw. Austin II* emphasized the substantial "federalism costs" imposed by Section 5, as well as the "dramatic improvements" in minority voter turnout and registration since the Act's passage. *Id.* at 2511. "Things have changed in the South," the Court wrote, explaining that minorities now register and vote at rates that "approach parity" with those of non-minorities, and that minority candidates "hold office at unprecedented levels." *Id.* The Court conceded that these "improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success," but made clear that "[p]ast success alone . . . is not adequate justification to retain the preclearance requirements." *Id.*

The Court also raised concern about the continued constitutionality of the Act's coverage formula, noting that it is "based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 2512. The Court cited the fact that the "racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Id.* Although the Court did not specify the precise nature of the differences between covered and non-covered jurisdictions that would be constitutionally necessary to justify Section 5's continued selective application, it did state that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 2512.

After identifying "serious constitutional questions" raised by the Act's coverage formula and preclearance requirement, however, the majority refrained from answering them. *Id.* at 2513. But Justice Thomas did not.

Writing separately as the lone dissenter, he explained that he would have "decided the constitutional issue presented" and concluded "that the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional." *Id.* at 2517, 2519 (Thomas, J., concurring in judgment in part, dissenting in part). According to Justice Thomas, "the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible." *Id.* at 2524. He went on to explain that this kind of extensive intentional discrimination in voting -- which led the Court to uphold the constitutionality of Section 5 on prior occasions -- "no longer exists," *citing* the high minority voter registration rates in states such as Alabama, Louisiana, and Mississippi. *Id.* at 2525. Justice Thomas dismissed evidence of the so-called "second generation barriers" to voting upon which Congress had relied, noting that evidence of Section 5 enforcement actions, Section 2 suits, and federal observer coverage "bears no resemblance to the record initially supporting § 5, and is plainly insufficient to sustain such an extraordinary remedy." *Id.* at 2526. With respect to evidence of intentional voting discrimination contained in the 2006 legislative record and cited by the three-judge court, Justice Thomas found that these "discrete and isolated incidents" fell short of a "coordinated and unrelenting campaign to deny an entire race access to the ballot." *Id.* "Perfect compliance with the Fifteenth Amendment's substantive command is not now - nor has it ever been the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment," he explained. *Id.*

IV. Shelby County, Alabama

Echoing the arguments of Justice Thomas, Shelby County brought this suit on April 27, 2010, asserting that "it is no longer constitutionally justifiable for Congress uto arbitrarily impose on Shelby County and other covered jurisdictions disfavored treatment by forcing them to justify all voting changes to federal officials in Washington, D.C. for another twenty five years." *See* Compl. ¶ 35. Shelby County's history under the Voting Rights Act is extensive and forms a relevant backdrop to this case. As a political subdivision of Alabama, Shelby County has been subject to preclearance since 1965, based on the Attorney General's determination that Alabama used a prohibited voting test or device on November 1, 1964, and had voter turnout of less than 50% in the 1964 presidential election. *See* 28 C.F.R. pt. 51 app.; 30 Fed. Reg. 9897 (Aug. 7, 1965); *see also* 42 U.S.C. § 1973b, § 1973c, § 1973l(c)(2); Compl. ¶¶ 28-29. From 1965 to the filing of this suit, the Department of Justice has received at least 682 preclearance submissions from Shelby County and jurisdictions located wholly or partially within Shelby County. *See* Def.'s Mot. for Summ. J. ("Def.'s Mot.") [Docket Entry 54], Ex. 4, Decl. of Robert S. Berman ("Berman Decl.") ¶ 4. Shelby County itself has submitted at least 69 proposed voting changes to the Attorney General for preclearance. *Id.* ¶ 5.

Since 1965, the Department has lodged objections to five proposed voting changes submitted by jurisdictions located wholly or partially within Shelby County. *Id.* ¶ 8. Shelby County was also a defendant in the so-called

Dillard litigation in the 1980s, in which black residents of Alabama challenged the at-large system used to elect Alabama county commissioners as a violation of Section 2 of the Voting Rights Act. *See Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1352-54 (M.D. Ala. 1986); *see also Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988) (reviewing history of *Dillard* litigation); *Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819, 821-23 (M.D. Ala. 1990) (describing Shelby County's involvement in *Dillard*). Although Shelby County was not one of the original nine defendants in *Dillard*, *see Dillard*, 640 F. Supp. at 1352, the plaintiffs in *Dillard* eventually raised claims against a total of 183 Alabama cities, counties, and school boards that employed at-large methods of election, including Shelby County, *see Dillard*, 686 F. Supp. at 1461.

In the original *Dillard* lawsuit, the court concluded that the Alabama legislature had "engaged in a pattern and practice of using at-large election systems as an instrument for race discrimination." 640 F. Supp. at 1361. The court explained that the challenged at-large electoral systems had been created against the backdrop of Alabama's "unrelenting historical agenda, spanning from the late 1800's to the 1980's, to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave." *Id.* at 1357. Moreover, the court noted, the Alabama legislature had "consistently enacted at-large systems for local governments during periods when there was a substantial threat of black participation in the political process." *Id.* at 1361. When viewed in light of the state's "undisputed history of racial discrimination," it became clear that the creation of at-large methods of election -- which did, in fact, have an "adverse racial impact" -- "was not adventitious but rather racially inspired." *Id.* Hence, the court found that preliminary injunctive relief with respect to the counties then defending their at-large election systems was warranted. *Id.* at 1373.

Despite the adverse judgment against the other Alabama counties with at-large electoral systems in place, Shelby County continued to deny that its at-large method for electing county commissioners violated Section 2, and the related case against it proceeded to trial. *See Dillard*, 748 F. Supp. at 822. While the case was under submission, however, Shelby County entered into a consent decree with the plaintiffs, under which it agreed to change its at-large electoral system to a "single-member district scheme" with one majority-black district. *Id.*

Most recently, on August 25, 2008, the Attorney General objected to a redistricting plan and 177 annexations submitted by the city of Calera, located within Shelby County. *See* Berman Decl. ¶¶ 9-10; *Id.*, Att. A. Calera's redistricting plan and annexations would have eliminated the city's sole majority-black district, which had been created pursuant to the consent decree in *Dillard*, and which had elected an African-American councilman for the past 20 years. *See* Berman Decl., Att. A. In its preclearance submission to the Attorney General, Calera conceded that it had, in fact, already adopted the 177 annexations without receiving advance preclearance for them. *See Id.*; *see also* Berman Decl. ¶ 9. After the Attorney General lodged an objection to the annexations and the city's 2008 redistricting plan, Calera nonetheless proceeded to conduct elections based on these unprecleared voting changes. *See* Berman Decl. ¶ 11; *Id.*, Att. B ("Calera Compl.") ¶ 18.; *Id.*, Att. C ("Calera Consent Decree") at 3. The elections held under the objected-to plan and annexations resulted in the defeat of the African-American incumbent councilman. *See Id.*, Att. D.

The Attorney General responded by bringing a Section 5 enforcement action, seeking to prohibit Calera from certifying the results of its elections "based on the district boundaries and electorate to which the Attorney General ha[d] interposed a timely objection unless and until preclearance under Section 5 . . . is obtained." Calera Compl. at 7. The case was temporarily resolved through a consent decree, and the Attorney General subsequently withdrew his objection to the 177 annexations. *See* Calera Consent Decree; *see also* Berman Decl. ¶ 15; *Id.*, Att. F. The Attorney General did not, however, withdraw his objection to the 2008 redistricting plan. *See* Berman Decl. ¶ 15; *Id.*, Att. F.

Because of the Attorney General's objection to Calera's proposed voting changes, Shelby County argues that it is not eligible for bailout. Compl. ¶ 34(b) (*citing* 42 U.S.C. § 1973b(a)(1)(E)).[4] As a result of its alleged ineligibility for bailout and the 2006 reauthorization of Section 5, Shelby County claims that it now "will have to regularly seek preclearance in the near future" -- a process that, historically, has required the expenditure of "significant taxpayer dollars, time, and energy." *See Id.* ¶¶ 32-33; Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") [Docket Entry 5], Decl. of Frank C. Ellis, Jr. ("Ellis Decl.") ¶¶ 7-8.

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[4] Shelby County also maintains that it is ineligible for bailout because it held several special elections under the authority of Act 65-816 (the "Planning Act" of 1965) between 1965 and 2003. *See* Compl. ¶ 34(a)(i)-(iii). During that time, the Planning Act had not been precleared by the Department of Justice. *Id.* ¶ 34(a)(ii)-(iii). Under Section 4(a), a covered jurisdiction is only eligible for bailout

Shelby County does not challenge any specific application of Section 5 to one of its proposed voting changes; rather, it seeks a declaration that Section 5 and Section 4(b) are facially unconstitutional, as well as a permanent injunction prohibiting the Attorney General from enforcing these provisions. *See* Compl. ¶¶ 1, 44(a)-(b). In Count I, Shelby County alleges that in reauthorizing Section 5 "for another twenty-five years in 2006, Congress lacked the evidence of intentional discrimination that warranted the enactment of the VRA in 1965 and its extensions in 1970, 1975, and 1982." *Id.* ¶ 38(c). Hence, Shelby County argues, because there is neither "'congruence and proportionality' . . . nor even a 'rational relationship' between the evidence compiled in support of the latest extension of Section 5 and the burdens imposed by that provision . . . Section 5 . . . exceeds Congress's authority under the Fourteenth and Fifteenth

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if it has complied "with the requirement that no change covered by . . . [Section 5] has been enforced without preclearance." *See* 42 U.S.C. § 1973b(a)(1)(D). Because Shelby County held special elections under the authority of the Planning Act (*i.e.*, "enforced" the Act) without first receiving preclearance, Shelby County maintains that it is also ineligible for bailout pursuant to 42 U.S.C. § 1973b(a)(1)(D).

Amendments," *Id.* ¶ 38(d) (internal citations omitted), "and, therefore, violates the Tenth Amendment and Article IV of the Constitution," *Id.* ¶ 37. In Count II, Shelby County similarly challenges the constitutionality of the 2006 reauthorization of Section 4(b)'s coverage formula, arguing that "Congress's reliance . . . on voting practices, voter registration data, and presidential election data from 1964, 1968, and 1972 as the trigger for the preclearance obligation of Section 5 is not an 'appropriate' means of enforcing the Fifteenth Amendment." *Id.* ¶ 42(a). Because "Section 4(b)'s coverage formula is not 'sufficiently related to the problem that it targets,'" Shelby County maintains that Section 4(b), like Section 5, exceeds Congress's Fourteenth and Fifteenth Amendment enforcement authority, and violates the principle of equal sovereignty embodied in the Tenth Amendment and Article IV. *Id.* ¶ 43(c).

Shortly after filing its complaint, Shelby County filed a motion for summary judgment. Several civil rights groups and Shelby County residents responded by filing motions seeking to intervene as defendants, which the Court granted. *See* 8/25/10 Order [Docket Entry 29]. Defendant and defendant-intervenors then asked the Court to deny Shelby County's summary judgment motion as premature, or, in the alternative, to grant limited discovery pursuant to Fed. R. Civ. P. 56(f). Denying the request, this Court found that there was no need for discovery on any of the three issues upon which discovery was sought. With respect to the first issue -- Shelby County's standing to sue -- the Court explained that no discovery was warranted since defendant "was unable to articulate any reason why a covered jurisdiction subject to Section 5's preclearance requirement - such as Shelby County - would lack standing to bring this type of action." *Shelby Cnty. v. Holder*, 270 F.R.D. 16, 18 (D.D.C. 2010). The Court next rejected defendant's contention that discovery was needed to determine whether Shelby County was, in fact, eligible for bailout, since Shelby County did not seek bailout. *Id.* at 19. Finally, the Court held that there was no need for discovery on Shelby County's constitutional challenge because it was purely facial -- not "as applied" -- and it therefore must "rise or fall on the record that Congress created when it extended [the Voting Rights Act's temporary provisions] in 2006." *Id.* at 21. Accordingly, the Court set a schedule for the filing of dispositive motions, which generated over 1,000 pages of briefs and exhibits and culminated in a lengthy motions hearing on February 2, 2011.

* * * * *

This Court does not write on a clean slate in assessing plaintiff's facial constitutional challenge to the 2006 reauthorization of Section 5 and Section 4(b). To date, one Supreme Court Justice has declared that he would strike down Section 5 as an unconstitutional exercise of Congress's Fifteenth Amendment enforcement power, *see Nw. Austin II*, 129 S. Ct. at 2517-27 (Thomas, J., concurring in judgment in part, dissenting in part), while several other Justices have voiced concerns about the continued vitality of the Act's coverage formula, *See, e.g., Nw. Austin II* Oral Arg. Tr. at 36 (Apr. 29, 2009) (Alito, J., asking, "[w]ouldn't you agree that there is

[sic] some oddities in this coverage formula"); *Id.* at 22 (Kennedy, J., inquiring whether there is "anything in the record" addressing whether "these States that are now covered . . . are markedly different from the noncovered jurisdictions"), and about the apparent never-ending nature of the preclearance obligation, which was originally intended to last only through 1970, but which is now scheduled to last through 2032, *Id.* at 32 (Roberts, C.J., stating with respect to Section 5, "at some point it begins to look like the idea is that this is going to go on forever"). At the same time, a three-judge panel of this Court, after undertaking an exhaustive review of the legislative record, concluded that there was sufficient evidence of modern-day, intentional discrimination in voting to justify Congress's 2006 reauthorization of the preclearance obligation on covered jurisdictions for another 25 years. *See Nw. Austin I*, 573 F. Supp. 2d at 221-83. Keeping all these views in mind, the Court will undertake its own assessment of the legislative record in order to determine whether Congress exceeded its enforcement authority under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) in 2006.

DISCUSSION

I. Threshold Issues

Three threshold issues are presented by this suit: (1) plaintiff's Article III standing; (2) plaintiff's eligibility for bailout; and (3) the facial rather than as-applied nature of plaintiff's claims. These three issues were, to some extent, already addressed in the prior Memorandum Opinion in this case. *See Shelby Cnty.*, 270 F.R.D. at 18-

21. Nevertheless, given the "well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Nw. Austin II*, 129 S. Ct. at 2513 (*quoting Escambia Cnty. v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984)), the Court will briefly revisit each of these issues to explain why none provides a valid basis for avoiding the merits of the facial constitutional challenge raised here.

A. Standing

To establish the "irreducible constitutional minimum of standing," a plaintiff must allege (1) an "injury in fact" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks and citations omitted). As a jurisdiction covered by Section 4(b), Shelby County maintains that it must expend "significant taxpayer dollars, time, and energy to meet its obligations under Section 5 of the VRA." Ellis Decl. ¶ 7. Shelby County's expenditure of time and money to ensure compliance with Section 5 constitutes a "concrete and particularized" injury that is caused by the continued operation of the statute, and that would be redressed by a decision declaring Section 5 facially unconstitutional and permanently enjoining its enforcement.

The mere fact that Shelby County does not challenge any specific objection to one of its proposed electoral changes does not serve to render its claims "conjectural or hypothetical" for purposes of Article III. *See LaRoque v. Holder*, 650 F.3d 777, 397 U.S. App. D.C. 93, 2011 U.S. App. LEXIS 13907, 2011 WL 2652441, at *10 (D.C. Cir. 2011) (noting that a plaintiff need only demonstrate a "'substantial probability' of imminent injury" to establish Article III standing to bring a facial constitutional challenge to Section 5). Because Shelby County is a jurisdiction subject to Section 5, it will be forced to expend resources obtaining preclearance for all of its future electoral changes, absent a decision from this Court granting its requested relief.[5] Shelby County therefore has alleged an injury that is both "credible and immediate, and not merely abstract or speculative." *See Navegar, Inc. v. United States*, 103 F.3d 994, 998, 322 U.S. App. D.C. 288 (D.C. Cir. 1997); *see also Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (permitting plaintiff to challenge the legality of his potential arrest under a criminal trespass statute where the plaintiff alleged threats of prosecution that were neither imaginary nor speculative). Accordingly, Shelby County has standing to pursue its facial constitutional challenges to Section 5 and Section 4(b).

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[5] In fact, Shelby County represented to the Court in July 2011 that it was in the process of completing its decennial redistricting plan, and that it would need to expend time and resources preparing a preclearance submission for the plan as early as last month, in the event that the Court denied its motion for summary judgment. *See* Notice to the Court [Docket Entry 79].

B. Bailout

Unlike the Texas municipal utility district in Nw. Austin, Shelby County has not framed its constitutional challenge "as being 'in the alternative' to its statutory argument" for bailout. *Nw. Austin II*, 129 S. Ct. at 2513. Indeed, Shelby County has expressly chosen not to petition for bailout, based on its determination that such a petition would be futile. *See* Compl. ¶ 34. Because Shelby County has not sought bailout under Section 4(a), a finding that Shelby County was bailout-eligible would not obviate the need for this Court to assess the merits of Shelby County's constitutional challenge, as was the case in *Nw. Austin II*. The Supreme Court's finding in *Nw. Austin II* that the plaintiff-district was eligible for bailout served to "afford [the plaintiff-district] all the relief it s[ought]," *see 129 S. Ct. at 2513*; here, however, a determination that Shelby County was eligible for bailout would only relieve Shelby County of its preclearance obligation if defendant or this Court could somehow "force Shelby County to accept bailout," which, as defendant correctly concedes, cannot be done. *See Shelby Cnty., 270 F.R.D. at 19.*[6]

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[6] Although the Court did not permit discovery into the question of Shelby County's bailout-eligibility, it is clear -- based on undisputed facts in the record -- that Shelby County is not eligible for bailout. Under Section 4(a)(1)(E), a jurisdiction is only eligible for bailout if, during the ten years preceding its bailout request, "the Attorney General has not interposed any objection . . . with respect to any submission by or on behalf of the plaintiff *or any governmental unit within its territory*." 42 U.S.C. § 1973b(a)(1)(E) (emphasis added). The Attorney General concedes that, in 2008, he interposed an objection to the proposed redistricting plan

C. The Facial Nature of Plaintiff's Challenge

Finally, it is important to remember that Shelby County's suit presents only a facial -- and not an as-applied -- challenge to the constitutionality of the 2006 reauthorization of Section 5 and Section 4(b). The "distinction between 'as-applied' and 'facial' challenges is that the former ask only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case," *Sanjour v. E.P.A.*, 56 F.3d 85, 92 n.10, 312 U.S. App. D.C. 121 (D.C. Cir. 1995), whereas the latter ask the court to conclude that "'no set of circumstances exists under which [the statute] would be valid,' or that the statute lacks any 'plainly legitimate sweep,'" *United States v. Stevens*, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010) (internal citations omitted). When

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and annexations submitted by the city of Calera, a "governmental unit" within Shelby County. *See* Def.'s Mot. at 8; Berman Decl. ¶¶ 9-10. As a result of this objection, Shelby County would not be eligible for bailout under Section 4(a)(1)(E), even if -- like the Texas municipal utility district in *Nw. Austin II* -- it had chosen to pursue such a course as an "alternative" to its facial constitutional challenge. Similarly, Shelby County concedes that it held several special elections under the authority of Act 65-816 (the "Planning Act" of 1965) between 1965 and 2003. *See* Compl. ¶ 34(a)(i)-(iii). During that time, the Planning Act had not been precleared by the Department of Justice. *Id.* ¶ 34(a)(ii)-(iii). Under Section 4(a), a covered jurisdiction is only eligible for bailout if it has complied "with the requirement that no change covered by . . . [Section 5] has been enforced without preclearance." *See* 42 U.S.C. § 1973b(a)(1)(D). Because Shelby County held special elections under the authority of the Planning Act, Shelby County is also ineligible for bailout under 42 U.S.C. § 1973b(a)(1)(D).

a plaintiff brings both a facial and an as-applied challenge to a statute, "the court must 'determine first whether the law is constitutional as applied to the challenging party's conduct, and then only if the as-applied challenge fails, . . . determine whether it is necessary to consider the facial challenge.'" *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 188 n.10 (D.D.C. 2010) (internal citations omitted); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (explaining that "for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first").

Here, however, Shelby County has made clear that it is only seeking to challenge the constitutionality of Section 5 and Section 4(b) on their face, and not as they have been applied to Shelby County in any particular instance. *See, e.g.*, Compl. ¶ 1 (seeking a declaratory judgment that Section 4(b) and Section 5 "are facially unconstitutional") (emphasis added); Pl.'s Mot. at 17 n.2 (describing plaintiff's challenge as facial); *Shelby Cnty.*, 270 F.R.D. at 19 (finding that discovery was "unwarranted" because "Shelby County brings only a facial challenge"). Because Shelby County has chosen not to raise an as-applied challenge -- and indeed, has explicitly waived its right to bring such a challenge, *see Shelby Cnty.*, 270 F.R.D. at 19 -- the Court's consideration of Shelby County's facial challenge is not premature. *See Stevens*, 130 S. Ct. at 1587 n.3 (rejecting contention that the Court's consideration of a facial constitutional challenge was "premature" where "the constitutional argument [wa]s a general one" and there was no "separate attack on a defined subset of the statute's applications").

II. Standard of Review

The Court must first determine the appropriate standard of review to use in evaluating whether Congress exceeded its enforcement authority under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) in 2006.[7] The Attorney General, relying on cases in which the Supreme Court has previously assessed the constitutionality of Section 5, argues that "when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard."

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[7] In addition to challenging the 2006 reauthorization of Section 5 and Section 4(b) as exceeding Congress's Fourteenth and Fifteenth Amendment enforcement authority, Shelby County argues that Section 5 and Section 4(b) impermissibly intrude on state sovereignty in violation of the Tenth Amendment and Article IV of the Constitution. *See* Compl. ¶¶ 39, 41, 43. The Supreme Court, however, has repeatedly rejected such federalism-based challenges to Section 5, recognizing that the Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *See City of Rome*, 446 U.S. at 179; *see also Lopez v. Monterey Cnty.*, 525 U.S. 266, 282, 119 S. Ct. 693, 142 L. Ed. 2d 728 (1999) (noting that "the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States"). To the extent that Section 5 and Section 4(b) constitute "appropriate" remedial enforcement legislation, then, their encroachment on state sovereignty is permissible.

See Def.'s Mot. at 12 (*citing Katzenbach*, 383 U.S. at 324; *City of Rome*, 446 U.S. at 175-77; *Georgia v. United States*, 411 U.S. 526, 535, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973); *Lopez*, 525 U.S. at 282-85). Shelby County, on the other hand, urges this Court to apply the "congruence and proportionality" framework first articulated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. at 520, to assess legislation enacted pursuant to § 5 of the Fourteenth Amendment, asserting that *Boerne* "applies just the same in Fifteenth Amendment cases" because "[t]he enforcement clauses of the Fourteenth and Fifteenth Amendments are co-extensive." *See* Pl.'s Mot. at 19; *see also* Pl.'s Reply in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 2 (explaining that "[t]he Supreme Court has made clear that all enforcement legislation is subject to congruence and proportionality review, and it has specifically relied on the voting rights cases in adopting and applying this test").

The parties in Nw. Austin engaged in the same dispute regarding the proper standard of review to apply in assessing the constitutionality of Section 5. *See Nw. Austin II*, 129 S. Ct. at 2512. Although the Supreme Court ultimately declined to resolve the issue, *see Id.*; but *see Id.* at 2524-25 (Thomas, J., concurring in judgment in part, dissenting in part) (suggesting that *Boerne* provides the framework for reviewing the constitutionality of Section 5), the three-judge court below held that "*Katzenbach*'s rationality standard governs this case," *Nw. Austin I*, 573 F. Supp. 2d at 241.

That court described *Katzenbach*'s "rationality standard" and *Boerne*'s "congruence and proportionality test" as "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." 573 F. Supp. 2d at 235-36. After summarizing what it characterized as "these two lines of cases," the court said that "the time has come to choose between them." 573 F. Supp. 2d at 241. The court ultimately "chose" *Katzenbach* for two reasons (although it went on to find that Section 5 passed muster under both *Katzenbach* and the congruence and proportionality framework outlined in *Boerne*). First, the court noted that *City of Rome*, which had "applied *Katzenbach*'s rationality test," constituted controlling precedent directly on point. *Id.* Although *City of Rome* pre-dates *Boerne*, the *Nw. Austin I* panel reasoned that because neither *Boerne* nor any case since had questioned the standard of review utilized in *City of Rome*, that standard had not been overruled. *See Id.* at 242. Hence, the court concluded that the type of review enunciated in *Katzenbach* and employed in *City of Rome* still governed the plaintiff's challenge to the 2006 extension of Section 5, even assuming that *Boerne* had "cast some doubt" on *Katzenbach* and *City of Rome*. *Id.* at 246. Second, the court pointed to the fact that *Boerne* involved a challenge to Congress's enforcement authority under § 5 of the Fourteenth Amendment, *Id.* at 517, whereas *Katzenbach* and *City of Rome* involved challenges to Section 5, which, "at its core," constitutes legislation enacted under § 2 of the Fifteenth Amendment, *Id.* at 243-44. "Even if the *City of Boerne* cases changed the test for *all* statutes enacted pursuant to the Fourteenth Amendment," the court explained, "those cases leave the Fifteenth Amendment standard untouched." *Id.* at 243.

This Court respectfully disagrees. A close analysis of the Voting Rights Act cases, *Boerne*, and cases following *Boerne* reveals that the Supreme Court has not left the standard of review for Fifteenth Amendment enforcement legislation "untouched"; moreover, it has not established a "distinct standard" for evaluating Fourteenth Amendment enforcement legislation different from that traditionally employed in the Fifteenth Amendment context. Rather, *Boerne* merely explicated and refined the one standard of review that has always been employed to assess legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments. *See* Appellant's Br., *Nw. Austin II*, 2009 WL 453246, at *33 (Feb. 19, 2009) (explaining that "*Boerne* and the cases following it do no more than elaborate and clarify the standard for reviewing Congress's efforts to enforce the Reconstruction Amendments"). The question is not, then, whether this Court, as "a district court bound by Supreme Court precedent," should follow "*Katzenbach* and *City of Rome* even if . . . the *City of Boerne* cases cast some doubt on those cases," *Nw. Austin I*, 573 F. Supp. 2d at 246. If this Court viewed *Boerne* and its enunciation of the congruence and proportionality test as merely "casting doubt" on *Katzenbach* and *City of Rome*, it would, indeed, still be obligated to follow those earlier cases, and leave to the Supreme Court "the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Rather, the question is whether, given the elaboration of the *Katzenbach* standard that was undertaken by the Supreme Court in *Boerne*, this Court should nonetheless adhere to the standard as first articulated in *Katzenbach*, simply because the *Boerne* elaboration occurred in the

Fourteenth Amendment context, not the Fifteenth. Such a course would, in this Court's view, constitute a misunderstanding of *Boerne*. This Court will therefore review the Supreme Court's evolving descriptions of the nature of Congress's enforcement powers under the Reconstruction Amendments, as explicated in *Katzenbach*, *Boerne* and later cases, to show that *Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*, and hence provides the appropriate standard of review to assess Shelby County's facial constitutional challenge to Section 5 and Section 4(b).

A. The "Virtually Identical" Enforcement Clauses of the Fourteenth and Fifteenth Amendments

Section 5 of the Fourteenth Amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," U.S. Const. amend. XIV, § 5, while § 2 of the Fifteenth Amendment states that "Congress shall have power to enforce this article by appropriate legislation," U.S. Const. amend. XV, § 2.[8] Given the nearly identical language and similar origin of these two Reconstruction Amendments, there would seem to be "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment, and the Supreme Court has not held to the contrary." *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 1999); *see also Hayden v. Pataki*, 449 F.3d 305, 331 n.5 (2d Cir. 2006) (finding "no indication in Supreme Court precedent, or in logic, that the Congress and the legislatures that enacted and ratified the Fourteenth and Fifteenth Amendments intended that they be 'enforced' in different ways").

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[8] In this Opinion, the Court uses "Section 5" to refer to Section 5 of the Voting Rights Act, and "§ 5" to refer to the enforcement clause of the Fourteenth Amendment. Similarly, the Court uses "Section 2" to refer to Section 2 of the Voting Rights Act, and § 2 to refer to the enforcement clause of the Fifteenth Amendment.

In fact, the Supreme Court has repeatedly emphasized -- both before, in, and after *Boerne* -- that the nature of the enforcement power conferred by § 5 of the Fourteenth Amendment is "virtually identical" to that conferred by § 2 of the Fifteenth Amendment. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001); *see also Boerne*, 521 U.S. at 518 (comparing Congress's Fourteenth Amendment enforcement authority to its "parallel power to enforce the provisions of the Fifteenth Amendment"); *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966) (explaining that "Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of § 5 of the Fourteenth Amendment]," as both sections permit Congress to "enforce by 'appropriate legislation' the provisions of that Amendment"); *Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 742 n.1, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003) (Scalia, J., dissenting) (noting that "Section 2 of the Fifteenth Amendment is practically identical to § 5 of the Fourteenth Amendment"); *Lopez*, 525 U.S. at 294 n.6 (Thomas, J., dissenting) (explaining that while "*City of Boerne* involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement powers conferred by the Fourteenth and

Fifteenth Amendments as coextensive"); *City of Rome*, 446 U.S. at 208 n.1 (Rehnquist, J., dissenting) (stating that "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive").

Hence, when the Supreme Court in *Katzenbach* first examined whether Congress's enactment of the Voting Rights Act exceeded its power to "enforce" the Fifteenth Amendment "by appropriate legislation," the Court looked for guidance to *Ex Parte Virginia* -- a case involving Congress's parallel enforcement power under § 5 of the Fourteenth Amendment. *See Katzenbach*, 383 U.S. at 326-27 (*citing Ex Parte Virginia*, 100 U.S. 339, 345-46, 25 L. Ed. 676 (1879)). In *Ex Parte Virginia*, the Supreme Court assessed the nature of Congress's power under the enforcement clauses of the Thirteenth and Fourteenth Amendments,[9] and explained that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex Parte Virginia*, 100 U.S. at 346. *Quoting* this language, the Supreme Court in *Katzenbach* rejected the contention that § 2 of the Fifteenth Amendment permits Congress to "do no more than to forbid violations of the Fifteenth Amendment in general terms." 383 U.S. at 327. Rather, the Court explained, § 2 of the Fifteenth Amendment -- like § 5 of the Fourteenth Amendment -- provides Congress with "full remedial powers" to enforce the Amendment by "appropriate" legislation; that is, to pass legislation to make the Amendment's protections "'fully effective.'" *See Id.* at 326 (*quoting Ex Parte Virginia*, 100 U.S. at 345).

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[9] Section 1 of the Thirteenth Amendment abolishes slavery, and § 2 provides, in terms identical to those in § 2 of the Fifteenth Amendment, that "Congress shall have power to enforce this article by appropriate legislation." *See* U.S. Const. amend. XIII.

According to the Court in *Katzenbach*, "[t]he basic test to be applied in a case involving s[ection] 2 of the Fifteenth Amendment" is the same as that to be applied "in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* As Chief Justice Marshall said in *McCulloch v. Maryland*: "'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (*quoting McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 421, 4 L. Ed. 579 (1819)).

After setting forth Congress's Fifteenth Amendment enforcement authority in these broad terms, the Supreme Court in *Katzenbach* proceeded to engage in a careful analysis of whether Section 5 and Section 4(b) constituted "appropriate" enforcement legislation, as that word is defined in *McCulloch v. Maryland* and *Ex Parte Virginia*. With respect to the coverage formula in Section 4(b), the Court acknowledged that Congress had confined the Act's most stringent remedies -- such as preclearance -- to "a small number of States and political subdivisions which in most instances were familiar to Congress by name." *See Katzenbach*, 383 U.S. at 328. The decision to target only certain sections of the country and not others was based on "evidence of actual voting discrimination" in these areas, and the Court found it "acceptable" for Congress to "limit its attention to the geographic areas where immediate action seemed necessary." *Id.* at 328-29. "Legislation need not deal with all phases of a problem in the same way," the Court explained, "so long as the distinctions drawn have some basis in practical experience." *Id.* at 331. Because the distinctions drawn by the coverage formula in Section 4(b) had such a basis, the Court found that the formula was "rational in both practice and theory." *See Id.* at 330.

The Court also concluded that Section 5's preclearance requirement constituted a "permissibly decisive" response to the problem of states "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 335. Given the "voluminous" legislative record amassed by Congress during its consideration of the Act, *Id.* at 308, which contained ample evidence of "obstructionist tactics" in covered jurisdictions, *Id.* at 328, the Court noted that "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself," thereby justifying the need for a prophylactic measure like Section 5, *see Id.* at 334-35. The Court determined, then, on the basis of the evidence of voting discrimination in the record, that Congress had "exercised its powers under the Fifteenth Amendment in an appropriate manner" when it enacted Section 5 and Section 4(b). *Id.* at 324.

The same year that it decided *Katzenbach*, the Supreme Court had occasion to re-examine the nature of Congress's enforcement authority under § 5 of the Fourteenth Amendment, and in so doing made clear that the test for reviewing exercises of Congress's Fourteenth and Fifteenth Amendment enforcement powers is the same. *See Katzenbach v. Morgan*, 384 U.S. at 651.[10] In *Katzenbach v. Morgan*, the Supreme Court addressed a Fourteenth Amendment challenge to Section 4(e) of the Voting Rights Act, which guaranteed the right to vote to persons educated in Puerto Rico who satisfied certain educational criteria but who could not read or write English. Registered voters in New York challenged Section 4(e) insofar as it forbid New York from enforcing its state election laws, which made the ability to read and write English a precondition to voting. *See Id.* at 643-45. Rejecting this challenge, the Supreme Court explained that § 5 of the Fourteenth Amendment is a "positive grant of legislative power," which permits Congress to "enforce" the Amendment by enacting legislation to prevent state action even if that state action would not otherwise be "prohibited by the provision of the Amendment that Congress sought to enforce." *Id.* at 648. Because there was a "basis" upon which Congress could have found that New York's application of its English literacy requirement to deny the right to vote to non-English speakers educated in Puerto Rico "constituted invidious discrimination in violation of the *Equal Protection Clause*," *Id.* at 656, Congress was entitled to respond to this state-sponsored discrimination by passing Section 4(e), even assuming that Section 4(e) would prevent some applications of New York's state election law that did not, in and of themselves, violate the substantive provisions of the Fourteenth Amendment, *see Id.* at 648.

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[10] The Court uses the shorthand "*Katzenbach*" to refer to *Katzenbach v. South Carolina*, but employs the full case name for *Katzenbach v. Morgan*.

The Supreme Court in *Katzenbach v. Morgan* explained the nature of Congress's Fourteenth Amendment enforcement power with reference to South Carolina v. *Katzenbach*, noting that § 2 of the Fifteenth Amendment "grants Congress a similar power to enforce by 'appropriate legislation' the provisions of that Amendment; and we recently held . . . that '[t]he basic test to be applied in a case involving s[ection] 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States'": namely, the test identified in *McCulloch v. Maryland*. *Id.* at 651 (internal citations omitted). Hence, the Court confirmed, the meaning of "appropriate," as stated in *McCulloch v. Maryland* and *Ex Parte Virginia*, governs Congress's enforcement authority under both § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. *See Id.*

When the Supreme Court next addressed a facial challenge to the constitutionality of Section 5 in *City of Rome*, it again held that *McCulloch v. Maryland* and *Ex Parte Virginia* provide the basic framework for assessing whether legislation is "appropriate" under § 2 of the Fifteenth Amendment. *See City of Rome*, 446 U.S. at 174-75. The Court also elaborated on its discussion in *Katzenbach v. Morgan* by describing the precise nature of Congress's authority to "enforce" the Reconstruction Amendments. According to the Court, "even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination," *Id.* at 173, Congress may, under the authority vested in it by § 2, "prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination," *Id.* at 176.

As one scholar has pointed out, this "reference to 'past discrimination' suggests that Congress is authorized to prohibit [discriminatory] effects only if the Court believes it is reasonable to infer discriminatory *purposes* in the past." Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy,* 28 N.Y.U. Rev. L. & Soc. Change 69, 80 (2003). In other words, *City of Rome* implies that Congress may exercise its § 2 enforcement powers by prohibiting electoral practices that do not themselves violate § 1 of the Fifteenth Amendment only as a means of "attacking the perpetuation of earlier, purposeful racial discrimination." *See City of Rome,* 446 U.S. at 177 (describing the Supreme Court's holding in *Oregon v. Mitchell,* 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970)) (emphasis added). But *City of Rome* made clear that when Congress does legislate pursuant to § 2 of the Fifteenth Amendment in response to earlier, purposeful voting discrimination, such legislation need only be "'appropriate' as that term is defined in *McCulloch v. Maryland* and *Ex Parte Virginia.*" *Id.* at 177. The Supreme Court in *City of Rome* thus framed the specific question before it as whether, in re-authorizing Section 5 in 1975, "Congress could *rationally* have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Id.* (emphasis added).

To answer this question, the Court looked to the evidence upon which Congress had relied in deciding to reauthorize Section 5 in 1975. *See Id.* at 180-82. The Court noted that Congress had given "careful consideration to the propriety of readopting § 5's preclearance requirement" and had considered evidence such as racial disparities in voter registration, the number of minority elected officials, and "the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General." *Id.* at 181. After considering such evidence, Congress "not only determined that § 5 should be extended for another seven years," but gave Section 5 a "ringing endorsement," explaining that Section 5 had been largely responsible for the increased minority political participation in the ten years since the Voting Rights Act's passage, and for ensuring that such progress was not "'destroyed through new procedures and techniques.'" *Id.* (*quoting* H.R. Rep. 94-196, at 10-11). *Citing* Congress's finding that Section 5 was "necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination," the Court found that, based on the evidence in the congressional record, the 1975 extension of Section 5 "was plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.* at 182.

B. *Boerne's* Refinement of *Katzenbach* and *City of Rome*

Then came *City of Boerne*. There, the Supreme Court addressed a challenge to the Religious Freedom Restoration Act ("RFRA"), a statute that Congress had enacted pursuant to § 5 of the Fourteenth Amendment, and which prohibited states from imposing a "substantial burden" on the free exercise of religion unless they could show that the burden was (1) in furtherance of a "compelling" governmental interest; and (2) the "least restrictive means" of furthering that interest. 521 U.S. at 515-16. The Court in *Boerne* began its analysis of RFRA by *quoting* the familiar passage from *Ex Parte Virginia* on the meaning of "appropriate" § 5 enforcement legislation. *See Id.* at 517-18. After noting that *Ex Parte Virginia* had only outlined "the scope of Congress' § 5 power in . . . broad terms," *Id.* at 517, the Court proceeded to expand on these "broad terms" by confirming what *Katzenbach v. Morgan* and *City of Rome* had already made clear: namely, that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518.

But the Court in *Boerne* went on to explain that Congress's power under § 5 is not unlimited. "Legislation which alters the meaning of the *Free Exercise Clause* cannot be said to be enforcing the Clause," the Court said, since Congress "has been given the power 'to enforce,'" but "not the power to determine what constitutes a constitutional violation." *Id.* at 519. The Court acknowledged that there is a fine line "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," and it explained that while Congress "must have wide latitude in determining where [the line] lies," ultimately it is for the Court to decide whether Congress has overstepped the bounds of its authority by attempting to "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id. at 519-20.* Hence, the Court concluded, in order for legislation to be upheld as a valid exercise of Congress's § 5 power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*

But in making this statement, the Supreme Court in *Boerne* did not purport to overrule *Katzenbach*, nor did it seek to distinguish between the standards of review to be applied in the Fourteenth and Fifteenth Amendment enforcement contexts. To the contrary, the Court cited *Katzenbach* as a paradigmatic example of a case that had "revolve[d] around the question whether § 5 legislation can be considered remedial," *see Boerne*, 521 U.S. at 525 (*citing Katzenbach*, 383 U.S. at 308) -- despite the fact that *Katzenbach* involved § 2 legislation, not § 5 legislation. The *Boerne* Court also discussed *Katzenbach v. Morgan* and *City of Rome* in great detail, *See, e.g., Boerne* 521 U.S. at 527-28, 533, without providing any indication that it was departing from the method of analysis it had used to assess Congress's exercise of its Fourteenth and Fifteenth Amendment enforcement authority in those cases. Instead, the Supreme Court in *Boerne* cited *Katzenbach v. Morgan* and *City of Rome* as illustrative of the principle that Congress may, consistent with § 5, enact "strong remedial and preventative measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *See Boerne*, 521 U.S. at 526. Because it had previously upheld challenged provisions of the Voting Rights Act only on the basis of actual evidence of unconstitutional voting discrimination by states, *see Id.* at 526-28, the Court found no reason to view its Voting Rights Act jurisprudence under § 2 of the Fifteenth Amendment as inconsistent with the pronouncement that "[t]he appropriateness of remedial measures must be considered in light of the evil presented," *Id.* at 530 (*citing Katzenbach*, 383 U.S. at 308).

Applying this standard to RFRA, however, the Court decided that RFRA was "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. In reaching this conclusion, the Court found a comparison between RFRA and the Voting Rights Act to be "instructive." *Id.* at 530. Whereas the Voting Rights Act had been passed on the basis of an extensive legislative record replete with instances of state-sponsored voting discrimination in violation of the Fifteenth Amendment, RFRA's legislative record lacked "examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* Indeed, the record contained no documented episodes of religious persecution that had occurred in the past 40 years. *Id.* And unlike the Voting Rights Act -- which was limited both in terms of the "discrete class of laws" that it affected (voting laws) and in the states that it covered (those where "constitutional violations were most likely") -- RFRA's "[s]weeping coverage" displaced laws in every state, "of almost every description and regardless of subject matter." *Id.* at 532. Finally, while Section 5 of the Voting Rights Act was enacted as a temporary provision, with a procedure by which jurisdictions could bail out of its requirements, RFRA had "no termination date or termination mechanism." *Id.* at 532-33.

The Supreme Court in *Boerne* made clear that a statute need not contain these kinds of limiting features in order to be sustained as congruent and proportional § 5 legislation. *Id.* at 533. But it explained that where "a congressional enactment pervasively prohibits *constitutional* state action in an effort to remedy or to prevent *unconstitutional* state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Id.* (emphasis added). Given the lack of any such limitations in RFRA, together with the absence of any recent documented instances of religious persecution in the legislative record, the Court in *Boerne* held that "RFRA cannot be considered remedial, preventative legislation." *Id.* at 532. "Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." *Id.* at 534-35.

After *Boerne*, the Supreme Court continued to refine the congruence and proportionality framework in a series of cases addressing whether Congress had validly abrogated state sovereign immunity pursuant to § 5 of the Fourteenth Amendment. *See Nw. Austin I*, 573 F. Supp. 2d at 240-41. In the first of these cases, the Court struck down the Patent and Plant Variety Protection Remedy Clarification Act, which subjected states to patent infringement suits, on the ground that Congress had failed to identify any "pattern of patent infringement by the States, let alone a pattern of constitutional violations" that could justify the Act as an appropriate remedial measure under § 5. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999). Instead, Congress appeared to have enacted the legislation only in "response to a handful of instances of state patent infringement that do not necessarily violate the Constitution." *Id.* at 645-46. The Act also did not contain any of the "various limits that Congress [had] imposed in its voting rights measures," which the Court deemed "particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Id.* at 647. Accordingly, given both the insufficient historical record of constitutional violations and the broad scope of the Act's coverage, the Court found "it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment." *Id.*

The following year in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), the Court similarly held that Congress's abrogation of state sovereign immunity in the Age Discrimination in Employment Act, which permitted suits for money damages against state employers alleged to have discriminated on the basis of age, exceeded Congress's authority under § 5. While reaffirming that "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct" than that which the Amendment itself proscribes, 528 U.S. at 81, the Court nonetheless found that Congress had exceeded this enforcement power by failing to identify "any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation," *Id.* at 88.

Then, in *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), the Court again applied congruence and proportionality review to strike down § 5 enforcement legislation, finding that the provision of Title I of the Americans with Disabilities Act ("ADA") that permitted individuals to sue states for money damages exceeded Congress's Fourteenth Amendment enforcement authority. *See* 531 U.S. at 374. As in *Boerne*, the Supreme Court in *Garrett* compared the legislative record amassed by Congress in support of the ADA with that considered by Congress in enacting the Voting Rights Act. Whereas Congress in passing the Voting Rights Act had documented "a marked pattern of unconstitutional action by the States," *Id.*, Congress in enacting the ADA had cited only "half a dozen examples" of state-sponsored discrimination against the disabled, *Id.* at 369. These incidents fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Id.* at 370. The Court also contrasted the ADA's sweeping nation-wide mandate "for the elimination of discrimination against individuals with disabilities" with the Voting Rights Act's more "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Id.* at 373 (internal quotation marks and citation omitted). This comparison of the ADA to the Voting Rights Act made clear "[t]he ADA's constitutional shortcomings." *Id.*

But after using congruence and proportionality review to strike down four separate pieces of § 5 enforcement legislation, the Court most recently held that two statutes enacted pursuant to Congress's Fourteenth Amendment enforcement authority were, in fact, congruent and proportional. *See Hibbs*, 538 U.S. at 724; *Tennessee v. Lane*, 541 U.S. 509, 533-34, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). In *Hibbs*, the Court upheld the constitutionality of the family-care provision of the Family and Medical Leave Act ("FMLA"), and in *Lane* the Court found that Title II of the ADA -- as applied to claims by the disabled alleging that they had been denied access to the courts because of their disability -- constituted a valid exercise of Congress's § 5 enforcement power. *See Hibbs*, 538 U.S. at 724; *Lane*, 541 U.S. at 533-34. Significantly, both statutes sought to protect a class or right that receives heightened judicial scrutiny: namely, "suspect gender classifications (the FMLA) and the fundamental right of access to the courts (ADA Title II)." *See Nw. Austin I*, 573 F. Supp. 2d at 241. As a result, "'it was easier for Congress to show a pattern of state constitutional violations' than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review." *Lane*, 541 U.S. at 529 (*quoting Hibbs*, 538 U.S. at 736). Given the nature of the classification at issue, the Court in *Hibbs* compared the showing needed to uphold the FMLA to that necessary to sustain the Voting Rights Act. Congress was "similarly successful" in demonstrating a pattern of unconstitutional conduct in the voting rights context, the *Hibbs* Court explained, because racial classifications, like gender classifications, "are presumptively invalid," so "most of the States' acts of race discrimination violated the Fourteenth Amendment." *Hibbs*, 538 U.S. at 736.

After *Hibbs*, *Lane*, and the other cases that have applied and clarified *Boerne*, it is now clear that the standard for reviewing Congress's enactment of remedial, prophylactic legislation under § 5 of the Fourteenth Amendment involves three steps. *See Nw. Austin I*, 573 F. Supp. 2d at 268-69. First, the court must "identify the constitutional right or rights that Congress sought to enforce" when it enacted the challenged legislation. *Lane*, 541 U.S. at 522; *see also Garrett*, 531 U.S. at 365 (explaining that the court must "identify with some precision the scope of the constitutional right at issue"); *Fla. Prepaid*, 527 U.S. at 652 (noting that "the first step of the inquiry . . . is to determine what injury Congress sought to prevent or remedy with the relevant legislation"). Second, it must "examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States" that justified the enactment of the remedial measure. *Garrett*, 531 U.S. at 368. Finally, the court must decide whether the challenged legislation constitutes "an appropriate response" to the identified "history and pattern" of unconstitutional conduct, *Lane*, 541 U.S. at 530 -- in other words, whether is it "congruent and proportional to the targeted violation," *Garrett*, 531 U.S. at 374; *Hibbs*, 538 U.S. at 737.

C. *Boerne* Governs Challenges to Congress's Enforcement Power Under Both § 2 of the Fifteenth Amendment and § 5 of the Fourteenth Amendment

The only remaining question, then, is whether, notwithstanding the Court's articulation and refinement of the congruence and proportionality framework in the context of challenges to Congress's enforcement power under § 5 of the Fourteenth Amendment, a different standard of review nonetheless governs Congress's exercise of its "parallel power" to enforce § 2 of the Fifteenth Amendment. Although *Boerne* and "the cases that define the limits of Congress's enforcement power have focused primarily on that power as granted by Section 5 of the Fourteenth Amendment," this Court agrees with the Second Circuit's determination that there is "no significant reason to conclude that the scope of the enforcement power under the two Amendments is different." *See Hayden*, 449 F.3d at 331 n.5.

To begin with, the language of the enforcement clauses of the Fourteenth and Fifteenth Amendments is almost identical, as they both reference Congress's ability to enforce the Amendment through the enactment of "appropriate" legislation. *See Id.*; *compare* U.S. Const.

amend. XIV, § 5 ("Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") *with* U.S. Const. amend. XV, § 2 ("Congress shall have power to enforce this article by appropriate legislation"). Moreover, the two Amendments have similar origins and histories. *See, e.g.*, Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 Wm. & Mary L. Rev. 725, 725 n.5 (1998) (explaining that "because the two Amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the [*Boerne*] analysis surely carries over" to the Fifteenth Amendment context). And perhaps most importantly, the Supreme Court has expressly "equated Congress's enforcement power under the two Amendments" on a number of occasions, both before and after *Boerne*. *See Hayden*, 449 F.3d at 331 n.5 (citing *Garrett*, 531 U.S. at 373 n.8; *Boerne*, 521 U.S. at 517-18; *Katzenbach v. Morgan*, 384 U.S. at 650-51).

Far from implying that the Fourteenth and Fifteenth Amendments were intended to be "'enforced' in different ways," *Hayden*, 449 F.3d at 331 n.5, *Boerne* itself is also best read to mean that the nature of Congress's enforcement powers under the two Amendments is the same. In *Boerne*, the Supreme Court relied on the Voting Rights Act as upheld in *Katzenbach* and *City of Rome* as a paradigmatic example of legislation that satisfies the congruence and proportionality test, contrasting the Voting Rights Act with RFRA in order to illustrate RFRA's constitutional deficiencies. *See, e.g.*, 521 U.S. at 518, 525-26, 530-33. Shelby County is correct to point out that *Boerne*'s repeated reliance on *Katzenbach* and *City of Rome* -- both of which were decided under § 2 of the Fifteenth Amendment -- would be "misplaced," *see* Pl.'s Mot. at 19, to say the least, if § 5 enforcement legislation "were to be judged against an entirely different constitutional metric" than that applicable to § 2 enforcement legislation, *see* Pl.'s Reply at 12; *see also* Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1191 (2001) (stating that *Boerne* "strongly suggests that Section 2 measures designed to enforce the Fifteenth Amendment are subject to stringent congruence and proportionality analysis as well"); Mark A. Posner, *Time is Still On its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 89 (2006) (noting that *Boerne* "strongly intimated that the same analysis applies when assessing Congress's authority under the two Amendments to enact prophylactic legislation").

Boerne's characterization of *Katzenbach* as a case that "revolve[d] around the question whether *§ 5 legislation* can be considered remedial," *see Boerne*, 521 U.S. at 525 (emphasis added), also cannot be reconciled with the contention that different modes of analysis govern judicial review of § 5 and § 2 enforcement legislation. Again, this is because the Court in *Katzenbach* upheld the challenged provisions of the Voting Rights Act not as a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, but as "a valid means of carrying out the commands of the Fifteenth Amendment."

Katzenbach, 383 U.S. at 337. Indeed, the Supreme Court in *Katzenbach* never even mentioned § 5 of the Fourteenth Amendment. To the extent that *Katzenbach* "revolve[d] around" the issue of what constitutes appropriate § 5 legislation, then, it could only be because the test for determining the validity of § 5 legislation is the same as that for determining the validity of § 2 legislation.

It is also significant that the Supreme Court in *Boerne* did not purport to overrule *Katzenbach v. Morgan*, or the half-century of precedent that has treated the nature of the enforcement power conferred by the Fourteenth and Fifteenth Amendments as coextensive. *See Katzenbach v. Morgan*, 384 U.S. at 651 (explaining that *McCulloch v. Maryland* and *Ex Parte Virginia* provide the definition of what constitutes "appropriate" enforcement legislation in both the Fifteenth and Fourteenth Amendment contexts). The Supreme Court in *Boerne* began its analysis by *quoting Katzenbach v. Morgan*'s acknowledgment that "*§* 5 is 'a positive grant of legislative power.'" *Boerne*, 521 U.S. at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. at 651). And it then recited the traditional articulation of "the scope of Congress' § 5 power" as laid out in *Ex Parte Virginia*, thereby suggesting that the congruence and proportionality framework was a mere elaboration of those "broad terms." *See Boerne*, 521 U.S. at 517-18.

Under *Katzenbach* and *City of Rome*, *Ex Parte Virginia*'s definition of "appropriate" legislation under the Thirteenth and Fourteenth Amendments also governs what constitutes "appropriate" legislation under the Fifteenth Amendment. *See Katzenbach*, 383 U.S. at 326;

City of Rome, 446 U.S. at 174-75. Hence, the Supreme Court's elaboration of *Ex Parte Virginia* in *Boerne* would seem to apply just the same in the Fifteenth Amendment context, at least in the absence of any indication that *Katzenbach* and *City of Rome* were incorrect to rely on a § 5 case in delineating the scope of Congress's § 2 power. But the Supreme Court in *Boerne* gave no such indication. In fact, it suggested just the opposite, by itself relying almost exclusively on § 2 cases in delineating the scope of Congress's § 5 power. *See* Karlan, 39 WM. & MARY L. REV. at 725 n.5 (noting that "most of the cases Justice Kennedy cited relied on Congress's use of its enforcement power under Section 2 of the Fifteenth Amendment").

The Supreme Court's failure in *Boerne* to announce any departure from *Katzenbach* and *City of Rome* can be explained by the fact that the congruence and proportionality test does not constitute a novel alternative to the standard of review employed in those earlier cases; rather, it reflects a more detailed articulation of the same standard that the Court has always applied to assess Congress's exercise of its Fifteenth Amendment enforcement power. In *Katzenbach*, the Court began with the first step of the *Boerne* framework, determining "what injury Congress sought to prevent or remedy" when it enacted the challenged provisions of the Voting Rights Act. *Fla. Prepaid*, 527 U.S. at 652; *see Katzenbach*, 383 U.S. at 308 (explaining that the Act was designed "to banish the blight of racial discrimination in voting"). The Court then proceeded to the second step of *Boerne*, looking to whether Congress had "identified a history and pattern of unconstitutional [conduct] by the States," *Garrett*, 531 U.S. at 368. In so doing, the Supreme Court made clear that the "constitutional propriety" of the Act "must be judged with reference to the historical experience it reflects," *Katzenbach*, 383 U.S. at 308, and it pointed to historical evidence of state-sponsored voting discrimination in the legislative record to justify the need for the Act, *id.* at 310 (describing states' use of tests and devices that were "specifically designed to prevent Negroes from voting"). Although the Court in *Katzenbach* did not use the words "congruent" and "proportional" when assessing the challenged provisions of the Act, it did closely analyze whether Section 5 and Section 4(b) constituted "an appropriate response" to the "history and pattern" of unconstitutional voting discrimination that Congress had identified, *see Lane*, 541 U.S. at 530. So, too, did the Court in *City of Rome* engage in a *Boerne*-like analysis, upholding the 1975 reauthorization of Section 5 only after describing the evidence of voting discrimination upon which Congress had relied in reauthorizing the Act's temporary provisions. *See City of Rome*, 446 U.S. at 182 (finding that "at least another 7 years of statutory remedies" was "necessary to counter the perpetuation of 95 years of pervasive voting discrimination").

To the extent that the analysis undertaken in *Katzenbach* and *City of Rome* was somewhat less rigorous than that applied in cases since *Boerne*, that may only be a reflection of the fact that where a remedial statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, it is "easier for Congress to show a pattern of state constitutional violations," as required at the second step of *Boerne*. *See Hibbs*, 538 U.S. at 736; *Lane*, 541 U.S. at 529. Because Section 5 seeks to protect the right to vote -- a "fundamental political right," *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) -- and to prohibit discrimination based on race -- an "immediately suspect" classification, *see Johnson v. California*, 543 U.S. 499, 509, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) -- the showing needed to substantiate Section 5 was easier to make in *Katzenbach* and *City of Rome* than in *Kimel* or *Garrett*, which involved classifications subject to less stringent levels of constitutional scrutiny. *See Nw. Austin I*, 573 F. Supp. 2d at 241.

The Attorney General relies heavily on *Lopez*, a Section 5 case decided shortly after *Boerne*, in arguing that congruence and proportionality review does not govern Shelby County's challenge to the constitutionality of Section 5. *See* Def.'s Reply in Supp. of Def.'s Mot. for Summ. J. [Docket Entry 67] at 6. But such reliance is unwarranted. In *Lopez*, the Supreme Court examined an as-applied challenge to Section 5 brought by Monterey County, California, a political subdivision covered by Section 4(b). *See Lopez*, 525 U.S. at 282. Monterey County alleged that Section 5 did not apply to its implementation of a voting change required by state law, since enactment of the change was non-discretionary and California -- the source of the change -- was not itself a covered jurisdiction subject to Section 5. *Id.* Rejecting this argument, the Court held that "the Act's preclearance requirements apply to measures mandated by a noncovered State to the extent that these measures will effect a voting change in a covered county." *Id.* at 269. The Court then briefly addressed the plaintiff's contention that Section 5 was unconstitutional to the extent that it was interpreted to apply "to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere." *Id.* at 283. Citing *Katzenbach* and *City of Rome*, the Court explained that it had previously upheld Section 5 as a valid exercise of Congress's Fifteenth Amendment enforcement authority -- despite its "intrusion into areas traditionally reserved to the States" -- and that no different result was required just because Section 5 "is held to cover acts initiated by non-covered States." *Id.* The Court then referenced *Boerne* as having held that Congress may, under the Fourteenth Amendment, "intrude[] into legislative spheres of autonomy previously reserved to the States." *Id.* (quoting *Boerne*, 521 U.S. at 518). Nowhere in *Lopez* did the Supreme Court mention either "congruence and proportionality" or "rational basis" review, or purport to apply either standard to Section 5. To the extent that *Lopez* cuts in either direction, then, the Court regards it as reaffirming that *Katzenbach*, *City of Rome*, and *Boerne* are consistent in their evolving descriptions of Congress's enforcement power under the Fourteenth and Fifteenth Amendments.

Because the Court finds no basis upon which to differentiate between the standards of review to be applied in the Fourteenth and Fifteenth Amendment enforcement contexts, it need not decide whether the 2006 reauthorization of Section 5 and Section 4(b) constituted an exercise of Congress's Fourteenth or Fifteenth Amendment enforcement authority, or a kind of hybrid legislation enacted pursuant to both Amendments. Shelby

County correctly points out that to date "[t]he Fifteenth Amendment has been the exclusive basis for upholding Section 5." *See* Pl.'s Reply at 47, 49 n.15; *see also City of Rome*, 446 U.S. at 173; *Katzenbach*, 383 U.S. at 327; *Allen*, 393 U.S. at 588 (Harlan, J., concurring in part, dissenting in part) (explaining that "Congress consciously refused to base s[ection] 5 of the Voting Rights Act on its powers under the Fourteenth Amendment"). But in adopting the Act's protections for language minorities in 1975 and then extending them in 2006, Congress expressly relied on its Fourteenth Amendment enforcement power as well, since the Fifteenth Amendment speaks only of discrimination on the basis of "race." *See Nw. Austin I*, 573 F. Supp. 2d at 243-44; *see also* S. Rep. No. 94-295, at 814-15 (1975) (explaining that "[t]he Fourteenth Amendment is added as a constitutional basis for these voting rights Amendments" in order to "doubly insure the constitutional basis for the Act," even though the Department of Justice has taken the position that "'language minorities' are members of a 'race or color' group protected under the Fifteenth Amendment"); 42 U.S.C. *§* 1973aa-1a (finding that, because "citizens of language minorities have been effectively excluded from participation in the electoral process," it is necessary to prescribe remedial measures "to enforce the guarantees of the Fourteenth and fifteenth Amendments").

Some have argued that this reliance on the Fourteenth Amendment was unnecessary, and that Congress "could have relied solely on its Fifteenth Amendment authority" in extending the Act's protections to language minorities, since the Supreme Court has "strongly suggested" that language minorities "qualify as racial groups" within the meaning of the Fifteenth Amendment. *See, e.g.*, *Nw. Austin I*, 573 F. Supp. 2d at 243-44. Regardless, there are additional reasons to question whether Section 5 can still be viewed as pure Fifteenth Amendment enforcement legislation. Section 5 is designed to combat not only outright denials of the right to vote, but also vote dilution -- "defined as a regime that denies to minority voters the same opportunity to participate in the political process and to elect representatives of their choice that majority voters enjoy." *Bossier II*, 528 U.S. at 359 (Souter, J., concurring in part, dissenting in part). Although there is an argument that measures that dilute minorities' voting strength violate the Fifteenth Amendment's guarantee against "abridgment" of the right to vote, *see id.*, the Supreme Court thus far has "dealt with vote dilution only under the Fourteenth Amendment," *id.*, and has "never held that vote dilution violates the Fifteenth Amendment," *Bossier II*, 528 U.S. at 334 n.3. To the extent that the Attorney General seeks to rely on evidence of vote dilution to justify the 2006 reauthorization of Section 5, then, it might be necessary to find that Section 5 constitutes valid Fourteenth Amendment -- as opposed to Fifteenth Amendment -- enforcement legislation. But again, this issue need not be decided, in light of the Court's conclusion that *Boerne* provides the proper mode of analysis to assess challenges to Congress's enforcement power under both § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Hence, irrespective of whether Section 5 is considered § 2 enforcement legislation, § 5 enforcement legislation,[11] or a kind of hybrid legislation enacted pursuant to both Amendments, it can only be upheld if it is "congruent and proportional" to the problem of unconstitutional racial discrimination in voting.

III. Application of *Boerne* to the 2006 Extension of Section 5

A. The Scope of the Constitutional Right At Issue

The first step in determining whether the 2006 extension of Section 5 passes muster under *Boerne* is "to identify with some precision the scope of the constitutional right at issue." *See Garrett*, 531 U.S. at 365; *see also Lane*, 541 U.S. at 522. Where a statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, it is "easier for Congress to show a pattern of state constitutional violations," as required at the second step of the *Boerne* analysis. *See Hibbs*, 538 U.S. at 736. In other words, Congress is more likely to be able to identify unconstitutional state action justifying remedial, prophylactic enforcement legislation when it seeks to protect against discrimination based on a classification like gender, "which triggers heightened scrutiny," *see Hibbs*, 538 U.S. at 736, than when it seeks to protect against discrimination based on a trait such as disability, which "incurs only the minimum 'rational-basis' review," *see Garrett*, 531 U.S. at 366. This is because "the heightened level of constitutional scrutiny" that accompanies a suspect classification or a fundamental right means that "the historical problems" identified by Congress with respect to that class or right are more likely to amount to constitutional violations, and a history of constitutional violations is a necessary predicate for the enactment of remedial enforcement legislation under the Reconstruction Amendments. *See* Posner, 10 N.Y.U. J. LEGIS. & PUB. POL'Y at 87. It is for this reason that "the Court gives Congress significant leeway to craft broad remedial prohibitions when fundamental rights or protected classes are at stake." *Nw. Austin I*, 573 F. Supp. 2d at 270.

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[11] In *Hibbs*, the Supreme Court noted that it had previously upheld "certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' § 5 power, including the literacy test ban and preclearance requirements for changes in States' voting procedures." *Hibbs*, 538 U.S. at 737-38. In support of this proposition, however, the Supreme Court cited only one case that dealt with preclearance requirements, and that case -- *Katzenbach* -- upheld Section 5 as a valid exercise of Congress's § 2 power, not its § 5 power. *See id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828; *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272; *Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769).

Significantly, Section 5 not only seeks to protect the right to vote -- a "fundamental political right, because [it is] preservative of all rights," *Yick Wo*, 118 U.S. at 370 -- but also seeks to protect against discrimination based on race, "the classification of which we have been the most suspect," *see M.L.B. v. S.L.J.*, 519 U.S. 102, 135, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (Thomas, J., dissenting). Because Section 5 is designed to protect "*both* the quintessential suspect classification (race) *and* the quintessential civil right (the franchise)," defendant-intervenors are correct that Congress acted at the "zenith of its constitutional enforcement authority" when it reauthorized Section 5 in 2006. *See* Harris Def.-Ints.' Mot. for Summ. J. ("Harris Mot.") [Docket Entry 55] at 22; *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 176 (2007) (explaining that Congress "acted at the apex of its power to enforce the guarantees of the post-Civil War Amendments" when it enacted the Voting Rights Act). Just as in *Hibbs* and *Lane*, then, it is "easier for Congress to show a pattern of state constitutional violations" justifying the need for Section 5 than when Congress seeks to enforce rights subject to lesser levels of constitutional review, since "racial classifications and restrictions on the right to vote - like gender discrimination (*Hibbs*) and access to the courts (*Lane*) - are 'presumptively invalid.'" *Nw. Austin I*, 573 F. Supp. 2d at 270 (quoting *Hibbs*, 538 U.S. at 736).

B. Evidence of Unconstitutional Voting Discrimination in the Legislative Record

Having determined "the metes and bounds of the constitutional right[s] in question," the core issue is whether Congress succeeded in identifying "a history and pattern" of unconstitutional, state-sponsored voting discrimination to justify the 2006 reauthorization of Section 5. *See Garrett*, 531 U.S. at 368. Shelby County argues that the evidence of so-called "second generation barriers" to voting upon which Congress relied in 2006 when it re-authorized Section 5 -- including evidence of racially polarized voting, preclearance statistics, the continued filing of Section 2 cases, and the dispatch of federal observers -- cannot justify the extension of Section 5, since "none of this evidence comes close to proving the existence of pervasive, intentional discrimination." *See* Pl.'s Mot. at 32. Instead, Shelby County contends, there are only two types of evidence that can be used to establish the constitutional necessity of Section 5: "(1) *direct* evidence of widespread, intentional voting discrimination and gamesmanship; and (2) registration data, turnout statistics, and the election of minorities to public office." Pl.'s Reply at 37 (emphasis added). This argument is flawed in several respects.

To begin with, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." *Katzenbach*, 383 U.S. at 330. To be sure, there must be an established "pattern of constitutional violations" in order to justify remedial, prophylactic legislation like Section 5, *see Fla. Prepaid*, 527 U.S. at 640, and discriminatory intent is a necessary element of a Fourteenth or Fifteenth Amendment violation, *see, e.g., City of Mobile*, 446 U.S. at 62, 67. Shelby County is therefore correct that some evidence of purposeful state-sponsored voting discrimination is needed to sustain Section 5. But Shelby County is incorrect to suggest that such evidence must be "direct." *See* Pl.'s Reply at 37. To the contrary, the Supreme Court has repeatedly recognized that unconstitutional "discriminatory intent need *not* be proved by direct evidence." *See Rogers v. Lodge*, 458 U.S. 613, 618, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982) (emphasis added) (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). Rather, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. at 242. Moreover, as the Supreme Court in *Katzenbach* made clear, Congress is not bound by the standards of proof applicable in judicial proceedings "when it prescribes civil remedies against other organs of government under s[ection] 2 of the Fifteenth Amendment." *See Katzenbach*, 383 U.S. at 330. Because the discriminatory effects of a challenged practice can constitute "powerful evidence of the intent with which it was adopted or maintained," *Continuing Need* 186 (prepared statement of Pamela S. Karlan), this Court would be remiss if it were to limit its examination of the legislative record to judicially proven instances of discriminatory intent.

Shelby County's suggestion that circumstantial evidence of voting discrimination cannot justify the 2006 reauthorization of Section 5 is also belied by *City of Rome*. There, in upholding the 1975 extension of Section 5, the Supreme Court pointed to no recent "direct" evidence of intentional voting discrimination by covered jurisdictions. Instead, it found that Section 5's reauthorization was justified based on the country's history of intentional discrimination in voting, together with more recent circumstantial evidence of continued voting discrimination, which included evidence of racial disparities in voter registration and turnout, the number of minority elected officials, and the nature and number of Section 5 objections. *See City of Rome*, 446 U.S. at

181. Clearly, then, such evidence is -- at the very least -- relevant in assessing whether Section 5 remains "justified by current needs." *Nw. Austin II*, 129 S. Ct. at 2512.

Not only is Shelby County incorrect to suggest that Section 5 can only be sustained on the basis of recent "direct" evidence of intentional voting discrimination, but it is also wrong to suggest that Congress lacked such evidence when it reauthorized Section 5 in 2006. Having examined the 2006 legislative record, this Court -- like the three-judge court in *Nw. Austin I* -- has found ample evidence of purposeful voting discrimination by covered jurisdictions. The record describes one instance in which Mississippi state legislators opposed a redistricting plan that would have given African-Americans an increased opportunity to elect representatives of their choice, referring to the plan "on the House floor as the 'black plan' and privately as 'the n-plan.'" S. Rep. No. 109-295, at 14. On another occasion, Georgia's Chair of its House Reapportionment Committee told his colleagues in the Georgia legislature that he was uncertain as to the outcome of the state's redistricting process, "because the Justice Department is trying to make us draw nigger districts and I don't want to draw nigger districts." *See Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982); *see also* H.R. Rep. No. 109-478, at 67; *Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 54 (Nov. 9, 2005) (prepared statement of Laughlin McDonald). In Shelby County's home state of Alabama, there were reports of voting officials "closing the doors on African-American voters before the . . . voting hours were over," *see* 1 *Evidence of Continued Need* 182 (Nat'l Comm'n Report), and of white voting officials using racial epithets to describe African-American voters in the presence of federal observers, *see* S. Rep. No. 109-295, at 130, 132. In both Texas and South Carolina, witnesses described various kinds of intimidation and harassment being directed at blacks at the polls, *see* 1 *Evidence of Continued Need* 138 (Nat'l Comm'n Report); S. Rep. No. 109-295, at 307, 311, while one witness from Virginia testified that "hate literature" had been distributed in his neighborhood, threatening to "lynch" African-Americans who voted in particular ways, *see* S. Rep. No. 109-295, at 355. All these examples of intentional voting discrimination took place not in the 1950s or 1960s, but in the 1980s, 1990s, and 2000s.

Yet Shelby County argues that even this kind of evidence carries little weight, as it is merely "anecdotal" and such "anecdotal examples of intentional discrimination" cannot justify the continued operation of Section 5. *See* Pl.'s Reply 39. Again, this Court disagrees. As Professor Theodore Arrington explained in his 2006 testimony before the Senate Judiciary Committee, "[t]he examination of specific cases cannot be dismissed as mere anecdotes," because "anecdote is the singular of data." *Continuing Need* 26 (responses of Theodore S. Arrington to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Kohl) ("Arrington Responses"); *see also Understanding the Benefits and Costs of Section 5 Pre-Clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 19 (May 17, 2006) ("*Benefits and Costs*") (testimony of Drew S. Days III) (explaining that to characterize "examples that are quite concrete . . . violations of the Voting Rights Act . . . as anecdotes, I think, is really to miss the point" since these "so-called anecdotes go right to the very heart of the matter"). Taken together, the large collection of anecdotes in the legislative record constitutes a valid form of data that must be assessed and weighed -- not dismissed as "isolated examples" of voting discrimination, *see* Pl.'s Reply at 39.

Anecdotes are by no means the only form of data in the legislative record that shows the continued existence of unconstitutional voting discrimination by covered jurisdictions. One study relied on by Congress found that 89% of the 209 objections to redistricting plans in the 1990s were based, at least in part, on discriminatory intent. *See Preclearance Standards* 181 (Peyton McCrary et al., "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act") (hereinafter, "McCrary Study"). In other words, the Justice Department determined that discriminatory purpose was a motivating factor in no less than 186 of the redistricting plans proposed by covered jurisdictions during the 1990s. *Id.* at 177, 181. Another study in the legislative record identified 24 lawsuits involving more than one hundred instances of intentionally discriminatory conduct in voting since 1982. *See Impact and Effectiveness* 986 (Katz Study). Such evidence can hardly be dismissed as "anecdotal."

Ultimately, an assessment of all the evidence in the legislative record confirms that Congress was, in fact, responding to what it reasonably perceived to be a continuing history and pattern of unconstitutional conduct by covered jurisdictions when it reauthorized Section 5 in 2006. Although some scholars voiced concern during the 2006 reauthorization hearings that "the Act has been so effective it will be hard to produce enough evidence of *intentional discrimination by the states* so as to justify the extraordinary preclearance remedy for another 25 years," *see, e.g., Introduction to Expiring Provisions* 216 (prepared statement of Richard L. Hasen) ("Hasen Prepared Statement"); *id.* at 221 (prepared statement of Samuel Issacharoff) ("Issacharoff Prepared Statement"), Congress succeeded in doing just that. Despite the marked improvements in minority political participation over the last several decades -- due, in large part, to the effectiveness of the Voting Rights Act -- the 2006 legislative record reveals that, just as in 1975, "'a bleaker side of the picture yet exists.'" *City of Rome*, 446 U.S. at 180 (internal citations omitted).

This Court will begin, as did the three-judge court in *Nw. Austin I*, by examining the three types of evidence relied on by the Supreme Court in *City of Rome* when it upheld the 1975 reauthorization of Section 5 -- evidence of (1) racial disparities in voter registration (and turnout); (2) the number of minority elected officials; and (3) the nature and number of Section 5 objections. The Court will then assess the other types of evidence cited by Congress when it reauthorized Section 5 in 2006, including evidence of (4) more information requests; (5) Section 5 preclearance suits; (6) Section 5 enforcement actions; (7) Section 2 litigation; (8) the dispatch of federal observers; (9) racially polarized voting; and (10) Section 5's deterrent effect. In the course of its review, the Court will call particular attention to the evidence of intentional, state-sponsored voting discrimination contained in the legislative record, keeping in mind that there must be "a history and pattern of unconstitutional [conduct] by the States" to justify a remedial, prophylactic measure like Section 5. *See Garrett*, 531 U.S. at 368.

1. Minority Voter Registration and Turnout

Shelby County points to the "dramatic rise in African-American voter registration and turnout rates" since 1965 as evidence that Section 5's protections are no longer constitutionally justified. *See* Pl.'s Reply at 44; *see also* Pl.'s Mot. at 25-26. It is true that there has been a substantial increase in black voter registration and turnout in the South since the Voting Rights Act was first enacted. *See* 1 *Evidence of Continued Need* 156-57 (Nat'l Comm'n Report). In 1964, the year before the Act's passage, the black voter registration rate was only 32% in Louisiana, 23% in Alabama, and a meager 6.7% in Mississippi. *Id.* In each of these states, the white voter registration rate was at least 50 percentage points higher than the corresponding rate for blacks. *See Katzenbach*, 383 U.S. at 313. Only ten years later, however, black voter registration rates in the South had already increased substantially -- no doubt as a result of the Act's prohibition of those tests and devices that had previously been employed to deny blacks access to the ballot. *See* S. Rep. No. 94-295, at 779. In Mississippi, for example, the percentage of blacks who were registered to vote multiplied almost tenfold in the seven years following the Act's passage, jumping from 6.7% in 1964 to 63.2% in 1971-1972. *Id.*

But in spite of these significant improvements, the Supreme Court in *City of Rome* remained troubled by the "[s]ignificant disparity" that "persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions." 446 U.S. at 180. In 1975, black voter registration rates in Alabama, Louisiana, and North Carolina continued to lag behind those of whites by as much as 23.6, 16, and 17.8 percentage points, respectively. *See* S. Rep. No. 94-295, at 779. Hence, while "the *City of Rome* Court acknowledged the dramatic progress the South had made since 1965," it still "found the evidence of continued discrimination sufficient to justify the 1975 extension" of the Act's temporary provisions. *See Nw. Austin I*, 573 F. Supp. 2d at 247. After *City of Rome*, then, the question is not whether there has been substantial improvement in minority voter registration and turnout since the Act's passage in 1965 (or even since the Act's reauthorization in 1975 or 1982), but whether, in spite of this substantial improvement, there remained significant racial disparities in voter registration and turnout when Congress reauthorized Section 5 in 2006. *See id.*

Just as in 1975, Congress in 2006 did find that significant disparities persisted between minority and non-minority voter registration and turnout in several jurisdictions subject to preclearance under Section 5. In Virginia, for example, Congress reported that the black voter registration rate in 2004 was almost 11 percentage points behind the corresponding rate for whites, while the racial disparity in voter turnout was even greater, with only 49% of blacks turning out to vote, as compared to

63% of whites. *See* H.R. Rep. No. 109-478, at 25. Similarly, in Texas, Congress found a 20 percentage point gap in voter registration between whites and Hispanics, *id.* at 29, with an even greater gap in voter turnout, *see* S. Rep. No. 109-295, at 11. Nationwide, the 2004 voter registration and turnout rates for Hispanics were approximately half the corresponding rates for whites, with only 34.3% of Hispanics registering and 28% turning out to vote, as compared to 67.9% and 60.3% for whites. *Id.* Although the difference between black and white voter registration and turnout rates was less significant, blacks nationwide still registered and turned out to vote at rates below those of whites in 2004, with only 64.3% of blacks registering, and 56.1% of blacks turning out to vote. *Id.*

Moreover, as the three-judge court in *Nw. Austin I* pointed out, these statistics understate the true disparities between minority and non-minority voter registration and turnout. That is because in computing the voter registration and turnout rates for whites, Congress included Hispanics. *See Nw. Austin I*, 573 F. Supp. 2d at 248. Given the low registration and turnout rates of Hispanic voters, the inclusion of these voters in the "white" category served to lower the overall white voter registration and turnout rates reported by Congress, thereby reducing the true disparity between black and white voter registration and turnout (as well as the disparity between Hispanic and white voter registration and turnout). *See id.*; *see also* Persily, 117 YALE L.J. at 197 (explaining that "once Hispanics are taken out of the white category the picture changes considerably"). For instance, Congress reported that in five of the 16 states covered in whole or in part by Section 4(b) (California, Georgia, Mississippi, North Carolina, and Texas), voter registration and turnout in 2004 was *higher* among blacks than whites. *See* S. Rep. No. 109-295, at 11. But when black voter registration and turnout rates are compared to the rates for *non-Hispanic* whites, only one of these states (Mississippi) had higher black than white voter registration and turnout in 2004. *See Nw. Austin I*, 573 F. Supp. 2d at 248. In each of the other states covered in whole or in part by Section 4(b) for which comparative data was available, voter registration was lower for blacks than for non-Hispanic whites. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004 tbl. 4a., Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States, *available at* http://www.census.gov/population/www/socdemo/voting/cps2004.html (hereinafter, "2004 U.S. Census Bureau Report") (last visited September 19, 2011); *see also* S. Rep. No. 109-295, at 11 (relying on 2004 U.S. Census Bureau Report).[12]

In many covered states, the disparities between black and non-Hispanic white voter registration and turnout were stark: in both Arizona and Florida, for example, voter turnout rates among non-Hispanic whites were more than 20 percentage points higher than voter turnout rates among blacks, while in Louisiana and Texas, voter registration rates among non-Hispanic whites were more than five percentage points higher than voter registration rates among blacks. *See* 2004 U.S. Census Bureau Report. When the data for non-Hispanic whites are used, the disparities between black and white voter registration and turnout rates in Virginia become even more pronounced than those reported by Congress. Whereas Congress found that Virginia had a 10.8 percentage point racial disparity in voter registration and a 14 percentage point racial disparity in voter turnout, *see* H.R. Rep. No. 109-478, at 25, the racial disparities become 14.2 and 16.6 percentage points, respectively, when black voter registration and turnout rates are compared to the rates for non-Hispanic whites. *See* 2004 U.S. Census Report.

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[12] In North Carolina and Alabama, for which the 2004 voter *registration* rate for blacks was lower than the rate for non-Hispanic whites, the voter *turnout* rate for blacks was higher than the rate for non-Hispanic whites. *See* 2004 U.S. Census Bureau Report. Aside from North Carolina, Alabama and Mississippi, all of the remaining 14 states covered in whole or in part by Section 4(b) had lower voter registration *and* turnout rates for blacks than for non-Hispanic whites. *See id.*

The 2004 disparities between Hispanic and white voter registration also become more severe when Hispanics are taken out of the "white" category. Although Congress reported a 20 percentage point gap in voter registration between Hispanics and whites in Texas in 2004, *see* H.R. Rep. 109-478, at 29, the gap increases to 32.1 percentage points when the rate for Hispanics is compared to the rate for non-Hispanic whites, *see* 2004 U.S. Census Report. Even greater gaps between Hispanics and non-Hispanic whites existed in other covered jurisdictions, with Hispanics in Arizona, California and Virginia registering in 2004 at rates more than 40 percentage points lower than the corresponding rates for non-Hispanic whites. *See id.* In Georgia and North Carolina, the racial disparities in registration rates between Hispanics and non-Hispanic whites were the highest of any covered jurisdictions, with only 9.6% of Hispanics registering to vote in Georgia and 13.4% of Hispanics registering to vote in North Carolina, as compared to 68% and 73.2% of non-Hispanic whites, respectively -- in other words, there was almost a 60 percentage point gap in voter registration between Hispanics and non-Hispanic whites in both Georgia and North Carolina. *See id.*

As the three-judge court in *Nw. Austin I* explained, these disparities in voter registration and turnout are "comparable to the disparity the *City of Rome* Court called 'significant.'" 573 F. Supp. 2d at 248 (quoting *City of Rome*, 446 U.S. at 180). In *City of Rome*, the Court deemed as "significant" the 16, 17.8, and 23.6 percentage point disparities in voter registration rates then-existing between blacks and whites in Louisiana, North Carolina, and Alabama. *See* S. Rep. No. 94-295, at 779; *City of Rome*, 446 U.S. at 180. In 2004, there were 14.2, 17.8, and 19.2 percentage point disparities between black and white voter registration rates in Virginia, Arizona, and Florida, respectively (using the data for non-Hispanic whites). *See* 2004 U.S. Census Report. Moreover, there were far greater gaps between Hispanic and non-Hispanic white voter registration rates than even those held "significant" in *City of Rome*, with disparities nearing 60 percentage points in two covered jurisdictions. *See id.*

2. Minority Elected Officials

Shelby County next points to the dramatic increase in the number of African-American elected officials since

1965 as proof that Section 5 has outlived its usefulness. *See* Pl.'s Mot. at 27-28; Pl.'s Reply at 46-47. Again, however, the number of African-American elected officials had already risen substantially by the time that Section 5 was reauthorized in 1975. Whereas there were only 72 black elected officials in the 11 southern states when the Voting Rights Act was first passed in 1965, there were 963 black elected officials in the seven southern states subject to preclearance by 1974, including 68 black state legislators. *See* S. Rep. No. 94-295, at 780. Yet the Supreme Court in *City of Rome* did not regard this progress as fatal to the 1975 reauthorization of the Act's temporary provisions. Although the Court recognized that "the number of Negro elected officials had increased since 1965," *see City of Rome*, 446 U.S. at 180, the Court nonetheless heeded Congress's advice "not to be misled by sheer numbers." *See* S. Rep. No. 94-295, at 780. Instead, it examined the *nature* of the positions to which African-Americans had been elected, and found that "most held only minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *See City of Rome*, 446 U.S. at 181.

As of 2000, 35 African-Americans held statewide office -- certainly an improvement from 1975 -- but the percentage of statewide elected officials who were African-American (5%) was still significantly below the African-American proportion of the voting-age population (11.9%). *See* 1 *Evidence of Continued Need* 156-58 (Nat'l Comm'n Report); H.R. Rep. No. 109-478, at 33. The House Committee on the Judiciary found that in Mississippi, Louisiana, and South Carolina -- all of which have been subject to preclearance since 1965 -- no African-American had ever been elected to statewide office. *See* H.R. Rep. No. 109-478, at 33. And in Alabama, only two African-Americans had ever been elected to statewide office as of 2006. *See* S. Rep. No. 109-295, at 133 (citing *Benefits and Costs* 97 (responses of Fred D. Gray to questions submitted by Senators Cornyn, Leahy, Coburn, and Kennedy) ("Gray Responses")).

Congress also heard evidence in 2006 that blacks were under-represented in state legislatures in the South based on their percentage of the population. Specifically, the House Committee on the Judiciary reported that in Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, blacks comprised 35% of the population, but only 20.7% of the state legislators. *See* H.R. Rep. 109-478, at 33. The House Committee on the Judiciary similarly found that the number of Latino elected officials had "failed to keep pace with [their] population growth." *See id.* at 33-34. Shelby County objects to the Court's reliance on such evidence in assessing the continued need for Section 5, arguing that "proportional representation is not a constitutional aim." *See* Pl.'s Reply at 46. That may be true. But in upholding the constitutionality of the 1975 reauthorization of Section 5 in *City of Rome*, the Supreme Court noted that the percentage of black elected officials in covered jurisdictions still fell short of their total percentage of the population. *See City of Rome*, 446 U.S. at 181. Following *City of Rome*, then, it is at least relevant that the percentage of minority elected officials continued to lag behind the minority percentage of the population when Congress reauthorized Section 5 in 2006.

3. Section 5 Objections

The Supreme Court in *City of Rome* cited "[t]he recent objections entered by the Attorney General . . . to Section 5 submissions" as a clear indication of the "*Continuing Need* for this preclearance mechanism." 446 U.S. at 181 (quoting H.R. Rep. No. 94-196, at 10-11). So, too, did Congress in 2006 point to the "hundreds of objections interposed" by the Attorney General in recent years as "[e]vidence of continued discrimination in voting" that warranted the reauthorization of Section 5. *See* 2006 Amendments § 2(b)(4)(A), 120 Stat. at 577. Shelby County, however, argues that objection-related data cannot sustain the constitutionality of Section 5 for two reasons. First, Shelby County points to the fact that the number of Section 5 objections "has become exceedingly small" over the past several decades, as the Attorney General objected to less than 1% of all preclearance submissions between 1982 and 2004. *See* Pl.'s Reply at 56 (internal citations omitted). Second, Shelby County contends that objections are not "legitimate proxies for the type of purposeful discrimination needed to reauthorize Section 5." Pl.'s Mot. at 32. Both of these contentions are somewhat misleading.

With respect to Shelby County's first argument, it is undeniable that the percentage of preclearance submissions resulting in an objection -- which has always been low -- has continued to decline steadily over time. *See* 1 *Evidence of Continued Need* 197 (Nat'l Comm'n Report). Whereas the Justice Department objected to 4.06% of all preclearance submissions from 1968 to 1972, the objection rate dropped in each successive five-year interval between 1972 and 2002, reaching a low of .05% during the 1998 to 2002 time-frame. *See Introduction to Expiring Provisions* 219 (attachment to Hasen Prepared Statement). Since 2002, the objection rate has remained below 1%, with the Justice Department issuing only eight objection letters in response to 4,628 preclearance submissions in 2003, three objection letters in response to 5,211 preclearance submissions in 2004, and one objection letter in response to 4,734 preclearance submissions in 2005. *See* S. Rep. No. 109-295, at 13-14.

The decline in objection rates does not tell the full story, however. Notwithstanding the low rates of objections in recent years, the Justice Department still objected to more than 700 proposed voting changes between 1982 and 2006. *See* H.R. Rep. No. 109-478, at 21; S. Rep. No. 109-295, at 13. Moreover, the National Commission on the Voting Rights Act reported that more objections were interposed by the Attorney General between 1982 and 2004 than between 1965 and 1982, with nine of the 16 states covered by Section 4(b) receiving more objections after 1982 than before. *See* 1 *Evidence of Continued Need* 172-73 (Nat'l Comm'n Report); *see also* H.R. Rep. No. 109-478, at 21. To be sure, the two time-periods (1965 to 1982 and 1982 to 2004) are not equal in length, but it remains true that a substantial number of objections have been lodged since the 1982 reauthorization of Section 5. According to the National Commission on the Voting Rights Act, the Justice Department objected to an average of more than four preclearance submissions *per month* from August 1982 through December 2004. *Id.* at 172.

It is also significant to recall that a single objection can often affect thousands of voters, as objections are lodged not only in response to small-scale electoral changes such as the moving of a polling place, but also in response to large-scale changes such as state-wide redistricting plans. *See Continuing Need* 58 (Earls Responses). For example, in Alabama, the Justice Department objected to 39 preclearance submissions from 1982 through 2004, *see* 1 *Evidence of Continued Need* (Nat'l Comm'n Report) 259 (Map 5C), but these 39 objections included an objection to a congressional redistricting plan and several objections to county-wide redistricting plans, *see* 1 *History, Scope, & Purpose* 109-17 (appendix to statement of Bradley J. Schlozman, Complete Listing of Objections Pursuant to Sections 3(c) and 5 of the Voting Rights Act of 1965). In Louisiana, the Justice Department objected to 88 voting changes between 1982 and 2004, *see* 1 *Evidence of Continued Need* (Nat'l Comm'n Report) 264 (Map 5F), including *every* Louisiana House of Representatives redistricting plan that was submitted for preclearance. Indeed, from the passage of the Voting Rights Act in 1965 through its reauthorization in 2006, "[n]o Louisiana House of Representatives redistricting plan . . . has been precleared as initially submitted." *Introduction to Expiring Provisions* 152 (responses of Theodore M. Shaw to questions submitted by Senators Specter, Cornyn, Leahy, Kennedy, and Schumer) ("Shaw Responses").

Alabama and Louisiana are by no means unique among covered jurisdictions with respect to the receipt of objections in response to their redistricting plans. Even though redistricting plans accounted for only 2.4% of the preclearance submissions from 1982 through 2004, they accounted for 16.4% of the Section 5 objections during that time-frame. *See* U.S. Commission on Civil Rights, *Voting Rights Enforcement & Reauthorization: The Department of Justice's Record of Enforcing the Temporary Voting Rights Act Provisions* 33 (May 2006), *available at* http://www.usccr.gov/pubs/051006VRAStatReport.pdf (last visited September 19, 2011). Given that many of these redistricting plans were state- or county-wide, it is perhaps unsurprising that Section 5 objections from 2000 through May 2006 have aided an estimated 663,503 minority voters. *Continuing Need* 58 (Earls Responses). According to data compiled by one expert, a mere nine objections to South Carolina preclearance submissions during this time-frame served to protect 96,143 African-American voters, while six objections to Texas preclearance submissions served to protect 359,978 African-American and Hispanic voters. *Id.* Irrespective of the decline in objection rates, then, there is strong evidence that Section 5 has remained a "vital prophylactic" tool in "protecting minority voters from devices and schemes that continue to be employed by covered States and jurisdictions." H.R. Rep. No. 109-478, at 21.

There are many plausible explanations for the recent decline in objection rates, aside from the optimistic one urged by Shelby County -- *i.e.*, that "the discriminatory agenda of the covered jurisdictions that existed in 1965 . . . no longer exists," Pl.'s Mot. at 29. To begin with, Section 5 submissions (and associated objections) are always greatest in the years immediately following redistricting cycles, which occur at the beginning of the decade. *See*, *e.g.*, *Continuing Need* 54 (Earls Responses); *Introduction to Expiring Provisions* 165-66 (Shaw Responses). It is therefore to be expected that the number of preclearance submissions -- and hence, objections -- would be low in a mid-decade year like 2005. *See Continuing Need* 54 (Earls Responses).

In addition, many have speculated that the Supreme Court's 2000 decision in *Bossier II* is at least partially responsible for the post-2000 decline in objection rates. *See, e.g., id.* at 54, 69-70; *Preclearance Standards* 14 (Posner Prepared Statement); 1 *Evidence of Continued Need* 198-99 (Nat'l Comm'n Report). As previously explained, the Supreme Court in *Bossier II* "held that discriminatory purpose under Section 5 no longer is co-extensive with the ordinary meaning of discriminatory purpose or with the meaning of discriminatory purpose under the Fourteenth and Fifteenth Amendments." *See Preclearance Standards* 12 (Posner Prepared Statement). Instead, in *Bossier II* the Supreme Court found that discriminatory purpose under Section 5 encompasses only "the intent to cause retrogression." *Id.* Therefore, in order to object to a voting change under the "purpose" prong of Section 5 after *Bossier II*, the Justice Department needed to find "not simply that the jurisdiction officials' purpose was to discriminate, but that it was to make the situation for minorities worse than before - i.e., that the officials intended to 'retrogress.'" 1 *Evidence of Continued Need* (Nat'l Comm'n Report) 198. The difficulty of proving that state officials intended to retrogress could explain the decline in purpose-based objections (and hence, total objections) in the wake of *Bossier II*. As one voting rights lawyer has pointed out, if the *Bossier II* interpretation of "discriminatory purpose" had applied prior to 2000, it would have required the Justice Department to preclear even the redistricting plan proposed by the notorious Georgia "state legislator who openly declared his opposition to drawing a 'nigger district,'" because the plan -- though motivated by an unabashed intent to discriminate -- was not retrogressive. *Id.* at 199.

Other potential explanations for the recent decline in objection rates include under-enforcement of Section 5 by the Justice Department, which some former attorneys in the Voting Section believe to be the case, *see* 1 *Evidence of Continued Need* 197-98 (Nat'l Comm'n Report); *Continuing Need* 54 (Earls Responses) (suggesting that there have been "circumstances where the Department should have objected, but failed to"), or the possibility that the Justice Department has increasingly relied on "more information requests" and other types of informal communications with covered jurisdictions -- rather than objection letters -- as the primary means of preventing discriminatory voting changes, *Continuing Need* 57 (Earls Responses). Finally, even if the decline in objection rates does reflect increased compliance with the Voting Rights Act on the part of covered jurisdictions, as some have suggested, *See, e.g.*, 1 *History, Scope, & Purpose* 12 (prepared statement of Bradley J. Schlozman) (stating that the "tiny objection rate reflects the overwhelming - indeed, near universal - compliance with the Voting Rights Act by covered jurisdictions"), that is not necessarily indicative of a widespread change in racial attitudes. Rather, it could just as easily mean that "covered jurisdictions have accepted Section 5 as a principle they *must* comply with whenever they make a voting change, like it or not, and they have developed procedures for substantially increasing the likelihood of preclearance." 1 *Evidence of Continued Need* 200 (Nat'l Comm'n Report).

But whatever the explanation for the declining objection rate in recent years, the fact remains that the Justice Department issued 754 objection letters between 1982 and 2006, *see* S. Rep. 109-295, at 13, many of which were based on findings of discriminatory intent, *see Nw. Austin I*, 573 F. Supp. 2d at 221. Shelby County is correct that not all objection letters "involve actual intentional discrimination," *see* Pl.'s Reply at 58, given that Section 5 prohibits a "somewhat broader swath of conduct," *see Kimel*, 528 U.S. at 81, than the Fifteenth Amendment itself proscribes. But the Attorney General only denies preclearance to a voting change under Section 5 if he cannot conclude that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *See* 42 U.S.C. § 1973c(a). In its attempt to minimize the significance of the objection-related data in the legislative record, Shelby County ignores the substantial number of objections that the Attorney General has made under Section 5's "purpose" prong in recent years -- even though, as the *Nw. Austin I* three-judge court recognized, these intent-based objections "provide particularly salient evidence of potentially unconstitutional state action." 573 F. Supp. 2d at 252.

According to one study in the legislative record, as many as 43% of all Section 5 objections in the 1990s were based solely on discriminatory intent, while another 31% of objections were based at least in part on discriminatory intent. *See Preclearance Standards* 136, 180 tbl. 2 (McCrary Study). In other words, "the intent prong was involved in a remarkable 74 percent of all objections in that decade." *Id.* Congress also heard testimony that until *Bossier II* was decided, "the clear trend line, from the 1970s to the 1980s to the 1990s, was that discriminatory purpose increasingly was the basis on which Section 5 objections were being interposed." *Id.* at 13 (Posner Prepared Statement). From 1980 to 2000, the Attorney General lodged as many as 421 objections that were at least partially based on discriminatory intent, with 234 of those objections based *solely* on discriminatory intent. *Id.* at 180 tbl. 2 (McCrary Study). Purpose-based objections were particularly prevalent in the redistricting context, as approximately 80% of the Justice Department's objections to post-1990 redistricting plans were based on discriminatory intent. *Id.* at 13 (Posner Prepared Statement). In light of this data, the House Committee on the Judiciary had ample support for its conclusion in 2006 that the voting changes being sought by covered jurisdictions "were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21.

The legislative record contains countless examples of objection letters since 1982 in which the Justice Department has denied preclearance to a jurisdiction's proposed voting change because the jurisdiction failed to establish the absence of a discriminatory purpose for its change. For instance, in 2001, the all-white Board of

Aldermen in Kilmichael, Mississippi, cancelled a general election three weeks before it was scheduled to occur -- with no notice to the community -- after Census data showed that the town had recently become majority African-American, and after a significant number of African-Americans had been qualified as candidates in the aldermen and mayoral races. *See* H.R. Rep. No. 109-478, at 36-37; *Continuing Need* 60, 67 (Earls Responses); S. Rep. No. 109-295, at 225, 230-32; 1 *History, Scope, & Purpose* 1617 (appendix to statement of Bradley J. Schlozman, Copies of Objection Letters, by State, from 1980 to October 17, 2006) (hereinafter, "Schlozman Appendix"). The Justice Department objected to the town's decision to cancel the election, noting the suspicious "context in which the town [had] reached its decision" -- that is, "only after black persons had become a majority of the registered voters" and "only after the qualification period for the election had closed, and it [had] bec[o]me evident that there were several black candidates for office." 1 *History, Scope, & Purpose* 1617 (Schlozman Appendix). Because "[t] he town's purported non-racial rationales for the decision d[id] not withstand scrutiny," *id.*, the Justice Department forced Kilmichael to reschedule the election, whereupon the town elected its first African-American mayor, as well as three African-American aldermen, *see* H.R. Rep. No. 109-478, at 37.

The year after it objected to Kilmichael's cancelled election, the Justice Department objected to a redistricting plan proposed by the city of Albany, Georgia, based on its determination that Albany, too, had not "carried its burden of showing that its proposed plan was not designed with the intent to limit and retrogress the increased black voting strength." *See* 1 *History, Scope, & Purpose* 846 (Schlozman Appendix). The Justice Department examined Albany's history of redistricting with respect to Ward 4, which, it found, revealed an "intent to maintain Ward 4 as a district that remains at the . . . level of 70 percent white, thus eliminating any ability of black voters to elect a candidate of choice in this district." *Id.* After the black population in Ward 4 doubled from 20% to 40% during the 1980s, Albany adopted a redistricting plan that reduced the Ward's population to 30% black. Then, after the black population in Ward 4 increased from 30% to almost 51% during the 1990s, the city sought preclearance for another redistricting plan that would have reduced the population in Ward 4 to 30% black. *Id.* at 846-47. The Justice Department objected to the proposed plan, noting that "implicit" in the plan was "an intent to limit black political strength in the city to no more than four districts." *Id.* at 847.

Another intent-based objection was lodged against the 2001 redistricting plan proposed by Milden, Louisiana, in which the city "explicitly decided to eliminate one of the three existing majority minority districts," even though "it was not compelled to redraw the district," and had been "presented with an alternative that met all of its legitimate criteria while maintaining the minority community's electoral ability." *Id.* at 1150-52. The Justice Department interposed yet another intent-based objection to a redistricting plan submitted by Sumter County, South Carolina, that same year, after the county council "explicitly decided to . . . eliminate one of the four existing majority minority districts" despite the fact that the district's elimination had been "easily avoidable." *See* 2 *Voting Rights Act: Section 5 of the Act - History, Scope, and Purpose, Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2082-84 (Oct. 25, 2005) (hereinafter, "2 *History, Scope, & Purpose*") (Schlozman Appendix). In explaining the basis of its objection, the Justice Department noted that the county had not been forced to redraw the district and that it had rejected an alternative, non-retrogressive plan. *Id.* at 2083-84. Under the circumstances, the Justice Department was unable to conclude "that the action in question was not motivated by a discriminatory intent to retrogress." *Id.* at 2084.

These are just a few examples of the post-1982 objections to redistricting plans that have been lodged -- at least in part -- on the basis of discriminatory intent. There are many others. *See, e.g.*, 1 *History, Scope, & Purpose* 433 (Schlozman Appendix) (objecting to 1998 redistricting plan by Tallapoosa County, Alabama, because "the history of the instant redistricting process and its results raise serious concerns that the county . . . purposely impaired the ability of black voters to elect a candidate of choice"); *id.* at 412 (objecting to Greensboro, Alabama's 1993 redistricting plan on the ground that "the opportunity for black voters to elect a representative of their choice . . . appears to have been constrained deliberately"); *id.* at 1410 (objecting to Mississippi's 1991 statewide legislative redistricting plan where it appeared "that the proposed plan is calculated not to provide black voters in the Delta with the equal opportunity for representation required by the Voting

Rights Act"); *id.* at 830 (objecting to 2000 redistricting plan for Webster County, Georgia's board of education, where the plan was created shortly after the county had elected its first majority-black board, and the county's proffered reasons for the plan appeared to be "merely pretexts for intentionally decreasing the opportunity of minority voters to participate in the electoral process"); *id.* at 1611 (objecting to 1997 redistricting plan by Grenada, Mississippi, based on "substantial direct and circumstantial evidence of discriminatory purpose"); *id.* at 1516 (refusing to withdraw objection to Greenville, Mississippi's 1991 redistricting plan, which "appeared to have been motivated by a desire on the part of white city councilmembers to retain white control of the city's governing body," and explaining that since the plan's proposal, "white city officials [have] continue[d] to engage in race-based decisionmaking and to design schemes the purpose of which is to avoid black control of city government").

The Justice Department's intent-based objections over the last few decades have not been limited to redistricting plans. On several occasions, the Justice Department has suspected that discriminatory purpose was a motivating factor in a covered jurisdiction's change of a polling location. In 1992, for example, the Justice Department objected to Johnson County, Georgia's decision to move a polling place from the county courthouse to the American Legion. In its objection letter, the Justice Department noted that the American Legion had "a wide-spread reputation as an all-white club with a history of refusing membership to black applicants" and that "the American

Legion hall, itself, is used for functions to which only whites are welcome to attend." *Id.* at 727. Given its reputation and history, the American Legion created an obviously "hostile and intimidating" atmosphere for black voters, and had "the effect of discouraging black voters from turning out to vote." *Id.* Because Johnson County failed to meet its burden of proving that its relocation of the polling place had neither a discriminatory purpose nor effect, the Justice Department denied preclearance to the proposed change. *See id.*; *see also* 2 *History, Scope, & Purpose* 2428 (Schlozman Appendix) (objecting to 1994 polling place change by Marion County, Texas, where the change "appear[ed] to be designed, in part, to thwart recent black political participation"); *id.* at 2579 (objecting to 1999 polling place change by Dinwiddie County, Virginia, in part because "the sequence of events leading up to the decision to change the polling place . . . tends to show a discriminatory purpose"); *id.* at 2302 (objecting to 1991 polling place change proposed by district in Lubbock County, Texas, where polling "site selections . . . would seem calculated to discourage turnout among minority voters").

So, too, has the Justice Department denied preclearance to jurisdictions' proposed changes to their methods of election where there has been reason to believe that the changes were racially inspired. For instance, the Justice Department objected to Bladen County, North Carolina's 1987 attempt to change its method of election for its board of county commissioners from at-large elections to three double-member and one at-large district. Although the Justice Department found that the change would not have a retrogressive effect, it nonetheless denied preclearance to the change based on its inability to conclude "that the proposed election system is free from discriminatory purpose." *Id.* at 1761. According to the Justice Department, the evidence presented by the county demonstrated that "the responsible public officials [had] desired to adopt a plan which would maintain white political control to the maximum extent possible and thereby minimize the opportunity for effective political participation by black citizens." *Id.* at 1762. Indeed, the Justice Department explained, "it appears that the board undertook extraordinary measures to adopt an election plan which minimizes minority voting strength." *Id.* A similar intent-based objection was interposed in response to Wilson County, North Carolina's 1986 change to its system for electing county commissioners, in light of the Justice Department's determination that the county's method of election had been purposefully "designed and intended to limit the number of commissioners black voters would be able to elect." *Id.* at 1731.

The legislative record also contains examples of objection letters issued in response to jurisdictions' proposed annexations, in which the Justice Department has denied preclearance based on its inability to conclude that the annexation was free from discriminatory animus. In 1990, for example, the Justice Department objected to the decision by Monroe, Louisiana, to annex certain wards for the Monroe City Court, explaining that the annexations would have reduced the black percentage of the City Court's jurisdiction from 48.4% to 39.2%. 1 *History, Scope, & Purpose* 927 (Schlozman Appendix). The

Justice Department also expressed concern regarding the timing of the annexations, noting that one of the annexed wards "had been eligible to be added to the City Court jurisdiction since at least 1970," but that there had been "little or no interest in implementing this change until immediately prior to the 1984 City Court primary election, which we understand was marked by the presence of the first black candidate for the City Court." *See* 1 *History, Scope, & Purpose* 927-28 (Schlozman Appendix); *see also* H.R. Rep. No. 109-478, at 23. Similarly, the Justice Department in 1997 objected to the annexations proposed by the city of Webster, Texas, where "the city's annexation choices appear[ed] to have been tainted, if only in part, by an invidious racial purpose." 2 *History, Scope, & Purpose* 2492 (Schlozman Appendix).

Given these and the many other intent-based objections in the 15,000-page legislative record, the House Committee on the Judiciary had good reason to conclude in 2006 that Section 5 was still fulfilling its intended function of preventing covered jurisdictions from implementing voting changes "intentionally developed to keep minority voters and candidates from succeeding in the political process." H.R. Rep. No. 109-478, at 36.

4. More Information Requests

In reauthorizing Section 5 in 2006, Congress did not rely only on objection letters to evaluate the continued existence of voting discrimination by covered jurisdictions; it relied as well on so-called "more information requests" ("MIRs") by the Attorney General. *See* H.R. Rep. No.

109-478, at 40; 2006 Amendments § 2(b)(4)(A), 120 Stat. at 577. An MIR is a formal letter issued in response to a preclearance submission when the submission contains insufficient information for the Attorney General to determine whether the proposed voting change violates Section 5. *See* H.R. Rep. No. 109-478, at 40. When a covered jurisdiction receives an MIR, it can either (1) supply the requested information; (2) withdraw the proposed voting change; (3) submit a new proposed change that supersedes the prior change; or (4) choose not to respond. *Id.*; *see also* 2 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2545 (Mar. 8, 2006) (hereinafter, "2 *Evidence of Continued Need*") (Luis Ricardo Fraga & Maria Lizet Ocampo, *The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests*) (hereinafter, "Fraga & Ocampo Study"). In its 2006 examination of MIRs, the House Committee on the Judiciary found that "[t]he actions taken by a jurisdiction [in response to an MIR] are often illustrative of a jurisdiction's motives." H.R. Rep. No. 109-478, at 40. In particular, a covered jurisdiction's decision to withdraw its proposed change, submit a superseding change, or not respond to an MIR frequently constitutes a "tacit admission" that its originally-proposed change was, in fact, discriminatory. *See* 1 *Evidence of Continued Need* 178 (Nat'l Comm'n Report).

It is significant, then, that between 1982 and 2003, at least 205 proposed voting changes were withdrawn by covered jurisdictions after receipt of an MIR. *Id.*; *see also* H.R. Rep. No. 109-478, at 41. According to one study in the legislative record, MIRs resulted in a total of 855 withdrawals, superseding changes, and "no responses" by covered jurisdictions from 1990 through 2005. *See* 2 *Evidence of Continued Need* 2553 (Fraga & Ocampo Study). To be sure, not all of these withdrawals, superseding changes, or "no responses" represent concessions on the part of the covered jurisdiction that its initially-proposed voting change had an impermissible discriminatory purpose or effect. It is plausible that covered jurisdictions choose to withdraw their proposed electoral changes or not respond to MIRs for other reasons -- for example, because "responding is more costly than not implementing the change." *See, e.g., Continuing Need* 113 (Pildes Responses). But Shelby County is wrong to characterize voluntary withdrawals or "no responses" to MIRs as showing only that "bureaucratic hurdles to preclearance erected by DOJ have deterred covered jurisdictions from making nondiscriminatory voting changes." *See* Pl.'s Mot. at 46. Although it is unlikely that all withdrawals, superseding changes, and "no responses" represent successfully-thwarted attempts by covered jurisdictions to implement purposefully discriminatory voting changes, Congress found that, together "[t]he increased number of objections, revised submissions, and withdrawals over the last 25 years are strong indices of continued efforts to discriminate." H.R. Rep. No. 109-478, at 36; *see also Continuing Need* 112-13 (Pildes Responses) (explaining the need for "more qualitative information on the *reasons* jurisdictions respond as they do [to MIRs] to know what percentage of these responses in fact do signal changes that would have violated the VRA," but recognizing the likelihood that at least "some of these non-responses reflect the fact that the jurisdiction's proposed change would have violated the VRA").

5. Judicial Preclearance Suits

Even more probative of the continued existence of voting discrimination than withdrawals or "no responses" to MIRs, however, are the lawsuits in which a three-judge court has denied preclearance to a covered jurisdiction's proposed voting change. As previously explained, a covered jurisdiction may *seek* a declaratory judgment from a three-judge panel of this Court that its proposed voting change has neither a discriminatory purpose nor effect instead of submitting its change to the Attorney General for preclearance. *See, e.g.*, *Nw. Austin II*, 129 S. Ct. at 2509; 42 U.S.C. § 1973c. Although most jurisdictions choose the latter route, some have filed declaratory judgment actions seeking approval of their proposed voting changes since the passage of the Voting Rights Act in 1965. *See Nw. Austin I*, 573 F. Supp. 2d at 255. Forty-two of these declaratory judgment actions have been unsuccessful -- meaning that the three-judge court either denied preclearance to the proposed change, the jurisdiction withdrew the change, the case was dismissed, or a consent decree that cured the problem was reached. *See* 1 *Evidence of Continued Need* 177, 235 (Nat'l Comm'n Report). Of these 42 unsuccessful declaratory judgment actions, 25 occurred after 1982. *Id.* at 178, 270.

Most importantly, as the three-judge court in *Nw. Austin I* pointed out, "the legislative record contains several examples of judicial decisions denying preclearance that reveal evidence of intentional discrimination." 573 F. Supp. 2d at 255. In one particularly egregious example, which occurred shortly before the 1982 reauthorization of Section 5, a three-judge panel of this Court denied preclearance to Georgia's proposed 1981 congressional redistricting plan based on its finding that the plan had a discriminatory purpose under Section 5. *See* 1 *Evidence of Continued Need* 503-508 (ACLU Report); *Busbee*, 549 F. Supp. at 517. Georgia began its congressional redistricting process after the 1980 census showed that the state's ten existing districts -- all of which were majority-white with the exception of the Fifth District -- had become severely malapportioned. Under the leadership of Joe Mack Wilson, Chair of the state's House Reapportionment Committee, Georgia created a redistricting plan that maintained its nine majority-white districts, and split the large, contiguous black population of the Atlanta metropolitan area between the Fourth and Fifth Districts, thereby ensuring that blacks would still comprise a majority of the Fifth District, but would only constitute 46% of the registered voters there. *See Busbee*, 549 F. Supp. at 498-99. Because Georgia's plan increased the percentage of blacks in the Fifth District, however, it was not retrogressive, and therefore "technically . . . [did] not have a discriminatory effect, as that term has been construed under the Voting Rights Act." *Id.* at 516-17.

The three-judge court nonetheless denied preclearance to the plan based on its conclusion that the plan had been "the product of purposeful racial discrimination." *See id.* at 517-18. In reaching this determination, the court made an express finding that "Representative Joe Mack

Wilson is a racist." *Id.* at 500. The court cited Wilson's now-infamous statement that he did not want to draw "nigger districts," *id.* at 501, as well as testimony from other Georgia legislators, who conceded that they, too, had intentionally sought to "keep the Fifth District 'as white as possible . . . but just within the limits . . . to satisfy the Voting Rights Act . . . .'" *Id.* (internal citation omitted). As one state legislator explained, "'the motivation of the House leadership' in creating the Fifth District . . . was to 'increase [the percentage of the black population] just enough to say they had increased it [and] so that it would look like they had increased it, but they knew they had not increased it enough to elect a black." *Id.* (internal citation omitted). Another state senator admitted that he had felt obliged to vote for the plan because he "[didn't] want to have to go home and explain why I . . . was the leader in getting a black elected to the United States Congress." *Id.* at 514 (internal citation omitted). These "[o]vert racial statements," together with Georgia's history of racial discrimination in voting, and the absence of any legitimate non-racial reasons for the redistricting plan, convinced the three-judge court that the plan had been enacted with a discriminatory purpose, and hence had "'no legitimacy at all under our Constitution or under (Section 5).'" *Id. at 517* (alteration in original) (quoting *City of Richmond v. United States*, 422 U.S. 358, 378-79, 95 S. Ct. 2296, 45 L. Ed. 2d 245 (1975)).

In another, more recent declaratory judgment action, the Louisiana House of Representatives sought preclearance for its 2001 statewide redistricting plan, which eliminated a majority-black district in Orleans

Parish, and failed to create a comparable district anywhere else in the state. *See* Def.'s Mot. at 37; *Nw. Austin I*, 573 F. Supp. 2d at 256; *Continuing Need* 28 (Arrington Responses); *Introduction to Expiring Provisions* 152 (Shaw Responses); *Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 42-44 (June 21, 2006) (hereinafter, "*Policy Perspectives*") (responses of Debo Adegbile to questions submitted by Senators Kennedy, Leahy, Cornyn, and Coburn) (hereinafter, "Adegbile Responses"). In the course of defending their plan, Louisiana officials admitted that they had intentionally "'obliterated'" the majority-black district in order to achieve what they characterized as "proportional" representation for white voters in Orleans Parish. *See* Def.'s Br. in Supp. of Mot. for Summ. J., *La. House of Reps. v. Ashcroft*, Civ. A. No. 02-62 (D.D.C. Jan. 17, 2003); *see also Policy Perspectives* 43 (Adegbile Responses). But in selectively applying the theory of "proportional representation" to advantage only white voters in a particular area of the state, Louisiana officials ignored the fact that it was the black population in Orleans Parish, not the white population, that had increased during the preceding decade. *See Continuing Need* 28 (Arrington Responses). Moreover, the state made no attempt to remedy blacks' statewide under-representation in proportion to their percentage of the population, despite its avowed desire to achieve proportional representation for white voters in a particular area of the state. *See* Def.'s Br. in Supp. of Mot. for Summ. J., *La. House of Reps. v.*

Ashcroft, Civ. A. No. 02-62 (D.D.C. Jan. 17, 2003); *Policy Perspectives* 43 (Adegbile Responses); *Nw. Austin I*, 573 F. Supp. 2d at 256. Although the suit ultimately settled on the eve of trial when Louisiana agreed to restore the majority-black district, it nonetheless constitutes a recent example of a covered jurisdiction's thwarted attempt to enact a voting change with the express purpose of diminishing black electoral opportunity. *See Policy Perspectives* 43 (Adegbile Responses); *Introduction to Expiring Provisions* 152 (Shaw Responses). The case also illustrates the need to look beyond preclearance-related data in assessing the continued prevalence of intentional voting discrimination by covered jurisdictions, as the suit's eventual resolution through a settlement agreement means that "there is no firm objection statistic or declaratory judgment ruling that resulted from the litigation." *Introduction to Expiring Provisions* 152 (Shaw Responses).

6. Section 5 Enforcement Suits

Yet another type of evidence that Congress relied on as illustrative of the continued existence of voting discrimination by covered jurisdictions was section 5 enforcement actions undertaken by the Justice Department in covered jurisdictions since 1982. *See* 2006 Amendments § 2(b)(4)(A), 120 Stat. at 577. The Voting Rights Act authorizes the Justice Department -- as well as private citizens -- to bring suit under Section 5 to compel a covered jurisdiction to submit its proposed voting change for preclearance. *See Nw. Austin I*, 573 F. Supp. 2d at 256. Since 1982, there have been at least 105 successful Section

5 enforcement actions in which a covered jurisdiction has either been ordered to submit its proposed voting change for preclearance, or has voluntarily agreed to do so after a Section 5 enforcement suit was filed. *See* 1 *Evidence of Continued Need* 186 (Nat'l Comm'n Report). Based on its review of these cases, the House Committee on the Judiciary found that the failure by covered jurisdictions to submit voting changes for preclearance under Section 5 often reflects more than a mere oversight. "[C]overed jurisdictions continue to resist submitting voting changes for preclearance," the Committee noted in its 2006 report, explaining that "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes without the Federal Government's knowledge." *See* H.R. Rep. No. 109-478, at 41.

Historically, the most "defiant" of all the covered jurisdictions has been South Dakota, where former South Dakota Attorney General William Janklow notoriously described the preclearance requirement as "a facial absurdity" and advised against compliance, remarking, "I *see* no need to proceed with undue speed to subject our State laws to a 'one-man' veto by the United States Attorney General." *Id.* at 42. In accordance with Janklow's advice, South Dakota sought preclearance for less than five of the more than 600 voting changes that it enacted between 1976 and 2002. *Id.* Many of these voting changes "negatively impacted" the state's Native American population, some of whom eventually filed an enforcement action to compel the state to submit its voting changes for preclearance. *Id.* The suit resulted in a consent decree, under which South Dakota finally agreed to fulfill its obligations under Section 5. *Id.*

The legislative record contains many examples of Section 5 enforcement suits initiated in response to covered jurisdictions' implementation of voting changes without preclearance, including several examples of suits in which the unprecleared voting changes appeared to have been motivated by discriminatory animus. For instance, a Section 5 enforcement action was filed in response to Prairie View, Texas's attempt to reduce the availability of early voting during its racially-charged 2004 elections in Waller County. After two black students from historically black Prairie View A&M University announced their intent to run for local office (one for the Waller County Commissioners' Court, the county's governing body), the white district attorney threatened to prosecute all Prairie View A&M students who voted in the elections, claiming that the students were not legal residents of the county. *See* 1 *Evidence of Continued Need* 185 (Nat'l Comm'n Report); *id.* at 300 (Highlights of Hearings of the Nat'l Comm'n on the Voting Rights Act) (hereinafter, "Nat'l Comm'n Hearing Highlights"). Shortly thereafter, the county sought to reduce the availability of early voting at the polling places that were located closest to the Prairie View A&M campus. This reduction in early voting opportunities would have made it much more difficult for students to vote in the election's primary, because it was scheduled to take place during the university's spring break, and students therefore had to vote in advance if they planned to be out of town during their vacation. 1 *Evidence of Continued Need* 186 (Nat'l Comm'n Report). The university chapter of the NAACP filed suit under Section 5, seeking to enjoin Waller County from making this change to its voting practices without first receiving preclearance, which prompted the county to agree to restore the early voting opportunities that had previously been in place. *Id.* As a result, five times as many Prairie View A&M students were able to vote in the primary, in which the African-American student seeking election to the County Commissioners' Court won a narrow victory. *Id.*

Another Section 5 enforcement suit was brought in 1995 when Mississippi sought to revive its dual voter registration system, which had originally been enacted "as part of the 'Mississippi Plan' to deny blacks the right to vote following the Constitutional Convention of 1890." *Operation Push v. Allain*, 674 F. Supp. 1245, 1251 (N.D. Miss. 1987), *aff'd sub nom.*, *Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *see also* S. Rep. No. 109-295, at 223; 1 *Evidence of Continued Need* 176 (Nat'l Comm'n Report); H.R. Rep. No. 109-478, at 39. In 1987, a federal district court invalidated a revised version of Mississippi's dual registration system that the state had adopted in 1984, based on evidence that the revised system, like the original one, "result[ed] in a denial or abridgment of the right of black citizens in Mississippi to vote and participate in the electoral process." *Operation Push*, 674 F. Supp. at 1253. Nevertheless, Mississippi proceeded to implement yet another dual registration system in 1995, purportedly in an attempt to comply with the requirements of the National Voter Registration Act ("NVRA") of 1993. *See* H.R. Rep. No. 109-478, at 39. State officials "refused to submit the change for preclearance" despite the fact that Mississippi's "maintenance of two registration systems had previously been struck down as discriminatory." *Id.*

Private plaintiffs responded with a Section 5 enforcement action, as did the United States, and the two cases were consolidated before a three-judge court. *See Young v. Fordice*, 520 U.S. 273, 280, 117 S. Ct. 1228, 137 L. Ed. 2d 448 (1997). The case eventually reached the Supreme Court, which unanimously held that Mississippi was required to submit its dual registration system for preclearance. *Id.* at 291. Once compelled to *seek* preclearance, Mississippi received an objection, based on the Attorney General's inability to find that "the State's submitted NVRA procedures are not tainted by improper racial considerations." *Preclearance Standards* 83 (appendix to statement of Brenda Wright). As the Attorney General explained, the state's decision "to implement the requirements of the NVRA in a manner that would cause the State to revert to a form of dual registration" was "particularly noteworthy," given that "it occurred only a few years after a federal court had found that a similar requirement had led to pronounced discriminatory effects on black voters." *Id.*

Of course, the reasons behind a failure to *seek* preclearance under Section 5 are not always easy to discern. And there is no data in the legislative record revealing the percentage of successful Section 5 enforcement actions that have ultimately resulted in a denial of preclearance on the basis of discriminatory intent. But as demonstrated by Mississippi's 1995 attempt to revive its dual registration system, at least some of the 105 successful Section 5 enforcement suits since 1982 have been initiated in response to covered jurisdictions' voting changes that were subsequently found to be purposefully discriminatory.

7. Section 2 Litigation

Section 2 of the Voting Rights Act prohibits the imposition of any voting practice or procedure "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. Although a violation of Section 2 does not require a showing of unconstitutional discriminatory intent, "Section 2 cases have documented evidence that reveals a wide range of unconstitutional conduct by state and local officials." *See Impact and Effectiveness* 971 (Katz Study). Based on its review of several studies of Section 2 cases in the legislative record, the Senate Judiciary Committee identified six reported Section 2 cases that resulted in either a judicial decision or a consent decree reflecting that a covered jurisdiction had unconstitutionally discriminated against minority voters. *See* S. Rep. No. 109-295, at 13, 65. A study conducted by Professor Ellen Katz and the Voting Rights Initiative of the University of Michigan Law School identified an additional eight published Section 2 cases since 1982 in which a court determined that a covered jurisdiction had engaged in intentional discrimination against minority voters. *See Impact and Effectiveness* 986-91 (Katz Study); *see also Nw. Austin I*, 573 F. Supp. 2d at 258. Hence, as the three-judge court in *Nw. Austin I* explained, Congress "knew of a combined total of fourteen judicial findings of intentionally discriminatory or unconstitutional state action" by covered jurisdictions since 1982 when it chose to reauthorize Section 5 in 2006. 573 F. Supp. 2d at 258.

The *Nw. Austin I* court recognized that 14 "is not a great number of cases," especially when compared to the 421 intent-based objection letters lodged by the Attorney General during this time-frame. *See id.* But the court offered two explanations for the "relative scarcity" of judicial findings of intentionally discriminatory or unconstitutional conduct by covered jurisdictions. First, given Section 5's effectiveness in deterring covered jurisdictions from enacting discriminatory voting changes in the first place, it is understandable that there would not be many Section 2 cases challenging such practices. In other words, because most intentionally discriminatory voting practices are blocked by Section 5 prior to their implementation, they are unlikely to be the subject of a subsequent Section 2 challenge. *See id.* (citing *Introduction to Expiring Provisions* (Shaw Responses 160)); *see also Continuing Need* 143 n.18 (Earls Responses). Second, both the Senate Judiciary Committee and Professor Katz's study examined only *reported* Section 2 cases. Yet as Professor Katz acknowledged, "[t]hese lawsuits, of course, represent only a portion of the Section 2 claims filed or decided since 1982," given the high number of Section 2 cases that settle or are resolved without a published opinion. *See Impact and Effectiveness* 974 (Katz Study); *see also Continuing Need* 143 (Earls Responses). Indeed, according to one witness who testified before the Senate Judiciary Committee, there have been 66 reported cases of Section 2 violations since 1982 in the nine states that are "substantially covered" by Section 5, but there have been 587 *unreported* cases documenting such violations -- i.e., more than eight times as many unreported cases than reported cases revealing Section 2 violations by covered jurisdictions. *See Continuing Need* 143 (Earls Responses). It is to be expected, then, that an analysis of intentional or unconstitutional discrimination based solely on reported Section 2 cases would "seriously understate[] the findings." *Id.*

Finally, it is significant to recall that courts will avoid deciding constitutional questions if a case can be resolved on narrower, statutory grounds. *See, e.g., Nw. Austin II*, 129 S. Ct. at 2508. Courts therefore tend to refrain from finding that a jurisdiction engaged in unconstitutional voting discrimination if there is another basis upon which to invalidate the jurisdiction's challenged voting practice -- e.g., if the voting practice is found to violate the Section 2 "results" test. *See Continuing Need* 143-44, 144 n.19 (Earls Responses); *see also Escambia Cnty. v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984) (declining to decide whether evidence of discriminatory intent was adequate to support finding that at-large system of elections violated the Fourteenth Amendment, given the lower court's conclusion that the system also violated Section 2); *White v. Alabama*, 74 F.3d 1058, 1071 n.42 (11th Cir. 1996) (explaining that "[b]ecause we dispose of the district court's judgment on the ground that it violates the Voting Rights Act, we need not, and indeed, should not, discuss whether the judgment violates the Equal Protection Clause"); *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 306-07 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004) (acknowledging that "the General Assembly's adoption of the at-large system raises suspicions," but refusing to "disparage" those who enacted the system by finding a constitutional violation absent more "compelling evidence" of discriminatory intent, and instead, enjoining the at-large system as a violation of Section 2). As Professor Pamela Karlan explained during her 2006 testimony before the Senate Judiciary Committee, "when courts decide cases on [Section 2] effects test reasons, they don't reach the question whether there is also a discriminatory purpose. But let me tell you from my own experience that if we had to show discriminatory purpose in lots of these cases, we could do it." *Continuing Need* 6 (statement of Pamela S. Karlan). As a result, many instances of unconstitutional voting discrimination likely escape formal judicial condemnation.

Still, there have been at least 14 reported Section 2 cases involving judicial findings of intentional or unconstitutional voting discrimination by covered jurisdictions since 1982. *See Nw. Austin I*, 573 F. Supp. 2d at 258. Because the three-judge court in *Nw. Austin I* described most of these Section 2 decisions in great detail, *see* 573 F. Supp. 2d at 259-62, this Court will not endeavor to repeat the facts of all those cases here. But since Section 2 cases do offer very "powerful evidence of continuing intentional discrimination," *id.* at 259, a few such cases warrant mention, one of which was not addressed by *Nw. Austin I.*

In 2003, a federal district court assessing a Section 2 challenge to Charleston County, South Carolina's at-large method of elections for its County Council declined to find that the system had been adopted with an unconstitutional discriminatory purpose, but nonetheless enjoined the system as a violation of Section 2. *See Charleston Cnty.*, 316 F. Supp. 2d at 306. In so doing, the court noted that county officials had engaged in many other forms of purposeful voting discrimination in recent years. *See id.* at 290 n.23; *see also Impact and Effectiveness* 987-88 (Katz Study). The court described the persistent problem of white poll officials "intimidating and harassing" black voters in need of assistance at the polls, and quoted one member of the Charleston County Election Commission, who said that she had "received complaints from African-American voters concerning rude or inappropriate behavior by white poll officials in every election between 1992 and 2002." *See id.* at 287 n.23. At one point, the official harassment of elderly black voters at the polls became so egregious that it "prompted a Charleston County Circuit Court to issue a restraining order against the Election Commission requiring its agents to cease interfering with the voting process." *Id.* at 288 n.23.

The court in *Charleston Cnty.* also noted two "recent episodes" of racial discrimination in voting that it found particularly troubling. In the first, which occurred in 1991, the Charleston County Council decided to "reduce[] the salary for the Charleston County Probate Judge . . . following the election of the first and only African-American person elected to that position." *Id.* at 289 n.23. That same judge had been forced to sue to have his election upheld by the South Carolina Supreme Court, and even after the court affirmed the validity of the election, the judge had to seek Justice Department intervention in order to be sworn into office. *Id.* at 289-90 n.23. The second episode occurred after the 2000 Charleston County School Board elections, in which African-Americans won a majority of the seats on the board for the first time in the county's history. The county immediately responded by sponsoring "several pieces of legislation to alter the method of election for the school board." *Id.* at 290 n.23. None of the five African-American members of the board were consulted regarding their views on the change to the board's method of election, *id.*, and every African-American member of the legislative delegation voted against the proposed change, S. Rep. No. 109-295, at 309. It later became apparent that the change would have the effect of making the school board's method of election "an exact replica of the old County Council structure" that the court in *Charleston Cnty.* had struck down as a violation of Section 2. *See Continuing Need* 27-28 (Arrington Responses); *see also* S. Rep. No. 109-295, at 309. This method of election was subsequently denied preclearance by the Attorney General. *Continuing Need* 28 (Arrington Responses).

In a Section 2 case not discussed by the three-judge court in *Nw. Austin I*, Native American residents of South Dakota challenged the state's 2001 legislative redistricting plan as diluting Native American voting strength in violation of Section 2. *See Bone Shirt v. Hazeltine*, 2004 DSD 18, 336 F. Supp. 2d 976 (D.S.D. 2004); *see also Impact and Effectiveness* 988-89 (Katz Study). In assessing the plaintiffs' Section 2 challenge, the court described several recent instances of intentional state-sponsored voting discrimination against Native Americans in South Dakota. *See Bone Shirt*, 336 F. Supp. 2d at 1023-26. For example, in 2002 the state passed a law requiring photo identification as a prerequisite to voting. When concerns were raised about the effect of the law on the state's Native American population, one state legislator responded: "I'm not sure we want that sort of person in the polling place." *Id.* at 1026 (internal quotation marks and citation omitted). Another legislator conceded that the measure had been passed as a means of "retaliating" against the recent rise in registration among Native American voters, after the Native American vote had proven particularly significant in a close senate race. *Id.* The court also described a 2003 challenge to a redistricting plan by Buffalo County, South Dakota, which had "confined virtually all of the county's Indian population to a single district containing approximately 1500 people." *Id.* at 1024. When members of the Crow Creek Sioux Tribe brought suit, alleging that the plan had been "drawn and maintained for a discriminatory purpose," the parties reached a settlement agreement, "with the county admitting that the plan was discriminatory." *Id.* The court in *Bone Shirt* went on to list many other reports of intentional voting discrimination against Native Americans in South Dakota, including cases in which local poll officials "refused to register Indians," or "refused to provide them with enough voter registration cards to conduct a voter registration drive." *Id.*

The legislative record describes several other Section 2 cases since 1982 that contain judicial findings of purposeful voting discrimination by covered jurisdictions. *See Impact and Effectiveness* 975-76, 987-94 (Katz Study). Two such cases from Shelby County's home state of Alabama warrant specific mention. Following the *Dillard* litigation, *see supra* pp. 29-30, in which Alabama residents challenged the at-large electoral systems used by many cities, counties, and school boards throughout the state (including in Shelby County), the town of North Johns admitted that its at-large system for electing commissioners violated Section 2 and entered into a consent decree, under which it agreed to implement a new electoral system with five single-member districts. *See Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1473 (M.D. Ala. 1989). When two African-American candidates for office sought "to take advantage of the new court-ordered single-member districting plan," *id.* at 1476, the mayor refused to provide them with the necessary financial disclosure forms that he had provided to all of the other candidates, and that all candidates were required to complete in order to run for office under state law. *Id.* at 1474-76; *Impact and Effectiveness* 990 (Katz Study). The two African-American candidates nonetheless remained on the ballot without completing the forms, and proceeded to win their respective elections, whereupon the mayor refused to swear them into office. *North Johns*, 717 F. Supp. at 1475. The candidates then filed suit under Section 2, alleging purposeful discrimination and seeking a court order certifying them as duly-elected members of the town council. *Id.* at 1476. Granting this request, the federal district court found "that North Johns, through its mayor, intentionally discriminated against [the candidates] because of their race." *Id.* The court explained that the election of the two candidates would have resulted in a majority-black town council, and that the mayor had "acted as he did in order to prevent this result, or at least not to aid in achieving it." *Id.* The court was "convinced that, but for [the candidates'] race, [the mayor] would have acted toward them as he acted toward other candidates; he would have provided to them, in a timely manner, the [necessary] information and forms." *Id.*

Similarly, a federal district court in *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988), found that intentional discrimination persisted in Alabama as late as the 1980s. In assessing a Section 2 class action filed by black residents of the state, who alleged that the manner in which poll officials had been appointed violated Section 2, the court described how Alabama's "history of racial inhumanity continues into today." 695 F. Supp. at 525. Specifically, the court found that "white poll officials continue to harass and intimidate black voters," and it went on to cite "numerous instances" in which "white poll officials refused to help illiterate black voters or refused to allow them to vote, where they refused to allow black voters to cast challenged ballots, and where they were simply rude and even intimidating toward black voters." *Id.* Although acknowledging that these occurrences are "much less frequent today than in the past," the court found that "their impact is still dramatic and widespread in the black community in light of this state's not-so-distant history of open and violent discrimination." *Id.*

8. Dispatch of Federal Observers

Additional evidence of intentional state-sponsored discrimination against minority voters is revealed by the continued dispatch of federal observers to covered jurisdictions. Under Section 8, the Attorney General may send federal observers to monitor any state or local elections when "necessary to enforce the guarantees of the 14th or 15th amendment."[13] *See* 42 U.S.C. § 1973f(a)

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[13] 13. Under the original version of the Act, federal observers could only be sent to monitor elections in jurisdictions for which

(2). Between 1982 and 2006, 300 to 600 federal observers were assigned annually to observe elections in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 44; S. Rep. No. 109-295, at 96. Five of the six states originally covered by Section 5 -- Louisiana, Georgia, Alabama, South Carolina, and Mississippi -- accounted for 66% of the 622 total federal observer coverages[14] during this time-frame, 1 *Evidence of Continued Need* 181 (Nat'l Comm'n Report), with Mississippi alone accounting for 40% of all such coverages, H.R. Rep. No. 109-475, at 44. In reauthorizing Section 5 in 2006, Congress cited the "tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions" during the past 25 years as evidence of "the continued need for [the] Federal oversight" provided by the temporary provisions of the Voting Rights Act. *See* 2006 Amendments § 2(b)(5), 120 Stat. at 578.

"federal examiners" had been appointed. *See* 1965 Act *§ 8*. Federal examiners "in the early days of the Act were empowered to help register minority voters," 1 *Evidence of Continued Need* 179, and could be dispatched either to jurisdictions that were covered by Section 4(b), or to non-covered jurisdictions that were subject to coverage by federal court order, *see* 1965 Act §§ 3(a), *6*. When Congress reauthorized the Act's temporary provisions in 2006, it repealed the sections of the Act pertaining to federal examiners, and amended Section 3(a) of the Act to authorize the direct assignment of federal observers to non-covered jurisdictions where "appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973a(a); *see also* H.R. Rep. No. 109-478, at 91.

[14] For purposes of this Opinion, each occasion when federal observers are dispatched to a jurisdiction is referred to as one "observer coverage," although several individual observers may have been present.

Shelby County attempts to minimize the significance of this evidence, however, by arguing that the dispatch of federal observers "indicates only that it was predicted that there *might* be conduct with the effect of disenfranchising minority citizens, which *might* or *might not* be purposeful discrimination." Pl.'s Mot. at 35. As a technical matter, Shelby County is correct. But observers are not assigned to a particular polling location based on sheer speculation; they are only dispatched if "there is a *reasonable* belief that minority citizens are at risk of being disenfranchised." H.R. Rep. No. 109-478, at 44 (emphasis added); *see also* 1 *Evidence of Continued Need* 180 (Nat'l Comm'n Report) (explaining that "observers are sent because there are *reasonable* grounds in the opinion of the Department of Justice to expect discrimination on Election Day") (emphasis added). It may be that some of the 622 observer coverages since 1982 have ultimately proven unnecessary, but the legislative record reveals many instances of intentional voter discrimination at the polls, where the presence of federal observers has been needed to protect access to the ballot for racial and language minorities.

Congress heard testimony from Alabama state senator Bobby Singleton as to the importance of federal observers in preventing the intimidation of black voters at the polls in Alabama. *See* 1 *Evidence of Continued Need* 182 (Nat'l Comm'n Report). Singleton described one incident in 1992 in which he was taken to jail after attempting to prevent white poll officials from "closing the doors on African-American voters . . . whom they did not want to come in, [because] [they] . . . would have made a difference in the . . . votes on that particular day."

Id. at 298 (Nat'l Comm'n Hearing Highlights). Barry Weinberg, former Deputy Chief of the Voting Section of the Civil Rights Division of the Justice Department, similarly described the harassment of black voters by white poll officials in Alabama, including one instance in which a local poll official remarked in the presence of a federal observer that "niggers don't have principle enough to vote and they shouldn't be allowed." *See Voting Rights Act: Sections 6 and 8 - The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (Nov. 15, 2005) (prepared statement of Barry H. Weinberg). Weinberg also described various forms of discrimination faced by language minority voters at the polls, who have sometimes "been denied the ballot because they identified their street name according to common Spanish usage rather than the formal English name." *Id.* at 34. On other occasions, prospective Hispanic voters have been "admonished not to use Spanish when talking in the polling places," or have been asked to provide "on-the-spot evidence of their citizenship before being given a ballot," even though such evidence is not required from Caucasian voters. *Id.* The legislative record describes one such example of discrimination against Latinos in Arizona, in which men wearing "military or tool belts" and black T-shirts reading "U.S. Constitutional Enforcement" approached Latinos waiting in line to vote, demanding proof of citizenship. *See* 3 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3976 (Mar. 8, 2006) (hereinafter, "3 *Evidence of Continued Need*") (Arizona Report for the Nat'l Comm'n on the Voting Rights Act).

Congress heard evidence that in 1990, on the eve of an election marked by the presence of an African-American candidate for one of North Carolina's Senate seats, 125,000 African-American voters in North Carolina received postcards falsely informing them that if they had moved within thirty days they could not vote. *See* 2 *Evidence of Continued Need* 1755 (appendix to statement of Wade Henderson). As recently as 2004, a sheriff in Alamance County, North Carolina, "took a list of registered voters in his county that had Spanish surnames, and said publicly that he would send deputies to the homes of each of those voters to verify that they were citizens." *Continuing Need* 18 (testimony of Anita S. Earls). That same year, there were reports of police being stationed outside polling sites in an "overwhelmingly Latino" area of Texas -- a more subtle, yet "familiar form of voter intimidation." *See* S. Rep. No. 109-295, at 344.

The record contains several other examples of state-sponsored discrimination against minority voters in Texas, including the 2004 closing of a polling place in a predominantly-black precinct, despite the fact that "voters remained in line" and the closing was "contrary to state law." *Id.* at 343. There were additional reports of minority voters "being turned away from their polling locations and asked to return at a later time" for no apparent reason. *Id.* And during the Southern Regional Hearing of the National Commission of the Voting Rights Act, Professor Vernon Burton testified that there had been "various kinds of intimidation and misinformation" directed at black voters in Texas during the 2000 and 2002 elections, as well as "late change[s] of polling places; dropping individuals from poll lists without cause; [and] not allowing individuals to file challenge ballots." *See* 1 *Evidence of Continued Need* 298 (Nat'l Comm'n Hearing Highlights). Professor Burton went on to describe a particularly disturbing incident in Wharton County, Texas, in which the home of a campaign staff treasurer for an African-American candidate for sheriff was burned. *Id.* As Professor Burton explained, the incident occurred shortly after the treasurer had received "'threatening calls saying what would happen to her if she did not get [the candidate's] - and we won't use the N word - sign out of her yard.'" *Id.*

9. Racially Polarized Voting and Vote Dilution

Congress also relied on evidence of racially polarized voting in reauthorizing Section 5 in 2006, noting that the persistence of racially polarized voting "in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protections of the [Act]." *See* 2006 Amendments § 2(b)(3), 120 Stat. at 577. Racially polarized voting "occurs when voting blocs within the minority and white communities cast ballots along racial lines." H.R. Rep. No. 109-478, at 34. The House Committee on the Judiciary in 2006 found that the continued existence of racially polarized voting presented a "serious concern," *id.*, for two reasons. First, racially polarized voting effectively creates an "election ceiling" for minority voters, as it renders them "powerless" to elect candidates of their choice in non-majority-minority districts. *Id.* Second, "[t]he potential for discrimination in environments characterized by racially polarized voting is great." *Id.* at 35. That is because, as the three-judge court in *Nw. Austin I* explained, racially polarized voting is "a necessary precondition for vote dilution to occur," since it is racially polarized voting that "enables the use of devices such as multi-member districts and at-large elections that dilute the voting strength of minority communities." *See* 573 F. Supp. 2d at 263 (internal quotation marks and citations omitted). In other words, where minorities and non-minorities tend to prefer different candidates, the ability of minorities to elect their candidates of choice can be intentionally reduced through the adoption of a wide variety of dilutive techniques, including the manipulation of district boundaries, the enactment of discriminatory annexations, and the implementation of majority-vote requirements. *See* 2 *Evidence of Continued Need* 1721 (appendix to statement of Wade Henderson).

Hence, Congress was concerned by the evidence in the legislative record indicating that "the degree of racially polarized voting in the South is increasing, not decreasing." 1 *Evidence of Continued Need* 215 (Nat'l Comm'n Report). Congress heard testimony that in Shelby County's home state of Alabama, there were 35 black representatives serving in the state legislature, only one of whom had been elected from a majority-white district. *See Benefits and Costs* 97 (Gray Responses). Evidence in the congressional record also revealed "high degree[s]" of racially polarized voting in South Carolina and Louisiana. *See* H.R. Rep. No. 109-478, at 35. As one expert on voting trends in Louisiana testified, "the racial differences in candidate preferences are pervasive across offices. It doesn't matter whether the office at issue is state Representative, state Senator, Governor, Mayor, District Attorney, or Public Service Commissioner. It could be for a position as Recorder of Mortgages or Register of Conveyances"; regardless of the nature of the elected position, "[r]acially polarized voting remains pronounced and pervasive in Louisiana." *Voting Rights Act: The Continuing Need for Section 5, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong 59 (Oct. 25, 2005) (hereinafter, "*Continuing Need for Section 5*") (prepared statement of Richard Engstrom).

A report in the legislative record on voting rights in Mississippi confirmed that racially polarized voting remained pronounced and pervasive there as well, with blacks in Mississippi "overwhelmingly tend[ing] to vote for blacks and whites almost unanimously vot[ing] for whites in most black versus white elections." *See* 2 *Evidence of Continued Need* 1721 (appendix to statement of Wade Henderson) (internal quotation marks omitted). Moreover, the report explained, "[n]o black candidate has won election to Congress or the state legislature from a majority-white district in Mississippi." *Id.* at 1722. And Mississippi is by no means unique among southern states in this respect. Another study in the legislative record found that during the 1980s and 1990s, "not a single black candidate won a majority-white district in the South." *Benefits and Costs* 69 (responses of Drew S. Days III to questions submitted by Senators Cornyn, Coburn, Kennedy, Leahy, and Schumer). According to the National Commission on the Voting Rights Act, only 8% of all black

U.S. representatives in 2000 were elected from majority-white districts. 1 *Evidence of Continued Need* 159 (Nat'l Comm'n Report).

Shelby County objects to this Court's reliance on evidence of racially polarized voting in assessing the continued need for Section 5, arguing that racially polarized voting constitutes private conduct, not "governmental discrimination -- the only type of discrimination Congress is empowered to remedy under the Fifteenth Amendment." *See* Pl.'s Mot. at 31. But Shelby County fails to recognize the close link between racially polarized voting and intentional, state-sponsored minority vote dilution. It is only because of the continued existence of racially polarized voting that covered jurisdictions can structure their electoral processes so as to intentionally diminish the ability of minority voters to elect candidates of their choice. *See Continuing Need* for Section 5 59 (prepared statement of Richard Engstrom). Although the persistence of racially polarized voting -- in and of itself -- does not provide evidence of unconstitutional voting discrimination by covered jurisdictions and their officials, the persistence of measures that are intentionally designed to "dilute minority voting strength" does provide such evidence, and these measures can only be effective in areas that are marked by racially polarized voting.

Shelby County argues, however, that the Attorney General is incorrect to rely even on evidence of intentional minority vote dilution in justifying the 2006 reauthorization of Section 5, since "Section 5 enforces the Fifteenth Amendment" and "claims alleging purposeful vote dilution are cognizable under the Equal Protection Clause of the Fourteenth Amendment - not under the Fifteenth Amendment." *See* Pl.'s Reply at 47. The Supreme Court has never "explicitly decided[] that the Fifteenth Amendment applies to dilution claims." *See Bossier II*, 528 U.S. at 359 n.11 (Souter, J., concurring in part, dissenting in part); *see also supra* pp. 63-64. But the Court in *City of Rome* relied on evidence of minority vote dilution in upholding the constitutionality of the 1975 reauthorization of Section 5 as a valid exercise of Congress's Fifteenth Amendment enforcement authority. *See* 446 U.S. at 181 (*quoting* Congress's finding that "'[a]s registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength'") (internal citation omitted). Regardless of whether intentional state-sponsored minority vote dilution violates the Fifteenth Amendment, then, Shelby County's argument that such evidence cannot be used to sustain the 2006 reauthorization of Section 5 is directly refuted by *City of Rome*.[15]

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[15] In *City of Rome*, Justice Rehnquist, joined by Justice Stewart in dissent, voiced concerns as to the majority's reliance on evidence of vote dilution in justifying the 1975 reauthorization of Section 5, arguing that any "disparate impact associated with nondiscriminatory electoral changes . . . result[ing] from bloc voting" cannot establish "congressional power to devise an effective remedy for prior constitutional violations." *Id.* at 217 (Rehnquist, J., dissenting). But Justice Rehnquist's objection to the use of such evidence stemmed from the fact that, in *City of Rome*, the city had proven that its dilutive electoral changes were not purposefully discriminatory. *Id.* at 214. Justice Rehnquist went on to explain that where states seek "to prevent the participation of blacks in local government by measures other than outright denial of the

Shelby County's position on the irrelevance of intentional dilutive measures is also at odds with the history and purpose of Section 5. According to Shelby County, the so-called "second generation barriers" to voting that "do not interfere with the right to vote, but instead limit the effectiveness of that vote," cannot be used to justify Section 5's constitutionality, *see* Pl.'s Reply at 21, because Section 5 was intended to combat only those tactics that were aimed at direct disenfranchisement, rather than indirect "dilutive mechanisms," *id.* at 48. But Section 5 never had such a limited purpose. To the contrary, Congress specifically designed the preclearance requirement in order to prohibit covered jurisdictions from implementing any and all discriminatory voting changes, regardless of the form they might take. *See, e.g.*, *Continuing Need* 41 (Earls Responses) (explaining that "Section 5 was not intended merely to increase minority registration rates, but rather to make sure that covered jurisdictions did not put in place . . . a host of other practices that would negate or dilute the voting strength of newly enfranchised black voters."). Prior to the enactment of Section 5, covered jurisdictions were able to perpetuate minority disenfranchisement by adopting new, deceptive

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franchise," Congress can "of course remedy and prevent such purposeful discrimination." *Id.* (emphasis added). Here, Shelby County has not proven -- nor even alleged -- that all instances of state-sponsored minority vote dilution in the legislative record are free from discriminatory animus. Hence, even under the more limited view of Congress's enforcement authority endorsed by Justice Rehnquist in *City of Rome*, the evidence of purposefully dilutive measures in the 2006 legislative record could provide valid grounds for the reauthorization of Section 5.

discriminatory techniques as soon as the old ones had been struck down. Although the primary focus of Section 5 in 1965 may have been those techniques that were being used to prevent blacks from entering polling places and casting ballots, "the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles." *See Bossier II*, 528 U.S. at 366 (Souter, J., concurring in part, dissenting in part). It is for this reason that the Supreme Court in Allen held that Section 5 bars not only those voting changes that interfere with minorities' access to the ballot, but also those changes that interfere with the weight of the ballots cast. *See Allen*, 393 U.S. at 569 (recognizing that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot"); *see also Continuing Need* 36 (Arrington Responses) (explaining that the Act has always been "about more than just the mere ability to cast a vote . . . The vote must be counted and must count").

Although Shelby County seeks to portray "second generation barriers" to voting as novel creations of the 1980s and 1990s, such dilutive measures have long been employed by covered jurisdictions as a means of intentionally discriminating against minority voters. *See, e.g., Evidence of Continued Need* 209 (explaining that vote dilution "consists of mechanisms employed by whites since the First Reconstruction in the nineteenth century"); *Introduction to Expiring Provisions* 206 (prepared statement of Chandler Davidson) (noting that dilutive tactics were "widely used in the Nineteenth Century when black males could vote" and "began to be used once more in the mid-Twentieth Century, particularly after the abolition of the white primary, as increasing numbers of blacks began to be able to exercise the franchise"). Indeed, Congress relied on evidence of these purposefully dilutive mechanisms in each of its previous reauthorizations of Section 5. *See* H.R. Rep. No. 109-478, at 36. In its 2006 report, the House Committee on the Judiciary specifically found that the voting changes being sought by covered jurisdictions -- which included "enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements" -- "resemble[d] those techniques and methods used in 1965, 1970, 1975, and 1982." *Id.* This Court sees no reason, then, why the continued existence of these dilutive techniques, as well as the continued existence of racially polarized voting -- a necessary precondition for such techniques to be effective -- cannot support the 2006 reauthorization of Section 5.

10. Section 5's Deterrent Effect

Any assessment of the persistence of intentional voting discrimination by covered jurisdictions must also take into account "the number of voting changes that have never gone forward as a result of Section 5." *See* H.R. Rep. No. 109-478, at 24. In 2006, the House Committee on the Judiciary found that Section 5 has deterred covered jurisdictions "from even attempting to enact discriminatory voting changes," as covered jurisdictions "'tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.'" *Id.* (quoting 1 *Evidence of Continued Need* 177 (Nat'l Comm'n Report)). In light of Section 5's substantial deterrent effect, any evaluation of the continued existence of purposeful voting discrimination by covered jurisdictions cannot be based solely on the number of intent-based objections lodged by the Attorney General, or the number of lawsuits in which a three-judge court has denied preclearance to a covered jurisdiction's racially-motivated voting change. Rather, the assessment of the continued need for Section 5 must also account for those intentionally discriminatory voting changes that have been abandoned by covered jurisdictions prior to the formal preclearance process, simply as a result of Section 5's existence.

Congress in 2006 heard testimony from a number of voting rights practitioners and scholars as to how Section 5 has prevented the enactment of discriminatory voting changes "'under the radar screen [in ways] that may not appear easily in statistics.'" *See Nw. Austin I*, 573 F. Supp. 2d at 264 (quoting *Introduction to Expiring Provisions* 17 (testimony of Theodore Shaw)). As one civil rights lawyer in Alabama testified, "Section 5 provides a powerful deterrent . . . and based on my experience, I strongly believe that the continued Section 5 coverage in Alabama is not only necessary but it is imperative." *Benefits and Costs* 4 (statement of Fred D. Gray). Other witnesses similarly expressed the view that "[t]he number of objections does not capture the Act's tremendous deterrent effect."

Continuing Need 100 (Karlan Responses); *id.* at 141 (prepared statement of Anita S. Earls); *Introduction to Expiring Provisions* 166 (Shaw Responses); *Impact and Effectiveness* 66 (prepared statement of Joseph D. Rich). One witness interpreted the decline in objection rates not as an indication that Section 5 is no longer needed, but as a sign of Section 5's success in preventing covered jurisdictions from submitting discriminatory voting changes for preclearance in the first place. As she explained, "[i]f there was an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but that it is sufficiently serving its purpose and must be renewed." *Continuing Need* 68 (Earls Responses).

The three-judge court in *Nw. Austin I* provided "several concrete examples" of cases in which "formal objections were unnecessary to thwart discriminatory voting changes," because the mere existence of Section 5 served to deter covered jurisdictions from "proposing certain changes once they realized the proposals would prompt objections." *See* 573 F. Supp. 2d at 265. Several witnesses highlighted the significance of Section 5 not just as a deterrent to the enactment of discriminatory voting changes, but also as a kind of "bargaining chip" for minority voters, ensuring that minority political participation remains a "central consideration" in the structuring of electoral processes. *See Continuing Need* 190-91 (prepared statement of Pamela S. Karlan); *see also Impact and Effectiveness* 66 (prepared statement of Joseph D. Rich).

Unfortunately, it is simply not possible to determine the number of purposefully discriminatory voting changes that have been deterred by Section 5. *See, e.g.*, *Continuing Need* 114 (Pildes Responses) (noting that "the extent to which the existence of § 5 creates an effective deterrent effect is extremely difficult, perhaps impossible, to quantify"); *Introduction to Expiring Provisions* 73 (Hasen Responses) (explaining that the magnitude of Section 5's "deterrent effect cannot be quantified from the record"). Nor is it possible to determine -- at least to any reasonable degree of certainty -- whether, in the absence of Section 5, covered jurisdictions would resort to a host of unconstitutional, discriminatory voting practices. *See Introduction to Expiring Provisions* 39-40 (Hasen Responses); *see also Nw. Austin I*, 573 F. Supp. 2d at 267 (recognizing that "no one can know for sure what would happen if section 5 were allowed to expire"). Nevertheless, in examining whether Section 5 remains "justified by current needs," *Nw. Austin II*, 129 S. Ct. at 2512, it is significant to recall Congress's finding in 2006 that the preclearance requirement has continued to deter covered jurisdictions from even attempting to adopt discriminatory voting changes in the first place. *See* H.R. Rep. No. 109-478, at 24. It therefore seems fair to assume that the instances of intentional voting discrimination documented in the legislative record represent only a fraction of those instances that otherwise would have occurred in the absence of Section 5, given the number of "discriminatory voting changes that have never materialized" as a result of the preclearance requirement. *See id.* at 36.

C. Section 5 as a Congruent and Proportional Response to a Continuing History and Pattern of Unconstitutional Conduct by Covered Jurisdictions

1. A Continuing History and Pattern of Unconstitutional Conduct

Having reviewed the evidence of unconstitutional voting discrimination in the 2006 legislative record, the Court must now answer the central question posed by this case: "does the 2006 legislative record contain sufficient evidence of contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years?" *See Nw. Austin I*, 573 F. Supp. 2d at 265. In other words, did Congress possess the requisite "evidence of a pattern of constitutional violations on the part of the States," *Hibbs*, 538 U.S. at 729, which is needed to satisfy the second step of the three-part *Boerne* analysis? For several reasons, this Court agrees with the three-judge court in *Nw. Austin I* that "the 2006 legislative record is plainly adequate to justify section 5's 'strong remedial and preventive measures.'" 573 F. Supp. 2d at 271 (quoting *Boerne*, 521 U.S. at 526).

First, the legislative record amassed by Congress in support of the 2006 reauthorization of Section 5 is at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*. *See Nw. Austin I*, 573 F. Supp. 2d at 265-66, 270-71. In *City of Rome*, the Supreme Court looked to three types of evidence in evaluating whether Section 5 remained justified by current needs: evidence of (1) continued racial disparities in voter registration; (2) the number of minority elected officials; and (3) the nature and number of Section 5 objections. In 1975, there were 16, 17.8, and 23.6 percentage point disparities in voter registration rates between blacks and whites in Louisiana, North Carolina, and Alabama -- disparities that the Supreme Court characterized as "significant." *See* S. Rep. No. 94-295, at 779; *see also City of Rome*, 446 U.S. at 180. In 2004, there were 14.2, 17.8, and 19.2 percentage point disparities in voter registration rates between blacks and non-Hispanic whites in Virginia, Arizona, and Florida, and disparities of over 40 percentage points in voter registration rates between Hispanics and non-Hispanic whites in Arizona, California, Virginia, Georgia, and North Carolina. *See* 2004 U.S. Census Report. These disparities are certainly comparable to those deemed "significant" by the Supreme Court in *City of Rome*.

With respect to minority elected officials, in 2006, just as in 1975, Congress recognized the significant progress that had been made as far as the number of African-American elected officials in covered jurisdictions, but also found that African-Americans remained under-represented in state legislatures in the South based on their percentage of the population. *See* H.R. Rep. No. 109-478, at 33. Congress additionally found that three of the covered states that had never elected a black representative to statewide office as of 1975 (Mississippi, Louisiana, and South Carolina) still had never elected a black representative to statewide office as of 2006. *Id.*

In terms of the objection-related statistics in the legislative record -- the third category of evidence relied on by the Supreme Court in *City of Rome* -- Congress in 2006 acknowledged that the objection rate had been lower in recent years than in the years immediately prior to the 1975 reauthorization of Section 5. But Congress also received evidence indicating that the objection rate has always been below 5%, *see Introduction to Expiring Provisions* 219 (attachment to Hasen Prepared Statement), and that there were still more than 700 objections lodged by the Attorney General since 1982, *see* H.R. Rep. No. 109-478, at 21, with more objections lodged after 1982 than before, *see* 1 *Evidence of Continued Need* 172-73 (Nat'l Comm'n Report). In light of this data, the House Committee on the Judiciary had good reason to conclude that the evidence of voting discrimination in the 2006 legislative record still "resemble[d]" the evidence before Congress when it reauthorized Section 5 in 1975. *See* H.R. Rep. No. 109-478, at 6. This "resemblance" of the 2006 legislative record to the 1975 legislative record is critical, given that *Boerne* and later cases applying the congruence and proportionality framework have repeatedly cited the legislative record at issue in *City of Rome* as containing precisely the kind of evidence needed to sustain remedial, prophylactic enforcement legislation like Section 5. *See Nw. Austin I*, 573 F. Supp. 2d at 271 (*citing Boerne*, 521 U.S. at 530; *Fla. Prepaid*, 527 U.S. at 640; *Garrett*, 531 U.S. at 369, 373-74).

In addition to the three categories of evidence relied on by the Supreme Court in *City of Rome*, Congress in 2006 identified several other forms of evidence that bear directly on the persistence of unconstitutional voting discrimination by covered jurisdictions. As previously mentioned, one study in the legislative record revealed that there were 421 objections lodged between 1982 and 2006 in which the Attorney General denied preclearance to a covered jurisdiction's proposed voting change based on his inability to find that the change was not motivated by a racially discriminatory purpose. *See Preclearance Standards* 180 tbl. 2 (McCrary Study). Another study found that 205 voting changes were withdrawn by covered jurisdictions after receipt of an MIR, thereby suggesting that the covered jurisdiction may have known that its change could not withstand federal scrutiny. *See* 1 *Evidence of Continued Need* 178 (Nat'l Comm'n Report). There were 25 unsuccessful judicial preclearance suits filed since 1982, including some in which preclearance was denied on the basis of discriminatory intent. *See Nw. Austin I*, 573 F. Supp. 2d at 266. And there were at least 105 successful Section 5 enforcement actions between 1982 and 2006, some of which led to the abandonment of unprecleared voting changes by covered jurisdictions, while others led to intent-based denials of preclearance after covered jurisdictions were forced to submit their voting changes for federal review. *See* 1 *Evidence of Continued Need* 185-86 (Nat'l Comm'n Report); *see also Preclearance Standards* 83 (appendix to statement of Brenda Wright). From 1982 to 2006, there were tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions, *see* 2006 Amendments § 2(b)(3)-(4), (8), 120 Stat. at 577-78, many of whom played a key role in preventing the attempted intimidation and harassment of minority voters at the polls, *see* H.R. Rep.

No. 109-478, at 44. And perhaps most importantly, there were at least 14 reported Section 2 cases since 1982 involving judicial findings of intentional or unconstitutional voting discrimination by covered jurisdictions. *Nw. Austin I*, 573 F. Supp. 2d at 258. As the three-judge court in *Nw. Austin I* pointed out, "all this evidence becomes even more compelling given Congress's finding that section 5's preclearance requirement has deterred covered jurisdictions from even attempting to implement an unknown and unknowable number of [voting] changes." *Id.* at 266.

It is noteworthy that the evidence of unconstitutional voting discrimination in the 2006 legislative record far exceeds the evidence of unconstitutional discrimination found sufficient to uphold the challenged legislation in both *Hibbs* and *Lane*. *See Nw. Austin I*, 573 F. Supp. 2d at 271. In *Hibbs*, a male employee of the Nevada Department of Human Resources brought suit under the FMLA after he was discharged for failing to return to work because he had been caring for his ailing wife. Nevada contended that Congress had exceeded its Fourteenth Amendment enforcement authority by abrogating state sovereign immunity in the FMLA. Rejecting this challenge, the Supreme Court held that Congress "had evidence of a pattern of constitutional violations on the part of the States in this area," which justified enactment of the remedial § 5 legislation. 538 U.S. at 729. In so holding, the Supreme Court relied on just four pieces of evidence:

> (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities

> in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986 . . . that public-sector parental leave policies "diffe[r] little" from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would "leav[e] Federal employees open to discretionary and possibly unequal treatment."

Lane, 541 U.S. at 528 n.17 (citation omitted) (summarizing *Hibbs*, 538 U.S. at 728-33).

In other words, the Supreme Court upheld the challenged provision of the FMLA as responsive to a documented history and pattern of unconstitutional conduct by the states, based solely on (1) a survey that found discriminatory parental leave practices by *private*-sector employers, not state employers; and (2) three other forms of evidence of employers' discriminatory practices with respect to *parental* leave, despite the fact that the FMLA provision at issue provided for *family* leave, not parental leave. *See Hibbs*, 538 U.S. at 746-48 (Kennedy, J., dissenting). The majority concluded that evidence relating to parental leave was "relevant because both parenting and family leave provisions respond to 'the same gender stereotype: that women's family duties trump those of the workplace.'" *Id.* at 748 (quoting 538 U.S. at 731 n.5). But as Justice Kennedy pointed out in dissent, "the question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment . . . [but] whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave." *Id.* at 749.

In *Lane*, the Supreme Court upheld Title II of the ADA as applied to claims by the disabled alleging that they had been denied access to the courts based on "statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services." *Lane*, 541 U.S. at 529. Significantly, however, the Supreme Court in *Lane* identified only "*two* reported cases finding that a disabled person's federal constitutional rights were violated" as a result of being denied access to the courts. *Id.* at 544 (Rehnquist, C.J., dissenting) (citing 541 U.S. at 525 n.14). Aside from those two cases, the only evidence that the Court identified with respect to "due process 'access to the courts'" violations was (1) the testimony of two witnesses before a House subcommittee as to the "'physical inaccessibility' of local courthouses," even though neither witness "reported being denied the right to be present at constitutionally protected court hearings"; and (2) a report by the ADA Task Force on the Rights and Empowerment of Americans with Disabilities, which contained "a few anecdotal handwritten reports of physically inaccessible courthouses." *Id.* at 545. As Chief Justice Rehnquist noted in dissent, these types of anecdotes do "not state a constitutional violation," since "[a] violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding." *Id.* at 546. Yet the majority in *Lane* found this evidence sufficient to establish "a pattern of unconstitutional treatment in the administration of justice," at least when viewed against the "backdrop of pervasive unequal treatment in the administration of state services and programs." *Id.* at 524.

The evidence relied on by the Supreme Court to uphold the challenged legislation in *Hibbs* and *Lane* "pales in comparison to the extensive record Congress compiled when extending section 5." *Nw. Austin I*, 573 F. Supp. 2d at 271. Just on the subject of formal judicial findings of unconstitutional conduct, Congress in 2006 identified three times as many reported cases since 1982 in which covered jurisdictions committed unconstitutional voting discrimination against minority voters (6) than the number of cases *Lane* identified in which a state unconstitutionally denied a disabled person access to the courts (2). *Compare* S. Rep. No. 109-295, at 65 *with Lane*, 541 U.S. at 544 (Rehnquist, C.J., dissenting) (citing 541 U.S. at 525 n.14). This is particularly remarkable, as the *Nw. Austin I* court noted, "given that section 5 was actively deterring constitutional violations throughout the period under review." 573 F. Supp. 2d at 272.

But, of course, there is much more in the 15,000-page record supporting the 2006 reauthorization of Section 5. The circumstantial evidence of unconstitutional voting discrimination relied on by Congress also far outweighs the circumstantial evidence of unconstitutional discrimination relied on by the Supreme Court in *Hibbs* and *Lane*. In *Lane*, for example, the Court cited as circumstantial evidence of unconstitutional discrimination the testimony of several disabled persons as to the physical inaccessibility of local courthouses -- even though physical inaccessibility, in and of itself, does not reflect a constitutional violation. *See* 541 U.S. at 546 (Rehnquist, C.J., dissenting) (explaining that "[w]e have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance"). By contrast, many of the examples of voting discrimination cited by Congress in support of the 2006 reauthorization of Section 5 are highly suggestive of unconstitutional conduct: whether it be Kilmichael, Mississippi's decision to cancel its 2001 local elections in which a significant number of African-Americans sought office immediately after new Census data revealed that African-Americans recently had become a majority of the town's population; Charleston County, South Carolina's sudden decision in 2000 to change the method of election for its school board to one that had recently been struck down as discriminatory, just after African-Americans won a majority of seats on the board for the first time; Alabama poll officials' 1992 attempts to "close the doors" on African-American voters before the voting hours were over; Louisiana's 2001 decision to purposefully "obliterate" a majority-black district in Orleans Parish; South Dakota's passage of a photo identification law in 2002 that state legislators conceded was adopted in order to "retaliate" against the recent rise in Native American voter registration; Mississippi's 1995 attempt to revive its dual registration system without seeking preclearance, even though prior versions of the system had all been invalidated as discriminatory; or Waller County, Texas's suspiciously-timed reduction in voting opportunities for Prairie View A&M students immediately before a 2004 election that was marked by the presence of two black Prairie View A&M students as candidates for office. None of these incidents resulted in a formal judicial finding of unconstitutional voting discrimination. Yet each case -- and many others like them in the 15,000-page legislative record -- supports the conclusion that unconstitutional voting discrimination persists in covered jurisdictions, notwithstanding the deterrent effect of Section 5.

In evaluating whether Congress properly found a history and pattern of unconstitutional conduct sufficient to justify the 2006 reauthorization of Section 5, it is also significant to recall the deference to which Congress is entitled when it legislates to enforce the substantive guarantees of the Fifteenth Amendment. As the Supreme Court acknowledged in *Nw. Austin II*, "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 129 S. Ct. at 2513. And as explained earlier, Congress acts at the pinnacle of its constitutional enforcement authority when it legislates to protect a fundamental right, or when it legislates to prohibit discrimination against a suspect class. *See supra* pp. 65-66. In reauthorizing Section 5 in 2006, Congress did both.

Moreover, Congress's determination that there is a continued need for Section 5 was not based on a perfunctory review of a few isolated examples of voting discrimination by covered jurisdictions. Instead, Congress "approached its task seriously and with great care." *Nw. Austin I*, 573 F. Supp. 2d at 265. It held 22 hearings over the course of eight months, and heard testimony from 92 witnesses, including Justice Department attorneys, law professors, social scientists, and civil rights litigators. In addition to that testimony, the evidence that Congress collected consisted of statistical and other analyses, objection letters, law review articles, judicial decisions, and first-hand accounts of discrimination. Ultimately, Congress amassed a 15,000-page legislative record in support of its decision to renew Section 5 -- a record that the Supreme Court has described as "sizeable," *Nw. Austin II*, 129 S. Ct. at 2513, and that dwarfs those deemed sufficient in *Lane* and *Hibbs*. Shelby County points out that "[i]t is the quality of the evidence that matters - not the quantity of evidence." *See* Pl.'s Reply at 38. But the Supreme Court has often acknowledged the quantity of the evidence considered by Congress in the course of assessing the sufficiency of that evidence. *See, e.g., Katzenbach*, 383 U.S. at 309 (describing the legislative history of the Act as "voluminous"). And surely Congress's judgment that "extending the expiring provisions of the Voting Rights Act is still necessary," S. Rep. No. 109-295, at 2, is all the more valuable given the "sheer bulk of the record showing both continued problems and significant improvements," *id.* at 15, which Congress reviewed prior to reaching its conclusion.

There are additional reasons to accord significant weight to Congress's 2006 decision to renew Section 5. First, Congress in 2006 did not enact new legislation, but instead reauthorized legislation that had already been in effect for more than 40 years. During those 40 years, the Supreme Court upheld the constitutionality of Section 5 on four separate occasions, each time finding that "circumstances continued to justify the provision[]." *See Nw. Austin II*, 129 S. Ct. at 2510 (citing *Georgia*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472; *City of Rome*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119; *Lopez*, 525 U.S. 266, 119 S. Ct. 693, 142 L. Ed. 2d 728); *see also Katzenbach*, 383 U.S. at 334. Twice, the Supreme Court has assessed facial challenges to Section 5 like the one raised here by Shelby County, and both times the Court has found that Section 5 passed constitutional muster based on evidence of continued voting discrimination by covered jurisdictions. *See Katzenbach*, 383 U.S. at 334; *City of Rome*, 446 U.S. at 182.

The Supreme Court in *Nw. Austin II* made clear that past discrimination alone cannot sustain Section 5, *see* 129 S. Ct. at 2511, but the Court by no means suggested that history was irrelevant to the constitutional analysis. In *Boerne* and the cases applying the congruence and proportionality framework since *Boerne*, the Supreme Court has acknowledged the significance of an established history of unconstitutional discrimination in evaluating the need for remedial enforcement legislation, often *citing* examples of discrimination at least several decades old in order to justify the challenged legislation. *See, e.g.*, *Lane*, 541 U.S. at 524 (describing the historical "backdrop" of discrimination against the disabled, and *citing* examples of such discrimination dating from the late 1970s); *Hibbs*, 538 U.S. at 729 (recognizing "[t]he history of the many state laws limiting women's employment opportunities," and providing examples of cases upholding the validity of such laws as far back as 1873); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 Ohio St. L.J. 177, 200 (2005) (interpreting *Lane* to mean that "old" evidence of voting discrimination could be used to support a reauthorization of Section 5).

When courts assess individual instances of alleged voting discrimination like those described in the 2006 legislative record -- for example, in the context of a Section 2 suit or a direct constitutional challenge -- they also look to historical evidence to determine whether there has been intentionally discriminatory, unconstitutional conduct. As the Supreme Court explained in *Rogers v. Lodge*, "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by the courts or made illegal by civil rights legislation, and that they were replaced by practices which, though neutral on their face serve to maintain the status quo." 458 U.S. at 625; *see also Charleston Cnty.*, 316 F. Supp. 2d at 305 (explaining that under *Arlington Heights*, "[t]he historical background of the jurisdiction's decision" must be considered in determining whether "discriminatory intent was in fact a motivating factor in a jurisdiction's enactment of legislation"). Given the significance of historical context in assessing both the general need for remedial, prophylactic enforcement legislation and whether particular instances of alleged voting discrimination do, in fact, amount to constitutional violations, it is clear that any assessment of the continued need for Section 5 cannot be undertaken in a historical vacuum.

This Court agrees with the three-judge court in *Nw. Austin I* that Congress's "predictive judgment" as to the continued need for Section 5 warrants "particular respect," given that it was a prediction based "on experience, requiring less in the way of conjecture than when Congress enacts legislation for the first time." 573 F. Supp. 2d at 267. In reauthorizing Section 5 in 2006, Congress could not be certain as to whether unconstitutional voting discrimination would increase in the absence of Section 5, and whether, just as in 1965, private enforcement actions would once again prove insufficient to protect minorities' voting rights if Section 5 were allowed to expire. But courts "must accord substantial deference to the predictive judgments of Congress . . . particularly when, as here, those predictions are so firmly rooted in relevant history and common sense." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 165, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)) (internal quotation marks and citations omitted). As the Supreme Court noted in *Nw. Austin II*, Congress is a co- equal Branch that is empowered under the Fifteenth Amendment "to determine in the first instance what legislation is needed to enforce it," and courts must be cautious when engaging in the grave and delicate role of assessing the constitutionality of carefully-considered legislation. *See* 129 S. Ct. at 2513. And in 2006, Congress concluded after many months of deliberation and compilation of a massive record that "a failure to reauthorize the temporary provisions [of the

Voting Rights Act], given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action," which, in light of past experience, would not be "enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." H.R. Rep. No. 109-478, at 57.

Congress's predictive judgment was based not only on the established pre-1965 history of unconstitutional state-sponsored voting discrimination in the South, but also on evidence of Section 5's substantial deterrent effect over 40 years. Most importantly, it was based on the extensive 15,000-page legislative record replete with direct and circumstantial evidence of contemporary voting discrimination by covered jurisdictions -- voting discrimination that occurred despite the existence of Section 5. This Court finds, then, that Congress satisfied its burden in 2006 of identifying a continuing "history and pattern of unconstitutional . . . discrimination by the States," *Garrett*, 531 U.S. at 368, which was sufficient to justify the reauthorization of Section 5 as remedial, prophylactic enforcement legislation.

2. The Congruence and Proportionality of Section 5

The third and final step of the *Boerne* analysis requires the Court to decide whether Section 5 still constitutes a "congruent and proportional" response to the problem that it targets. Shelby County casts Section 5 as an unduly broad remedial measure, arguing that "[l]ike RFRA, Section 5's 'sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions' regarding any change in voting laws." Pl.'s Reply at 21 (quoting *Boerne*, 521 U.S. at 532). In a sense, Shelby County is correct: Section 5 does require covered jurisdictions to *seek* preclearance for all changes to their voting practices or procedures, regardless of how trivial or innocuous those changes may be. *See, e.g., Nw. Austin II*, 129 S. Ct. at 2511 (noting that "the preclearance requirement applies broadly"). But Section 5 is nonetheless limited in meaningful ways. Indeed, the Supreme Court in *Boerne* praised Section 5 as an exemplary congruent and proportional remedy, pointing to the Act's temporal and geographic limits as a means of distinguishing it from RFRA, which lacked a "termination date or termination mechanism." *See Boerne*, 521 U.S. at 532-33. For purposes of assessing the congruence and proportionality of Section 5 as reauthorized in 2006, then, it is significant that "the limiting features of section 5 the Court believed so compelling in the *City of Boerne* cases all remain in place today." *Nw. Austin I*, 573 F. Supp. 2d at 274.

Despite Shelby County's suggestion that Section 5 has been transformed from an "emergency" provision into a "permanent" intrusion on state sovereignty, *see* Pl.'s Reply at 43, Congress in 2006 did not choose to make Section 5 permanent. Instead, it extended the preclearance requirement for 25 years, and provided for congressional reconsideration of the Act's temporary provisions in 15 years. *See* S. Rep. No. 109-295, at 5; 42 U.S.C. § 1973b(a)(7), (8). Although 25 years is longer than the 7 year extension of Section 5 upheld by the Supreme Court in *City* *of Rome*, the 2006 extension is the same length as the 1982 extension. And Congress had at least two good reasons for selecting 25 years as the length of the extension. First, a renewal period of more than 20 years was needed to cover two decennial redistricting cycles. Because "most section 5 activity 'occurs during redistricting, which only happens every ten years following each census,' a shorter extension would [have] 'capture[d] only one redistricting cycle,'" which would not have provided as much "'evidence . . . to allow Congress to make the same reasoned determination regarding renewal'" that the 2006 Congress was able to make as a result of the previous 25-year renewal of Section 5 in 1982. *See Nw. Austin I*, 573 F. Supp. 2d at 267 (internal citation omitted); *see also Introduction to Expiring Provisions* 167 (Shaw Responses). Second, a shorter extension period would not have encouraged as many covered jurisdictions to *seek* bailout. Under the 1982 Amendments, a covered jurisdiction petitioning for bailout must demonstrate that it has complied with the Act's requirements for the past ten years. *See* 42 U.S.C. § 1973b(a). Any renewal of Section 5 for a period of less than ten years therefore "'would [have] completely nullif[ied] the current incentive [for] covered jurisdictions to maintain clean voting records." *Nw. Austin I*, 573 F. Supp. 2d at 267 (internal citation omitted).

For these reasons, Congress decided that "another 25 years of remedial measures (for a total of 67 years of remedial measures under the VRA until 2032) remains appropriate given the near century of discrimination the Act is designed to combat." H.R. Rep. No. 109-478, at 58. Like the three-judge court in *Nw. Austin I*, this Court "*see*[s] no basis for questioning this quintessentially legislative judgment." 573 F. Supp. 2d at 268. Although the 25-year renewal period is substantial, the fact that Section 5 continues to be temporally limited distinguishes it from every piece of legislation that has been struck down by the Supreme Court as lacking congruence and proportionality under *Boerne*.

In addition to its termination date, Section 5 also remains limited by its termination mechanism, as jurisdictions may bailout of Section 5 coverage if they meet certain statutory requirements. *See Nw. Austin II*, 129 S. Ct. at 2509; 42 U.S.C. § 1973b(a). The Court in *Boerne* pointed to the existence of this termination mechanism, which "ensure[d] that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely," as indicative of Section 5's congruence and proportionality. *See* 521 U.S. at 533. Since *Boerne*, the bailout provision has remained in effect. *See* H.R. Rep. No. 109-478, at 55 (noting that "H.R. 9 preserves those same provisions" that were cited approvingly by the Court in *Boerne*, as covered jurisdictions may still "escape coverage by showing the danger of substantial voting discrimination has not materialized during the preceding (now ten) years"). Under 42 U.S.C. § 1973b(a), a jurisdiction may *see*k to terminate its coverage under Section 5 by filing a declaratory judgment action demonstrating that, for the past ten years, "it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has 'engaged in constructive efforts to eliminate intimidation and harassment' of voters, and similar measures." *Nw. Austin II*, 129 S. Ct. at 2509 (*quoting* §§ 1973b(a)(1)(A)-(F)).

Shelby County questions whether bailout is "a realistic option," citing the fact that only 6% of the jurisdictions originally covered by the Act have successfully bailed out since 1965. *See* Pl.'s Reply at 33. But this statistic is misleading. Since 1984 -- when the 1982 Amendments liberalizing the bailout procedure went into effect -- the Attorney General has consented to *every* bailout action that has been filed. *See* Berman Decl. ¶¶ 27, 29. Indeed, since the initiation of this lawsuit in April 2010, the Attorney General has consented to an additional seven bailout suits that have been filed by covered jurisdictions. *See* Def.'s Second Notice of Supp. Info. [Docket Entry 81] at 2; Def.'s Mot. at 72; Berman Decl. ¶ 27. Congress heard testimony during the 2006 reauthorization hearings from J. Gerald Hebert, former Acting Chief of the Civil Rights Division of the Justice Department, who, at the time of his testimony, had represented all of the covered jurisdictions to successfully bail out since 1984. *See Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (Oct. 20, 2005) (hereinafter, "*Scope and Criteria*") (prepared statement of J. Gerald Hebert) (hereinafter, "Hebert Prepared Statement"). According to Hebert, the reason for the low number of successful bailout actions is not that "jurisdictions are applying and being denied" but that "jurisdictions are just not applying." *Id.*

There are several plausible explanations for this failure to seek bailout. As Professor Karlan noted during her 2006 testimony before the Senate Judiciary

Committee, it is possible that "jurisdictions have not sought bailout because they have not satisfied all the conditions . . . and *see* no point in a futile effort to bail out." *Continuing Need* 93 (Karlan Responses). This, of course, could mean that the criteria for bailout are overly rigorous; but Congress in 2006 heard testimony that "[m]ost of the factors to be demonstrated are easily proven for jurisdictions that do not discriminate in their voting practices." *See Scope and Criteria* 90 (Hebert Prepared Statement) (rejecting the contention that "the criteria [for bailout] are . . . too difficult to meet"). Accepting that the bailout requirements are appropriately tailored to identify those jurisdictions with "clean" voting rights records, which appears to be the case, *see id.* at 104 (describing the bailout requirements as "perfectly tailored"), the failure of so many covered jurisdictions to seek bailout likely means that these jurisdictions -- or governmental units within these jurisdictions -- have, in fact, committed voting rights violations in recent years, thereby justifying their continued coverage under the Act.

Another possible reason for the low bailout rate is the minimal administrative cost associated with preclearance, and the fact that covered jurisdictions *see* no need to avoid the preclearance requirement. Congress in 2006 heard testimony from Donald Wright, General Counsel of the North Carolina State Board of Elections, who indicated that most preclearance submissions "are routine matters that take only a few minutes to prepare using electronic submission formats" that are "readily available." *Policy Perspectives* 313 (prepared statement of Donald M. Wright). Wright characterized the practical cost of preclearance as "insignificant" -- with the exception of redistricting submissions, which tend to be relatively infrequent -- and he went on to explain that the "consensus" among election officials in North Carolina is that Section 5 imposes "a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.* Other witnesses similarly testified that the benefits of Section 5 far outweigh its costs, given that the preparation of a preclearance submission is no more than "a small administrative act." *See Benefits and Costs* 25 (testimony of Fred D. Gray); *Continuing Need* 64 (Earls Responses) (explaining that "the majority" of officials "did not find Section 5 requirements to be burdensome").[16]

Indeed, in the *Nw. Austin* litigation, six states covered in whole or in part by Section 4(b) -- Louisiana, California, North Carolina, Arizona, Mississippi, and New York -- submitted an amicus brief in which they urged the Supreme Court *not* to strike down Section 5, arguing that "the benefits of Section 5 greatly exceed the minimal burdens that Section 5 may impose on States and their political subdivisions." *See* Amicus Br. for North Carolina, Arizona, California, Louisiana, Mississippi and New York, *Nw. Austin II*, 2009 WL 815239, at *2, 17 (Mar. 25, 2009). According to these states, Section 5 does not constitute "an undue intrusion on state sovereignty," because the administrative preclearance process is both "expeditious and cost-effective," and any burden that Section 5 imposes on covered jurisdictions is more than justified by Section 5's "substantial benefits." *Id.* at *1-2. Section 5's minimal administrative burden -- at least according to these six states -- stands in stark contrast to the "heavy litigation burden" imposed by RFRA. *See Boerne*, 521 U.S. at 534.[17]

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[16] The Court recognizes that administrative costs of compliance are not the only costs imposed by Section 5. *See, e.g., Bossier II*, 528 U.S. at 336 (referring to "the 'substantial' federalism costs that the preclearance procedure already exacts") (quoting *Lopez*, 525 U.S. at 282). Nevertheless, an assessment of a remedial statute's practical costs is relevant in determining whether it constitutes congruent and proportional legislation. *See, e.g., Boerne*, 521 U.S. at 534 (describing the "substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power").

In addition to the evidence indicating that the practical cost of Section 5 compliance is low, Congress in 2006 received evidence indicating that the practical cost of Section 2 litigation is high. As one expert explained during her 2006 testimony before the Senate Judiciary Committee, Section 2 litigation is both time-consuming and costly, as it requires attorneys "to assemble plaintiffs with standing, file a case and engage in discovery," and "even on an expedited schedule, trial will be months and possibly a year after the new law is put in place." *Continuing Need* 61 (Earls Responses). Section 2 litigation places a heavy burden on minority plaintiffs, who not only must fund the litigation, but also must prove that particular voting practices are, in fact, discriminatory (unlike Section 5, which shifts the burden to covered jurisdictions to prove that their voting changes are

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[17] No states have sought to join in Shelby County's well-publicized challenge to Section 5.

non-discriminatory). *See Katzenbach*, 383 U.S. at 328. Moreover, even if minority plaintiffs are able to satisfy this evidentiary burden, Section 2 -- unlike Section 5 -- can only eradicate discriminatory voting practices after they have already been implemented to the detriment of minority voters. *See* Def.'s Mot. at 55-57.

For all these reasons, several witnesses who testified during the 2006 reauthorization hearings speculated that in the absence of Section 5, Section 2 would prove insufficient to protect minority voting rights. *See, e.g.*, *Benefits and Costs* 80 (responses of Armand Derfner to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Schumer) (describing Section 2 cases as "expensive and time-consuming to litigate and hard to win," and refuting the position that "Section 5 is not needed because other litigation will do the job"); *Continuing Need* 15 (testimony of Pamela S. Karlan) (explaining that Section 2 suits demand "huge amounts of resources" and that Section 2 litigation is not "an adequate substitute in any way" for Section 5). The inadequacy of alternative remedies like Section 2 in combating continued voting discrimination by covered jurisdictions further confirms that Section 5 is "congruent and proportional" to the problem that it targets. *Cf. Garrett*, 531 U.S. at 373 (noting that the Voting Rights Act was only enacted after "traditional litigation had proved ineffective" in the course of describing why the Act reflects an appropriately "detailed but limited remedial scheme").

Perhaps the most significant way in which Section 5 remains limited, however, is through its application to only "those states with the most severe histories of discrimination" in voting. *See Nw. Austin I*, 573 F. Supp. 2d at 274. Since it was first enacted in 1965, Section 5 has never applied nationwide, but has always targeted specific jurisdictions with a "long history of racial disenfranchisement and dilution." *Continuing Need* 103 (Karlan Responses); *see also supra* pp. 11, 22. *Boerne* and its progeny have repeatedly highlighted Section 5's selective coverage in explaining why it constitutes appropriately tailored remedial legislation. *See, e.g.*, *Boerne*, 521 U.S. at 532-33 (comparing RFRA's nationwide application to the provisions of the Voting Rights Act upheld in *Katzenbach*, which "were confined to those regions of the country where voting discrimination had been most flagrant"); *Garrett*, 531 U.S. at 373 (explaining that the Voting Rights Act, unlike Title I of the ADA, was targeted at "those areas of the Nation where abundant evidence of States' systematic denial of [voting] rights was identified"); *Fla. Prepaid*, 527 U.S. at 647 (contrasting the "various limits" contained in the Voting Rights Act with the absence of any such limits in the Patent and Plant Variety Protection Remedy Clarification Act). And like the other limiting features of Section 5 that were lauded by the Supreme Court in *Boerne*, the coverage formula embodied in Section 4(b) remained unchanged when Congress reauthorized Section 5 in 2006.

Given that Congress preserved all of Section 5's traditional limiting features when it reauthorized Section 5 in 2006 (including its selective geographic scope, its termination date, and its termination mechanism), after it heard testimony as to the low administrative costs imposed by preclearance and the inability of Section 2 litigation to effectively prevent unconstitutional voting discrimination, this Court sees no reason to question Congress's considered judgment that Section 5 remains congruent and proportional to the problem that it targets.[18] The question remains, however, whether the geographical limitation of Section 5 through the coverage formula of Section 4(b) is itself vulnerable to challenge.

IV. The Constitutionality of Section 4(b)

Shelby County challenges Section 4(b) on the ground that it unconstitutionally differentiates between states in violation of "the principle of equal sovereignty" embodied in the Tenth Amendment and Article IV of the Constitution, and that, like Section 5, it does not constitute "'appropriate' enforcement legislation." *See* Pl.'s Mot. at 35; Compl. ¶ 43(c). Since *Katzenbach*, it is well-established that "[t]he doctrine of the equality of States . . . does not bar [the] approach" of selectively applying remedial legislation to only those "geographic areas where immediate action seem[s] necessary." 383 U.S. at 328-29. Nevertheless, the Supreme Court in *Nw. Austin II* made clear that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *See* 129 S. Ct. at 2512. According to Shelby County, "the decades-old data fossilized in the coverage formula bear no relation whatsoever to 'current political conditions' in those jurisdictions'" and "the 'evils' identified by Congress as a basis for reauthorizing Section 5 are not 'concentrated in the jurisdictions singled out for preclearance.'" Pl.'s Reply at 23 (quoting *Nw. Austin II*, 129 S. Ct. at 2512). Hence, Shelby County contends, Section 4(b)'s coverage formula is no longer "sufficiently related" to the problem that it targets.

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[18] To the extent that *Katzenbach*'s rationality standard rather than *Boerne*'s congruence and proportionality test provides the proper mode of analysis, the Court finds for the same reasons that the 2006 reauthorization of Section 5 withstands scrutiny under *Katzenbach*.

The Supreme Court in *Nw. Austin II* did not explicate the precise nature of the showing needed to determine whether Section 5's disparate geographic coverage remains "sufficiently related" to the problem that it targets. Several justices during oral argument seemed to suggest that Congress might have to undertake a comparative analysis of unconstitutional voting discrimination in covered versus non-covered jurisdictions and prove that the "States that are now covered . . . are markedly different from the noncovered jurisdictions" in order to justify Section 5's continued selective application. *Nw. Austin II* Oral Arg. Tr. at 22 (Apr. 29, 2009) (Kennedy, J.); *see also id.* at 48 (Roberts, C.J., asking whether it is counsel's "position that today southerners are more likely to discriminate than northerners"?); *id.* at 54 (Alito, J., asking counsel whether "there is no [greater] discrimination in voting in Virginia than in North Carolina or in Tennessee or in Arkansas or in Ohio"?); *id.* at 30 (Scalia, J., pressing counsel as to whether the legislative record shows only that section 5 is still "needed" in covered jurisdictions, or also that Section 5 is needed more in covered jurisdictions than in "the rest of the country"). Significantly, however, the Supreme Court in *Katzenbach* did not conduct any detailed comparative analysis of voting discrimination in covered versus non-covered jurisdictions when it upheld Section 4(b) in 1966, nor did the Court in *City of Rome* undertake such a comparative analysis when it upheld Section 5 (and its selective application) in 1980.

Hence, the Attorney General argues that it was sufficient for Congress in 2006 to choose "to continue covering the jurisdictions that it had already subjected to the preclearance requirement and that had not bailed out . . . based on findings that voting discrimination continued to exist in those specific jurisdictions and that Section 5 preclearance remained necessary to protect minority voting rights there." Def.'s Supp. Mem. [Docket Entry 75] at 3. No comparative showing as to the precise degree of voting discrimination in covered versus non-covered jurisdictions was necessary, the Attorney General contends, given that a set of jurisdictions was lawfully subjected to preclearance in 1965 -- and in subsequent reauthorizations of the Voting Rights Act -- and Congress learned that those same jurisdictions continued to warrant coverage in 2006. *See id.* Ultimately, however, this issue need not be parsed further here, because Congress in 2006 did examine *both* (1) whether voting discrimination persisted in the jurisdictions traditionally covered by Section 4(b), and (2) whether voting discrimination remained more prevalent in these jurisdictions than in the jurisdictions not subject to preclearance under the Act. *See* Def.'s Supp. Mem. at 4.

This Court has already described in great detail the evidence in the legislative record documenting the contemporary existence of unconstitutional voting discrimination by covered jurisdictions. In assessing whether this evidence is sufficient to justify the continued application of Section 5 to these jurisdictions, it is useful to start with *Katzenbach* -- the only Supreme Court case in which the Court has outlined the precise nature of the showing needed to sustain Section 4(b). There, South Carolina argued -- like Shelby County does here -- that the coverage formula was "awkwardly designed in a number of respects," 383 U.S. at 329, and it criticized the formula for excluding "certain localities which do not employ voting tests and devices, but for which there is evidence of voting discrimination by other means," *id.* at 330-31. But the Supreme Court dismissed these arguments as "largely beside the point." *Id.* at 329. Congress was not required to create a perfect fit between the coverage formula and the states where voting discrimination was the most prevalent, the Court explained, "so long as the distinctions drawn have some basis in practical experience." *Id.* at 331 (emphasis added).

The Court in *Katzenbach* further suggested that Congress was not even required to document evidence of unconstitutional voting discrimination in each of the states covered by Section 4(b).[19] According to the Court,

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[19] This view would also seem to be supported by cases like *Hibbs*, in which the Supreme Court upheld remedial enforcement legislation with nationwide application without requiring a showing of unconstitutional conduct by every state to which the legislation applied. *See, e.g., United States v. Blaine Cnty., Mon.*, 363 F.3d 897, 906 (9th Cir. 2004) (explaining that, based on *Hibbs*, "it is clear that Congress need not document evidence

Congress began working "with reliable evidence of actual voting discrimination in a *great majority of the States* and political subdivisions affected by the new remedies of the Act," and it created a formula that "was relevant to the problem of voting discrimination." *Id.* at 329 (emphasis added). That formula -- based on the presence of a voting test or device in a particular jurisdiction as well as low voter registration or turnout in that jurisdiction -- was "relevant" because of the "long history" of states using these tests and devices as a tool for perpetuating minority disenfranchisement. *See id.* at 330. Once Congress had constructed this "relevant" formula -- which was rational "in both practice and theory," *id.* -- Congress was "entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by s[ection] 4(b) of the Act," *id.* at 329, "at least in the absence of proof that

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of constitutional violations in every state to adopt a statute that has nationwide applicability"); *but see Hibbs*, 538 U.S. at 741-43 (Scalia, J., dissenting) (criticizing the majority's failure to "even attempt to demonstrate that each one of the 50 States covered by [the challenged legislation] was in violation of the Fourteenth Amendment"); *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) (stating that he "would not . . . abandon the requirement that Congress may impose § 5 prophylactic legislation only upon those particular States in which there has been an identified history of relevant constitutional violations"). It certainly would seem odd to place a higher evidentiary burden on Congress when it seeks to tailor its remedies to those states where the remedies are most needed than when it chooses to forego any attempt at tailoring, and instead simply enacts remedial legislation on a nationwide scale. On the other hand, one could argue that a higher evidentiary showing is justified in all circumstances in which Congress departs "from the fundamental principle of equal sovereignty." 129 S. Ct. at 2512.

they have been free of substantial voting discrimination in recent years," *id.* at 330.

Shelby County argues that the coverage formula is no longer "relevant" in 2006 because it is based on voter registration and turnout data that "is now 38 years old and will be 59 years old when the 2006 reauthorization expires," Pl.'s Mot. at 37, and because the "statutory coverage factors are tied to the ability to cast a ballot" whereas Section 5 today is directed primarily at so-called "second generation barriers" to voting, and not at states' attempted "interference with ballot access." Pl.'s Supp. Mem. [Docket Entry 74] at 4; *see also* Pl.'s Mot. at 38. Certainly the continued reliance on arguably outdated data is fair cause for concern. But ultimately Shelby County misses the point. As previously explained, *see supra* pp. 11, 22, the specific election years that have come to be used as "triggers" for coverage under Section 4(b) were never selected because of something special that occurred in those years; instead, they were chosen as mere proxies for identifying those jurisdictions with established histories of discriminating against racial and language minority voters. *See, e.g.*, *Continuing Need* 99 (Karlan Responses); *id.* at 110 (Pildes Responses). Notwithstanding the passage of time since the coverage formula was last updated, "[t]he identity of the jurisdictions with that pervasive history and contemporary voting discrimination has not changed." *Id.* at 103 (Karlan Responses). It is for this reason that Chairman Sensenbrenner was so vigorously opposed to the Norwood Amendment's proposed "updating" of Section 4(b) in 2006, which would have made the coverage formula dependent on voter turnout and registration data from the three most recent presidential elections. As Chairman Sensenbrenner explained, any "updating" of the coverage formula along these lines would eviscerate Section 5, since the coverage formula "is not, and I repeat 'not' predicated on these [voter turnout and registration] statistics alone." *See* 152 Cong. Rec. H5181. In 1965, states were only covered by Section 4(b) if "they applied discriminatory voting tests. And it was this aspect of the formula that brought these jurisdictions with the most serious histories of discrimination under Federal scrutiny," Chairman Sensenbrenner explained. *Id.*

It is also this aspect of the coverage formula -- that is, its link to jurisdictions with proven histories of racial discrimination in voting -- that the Supreme Court has repeatedly cited in noting that Section 5 constitutes an appropriate congruent and proportional remedy. *See, e.g., Boerne* 521 U.S. at 533 (contrasting Section 5's limited application with RFRA's nationwide scope, and noting that the preclearance requirement "was placed only on jurisdictions with a history of intentional discrimination in voting"); *Hibbs*, 538 U.S. at 741-43 (Scalia, J., dissenting) (suggesting that the Court in *City of Rome* upheld "the most sweeping provisions of the Voting Rights Act of 1965 . . . as a valid exercise of congressional power under § 2 of the Fifteenth Amendment" only because those provisions "were restricted to States 'with a demonstrable history of intentional racial discrimination in voting'") (quoting *City of Rome*, 446 U.S. at 177).

By preserving Section 4(b)'s existing coverage formula in 2006 -- under which jurisdictions are subject to preclearance if they maintained a voting test or device in 1964, 1968, or 1972, and had voter turnout or registration below 50% in that year's presidential election, *see* 42 U.S.C. § 1973b(b) -- Congress ensured that Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of voting discrimination. At the same time, Congress did not merely extend the preclearance requirement to these jurisdictions as a "[p]unishment for long past sins," *Nw. Austin II*, 129 S. Ct. at 2525 (Thomas, J., concurring in judgment in part, dissenting in part). Rather, Congress found substantial evidence of contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conduct, which, it concluded, justified their continued coverage under the Act. Finally, Congress found that any over- or under-inclusiveness in Section 4(b) could be remedied through use of the bailout provision in Section 4(a), and the bail-in provision in Section 3(c). *See Nw. Austin I*, 573 F. Supp. 2d at 274.

To the extent that an additional showing of a meaningful difference in voting discrimination between covered and non-covered jurisdictions was nonetheless required to demonstrate that the Act's coverage remains "sufficiently related to the problem that it targets," the legislative record does contain such evidence. For example, the study of Section 2 litigation conducted by Ellen Katz and the Voting Rights Initiative at the University of Michigan Law School found that 64 of the 114 reported Section 2 cases with outcomes favorable to minority voters were filed in covered jurisdictions. *See Impact and Effectiveness* 974 (Katz Study). Although a Section

2 violation does not require proof of unconstitutional discriminatory intent, "many of the same factors required to make a finding of intentional discrimination" are the factors used to determine whether there has been a violation of Section 2. *See* Def.'s Reply at 25; *see also Impact and Effectiveness* 986 (Katz Study). Accordingly, the fact that more than 56% of the successful Section 2 suits since 1982 have been filed in covered jurisdictions -- even though those jurisdictions contain only 39.2% of the country's African-American population, 31.8% of the Latino population, 25% of the Native American population, and less than 25% of the overall population -- suggests that unconstitutional discrimination remains more prevalent in covered than in non-covered jurisdictions. *See Impact and Effectiveness* 974; *see also Introduction to Expiring Provisions* 43-44 (responses of Chandler Davidson to questions submitted by Senators Cornyn and Leahy). The disproportionate number of successful Section 2 suits in covered jurisdictions is all the more remarkable considering that "Section 5 blocks and deters discrimination in covered jurisdictions, and, consequently, one would expect to *see fewer* Section 2 cases there." Def.-Int. Cunningham and Pierson's Supp. Mem. [Docket Entry 73] at 14.

There is also evidence in the legislative record indicating that five of the six Deep South states originally covered by Section 5 (namely, Louisiana, Mississippi, Alabama, Georgia, and South Carolina) accounted for as many as 66% of all federal observer coverages since 1982. *See* H.R. Rep. No. 109-478, at 24-25. This would certainly seem to suggest that minority voter intimidation and harassment continues to pose a greater problem in covered than in non-covered states -- and that it continues to pose a particularly severe problem in the Deep South. In addition, Congress received evidence in 2006 suggesting that minority candidates are less likely to succeed in elections in covered than in non-covered jurisdictions, *see Impact and Effectiveness* 1008 (Katz Study) (explaining that the majority of Section 2 cases finding a lack of minority candidate success have arisen in covered jurisdictions), and that racial appeals in elections were more prevalent in covered than in non-covered jurisdictions, *see id.* at 1003 (Katz Study) (noting that 63.2% of the Section 2 suits that found political campaigns to be characterized by racial appeals arose in covered jurisdictions). Finally, there is evidence in the record indicating that racially polarized voting is much more pronounced in covered than in non-covered jurisdictions. *See Continuing Need* 48 (Earls Responses). One study that assessed elections involving both minority and white candidates found that "virtually all such elections in covered jurisdictions had levels of white bloc voting at 70% or above while less than two thirds of such elections in non-covered jurisdictions had white bloc voting at 70%." *Id.* In other words, there was a "wide divergence" in the severity of racial bloc voting in covered and non-covered jurisdictions, which reflects "an important empirical finding demonstrating that minorities have less ability to participate equally in the political process in covered jurisdictions." *Id.*

Hence, although the legislative record is primarily focused on the persistence of voting discrimination in covered jurisdictions -- rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions -- the record does contain several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement. Like the three-judge court in *Nw. Austin I*, this Court declines to second-guess Congress's 2006 determination to preserve the traditional coverage formula -- targeting those jurisdictions with proven histories of racial discrimination in voting -- which was upheld in *Katzenbach* and "discussed with approval in the *City of Boerne* cases," 573 F. Supp. 2d at 279, particularly given the 2006 legislative record demonstrating a continued prevalence of voting discrimination in covered jurisdictions notwithstanding the considerable deterrent effect of Section 5 in those jurisdictions over the preceding 25 years. Accordingly, this Court finds that Section 4(b)'s disparate geographic coverage remains "sufficiently related" to the problem that it targets.

CONCLUSION

On the eve of the 2006 reauthorization of Section 5, many academics wondered whether, given the effectiveness of Section 5 in deterring unconstitutional conduct, Congress would be able to compile a sufficient record of recent unconstitutional voting discrimination to support Section 5's continued existence; in other words, had Section 5 become "a victim of its own success." *See, e.g.*, Samuel Isaacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004). One scholar characterized this phenomenon as the "Bull Connor is Dead" problem: given the fact that "[m]ost of the original racist elected officials are out of power," and that "those who remain in power . . . have for the most part been deterred by preclearance," would Congress be able to point toward "a record of recent state-driven discrimination . . . supporting renewal" of Section 5 in 2006? Hasen, 66 OHIO ST. L.J. at 177. Based on the evidence contained in the 15,000-page legislative record, this Court concludes that Congress did just that. Despite the effectiveness of Section 5 in deterring unconstitutional voting discrimination since 1965, Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still needed to safeguard racial and language minority voters. Understanding the preeminent constitutional role of Congress under the Fifteenth Amendment to determine the legislation needed to enforce it, and the caution required of the federal courts when undertaking the "grave" and "delicate" responsibility of judging the constitutionality of such legislation -- particularly where the right to vote and racial discrimination intersect -- this Court declines to overturn Congress's carefully considered judgment.

For the foregoing reasons, the Court will deny Shelby County's motion for summary judgment, and grant the motions for summary judgment filed by the Attorney General and the defendant-intervenors. A separate order has been filed on this date.

/s/
JOHN D. BATES
United States District Judge
Dated: September 21, 2011

APPENDIX C — MINUTE ORDER OF U.S. DISTRICT COURT, DISTRICT OF COLUMBIA, DATED FEBRUARY 4, 2011

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

1:10-cv-00651-JDB

SHELBY COUNTY, ALABAMA

v.

HOLDER

MINUTE ORDER: On the Court's own motion, and upon consideration of the arguments of counsel at the February 2, 2011 hearing and the entire record herein, it is hereby ORDERED that the parties shall submit additional briefing by not later than February 16, 2011, which shall be limited to the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it "rational in both practice and theory," *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), for Congress to preserve the existing coverage formula in Section 4(b) of the Act? In answering this question, the parties are strongly encouraged to point to specific instances in the legislative record that support their position. The parties are also encouraged to address each aspect of the question separately -- that is, to explain both why Section 4(b) is or is not rational "in practice" and why Section 4(b) is or is not rational "in theory." Plaintiff's memorandum addressing this question shall not exceed fifteen (15) pages in length, and defendant's memorandum addressing this question also shall not exceed fifteen (15) pages in length. Each defendant-intervenor may file its own memorandum addressing this question, which shall not exceed seven (7) pages in length; defendant-intervenors are, however, strongly encouraged to file a joint memorandum, not to exceed fifteen (15) pages in length, in order to avoid unnecessary duplication.

SO ORDERED.

Signed by Judge John D. Bates on 2/4/11.(lcjdb1)

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 16, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 10-0651 (JDB)

SHELBY COUNTY, ALABAMA, PLAINTIFF,

v.

ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT.

MEMORANDUM OPINION AND ORDER

Shelby County has sued Attorney General Eric Holder, seeking a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act ("VRA"), 42 U.S.C. §§ 1973b(b) and 1973(c), are unconstitutional. Shortly after filing its complaint, Shelby County moved for summary judgment. The United States, as well as defendant-intervenors -- a civil rights organization and a number of individuals -- ask the Court to deny the motion as premature, or in the alternative to grant discovery pursuant to Federal Rule of Civil Procedure 56(f).[1] The Court heard oral argument on defendant's request on September 10, 2010.[2]

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[1] Neither the government nor defendant-intervenors have offered any argument for why Shelby County's motion is premature. Indeed, a motion for summary judgment may be brought "at any time until 30 days after the close of all

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by identifying those portions of "the pleadings, the discovery and disclosure materials on file, and any affidavits" which it believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c)(2); *see also Celotex*, 477 U.S. at 323. If a party opposing a motion for summary judgment "shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken." Fed. R. Civ. P. 56(f). "The purpose of Rule 56(f) is to prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *1443 Chapin St., LP v. PNC Bank*, 258 F.R.D. 186, 187 (D.D.C. 2009) (internal quotation marks omitted). But

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discovery." Fed. R. Civ. P. 56(c)(1)(A). Accordingly, the Court will discuss only the request for discovery.

[2] A final transcript of the September 10 hearing is not yet available. Accordingly, the Court is unable to offer direct citations to the oral argument.

"[t]he Rule is not designed to allow 'fishing expeditions,' and [parties] must specifically explain what their proposed discovery would likely reveal and why that revelation would advance the [party's] case." *Milligan v. Clinton*, 266 F.R.D. 17, 18-19 (D.D.C. 2010); *see also Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (a court "*may* deny a motion for summary judgment or order a continuance to permit discovery if the party opposing the motion adequately explains why, at that timepoint, it cannot present by affidavit facts needed to defeat the motion").

Here, Defendants argue that they need discovery for three primary reasons: (1) to determine whether Shelby County has standing to bring suit; (2) to evaluate whether Shelby County may be eligible to "bail out" from the VRA's requirements; and (3) to gather information relating to the VRA's constitutionality. The Court takes each argument in turn.

1. Standing

To establish that it has standing to bring this suit, Shelby County offers that "[i]n the last ten years, [it] has sought preclearance numerous times, expended significant taxpayer dollars, time, and energy to meet its obligations under Section 5 of the VRA, and has had at least one election delayed in order to ensure compliance with the preclearance obligations of Section 5 of the VRA." *See* Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") [Docket Entry 5], Decl. of Frank Ellis, at ¶ 7. The government responds that, without discovery, it "is unable to determine whether Plaintiff has, in fact, suffered injury in complying with Sections 4(b) and 5." Gov't's Opp'n to Pl.'s Mot. for Summ. J. ("Gov't's Opp'n") [Docket Entry 7], at 11. Hence, although the government has not yet contested Shelby County's standing, it requests discovery in order to evaluate *whether* it will do so.

The government has not shown that it needs discovery to assess Shelby County's standing. The government has offered no reason to doubt the veracity of Ellis's declaration in support of standing. *See Strang*, 864 F.2d at 861 ("Without some reason to question the veracity of affiants . . . [a party's] desire to 'test and elaborate' affiants' testimony [through Rule 56(f) discovery] falls short."). And at oral argument, the government was unable to articulate any reason why a covered jurisdiction subject to Section 5's preclearance requirement -- such as Shelby County -- would lack standing to bring this type of action.[3] Thus, neither the government nor defendant-intervenors have put forth "specified reasons" why discovery is necessary to evaluate Shelby County's standing. *See* Fed. R. Civ. P. 56(f).

2. Bailout

The government's next argument in support of its discovery request stems from the "bailout" provision of

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[3] Indeed, in the related case of *Laroque v. Holder*, Civ. A. No. 10-561 (D.D.C. June 14, 2010) (Gov't's Mem. in Supp. of Mot. to Dismiss), the government has stated that there is no "hindrance to [a covered jurisdiction's] assertion of any proper constitutional claim concerning the application of Section 5." *Id.* at 22.

Section 4(a) of the VRA, which "allow[s] jurisdictions with clean records to terminate their section 5 preclearance obligation." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (Nw. Austin I)*, 573 F. Supp. 2d 221, 226 (D.D.C. 2008) (three-judge court), *rev'd on other grounds by* 129 S. Ct. 2504 (2009). Shelby County believes that it is not eligible for bailout. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. [Docket Entry 5], at 41 n.8. The government does not really contest the specifics of Shelby County's position, but states that it "does not presently know[] the degree to which Shelby County could meet or not meet each of the statutory bailout criteria under Section 4(a) of the [VRA]." Gov't's Opp'n at 10. The government suggests that if Shelby County is, in fact, eligible for bailout, granting that relief could obviate the need for any constitutional challenge. Accordingly, the government seeks discovery on this issue.[4]

Shelby County "has not," however, "sought 'bailout' from coverage pursuant to Section 4(a) of the VRA." Pl.'s Reply in Supp. of Mot. ("Pl.'s Reply") [Docket Entry 14], at 2. And the government agreed at oral argument that neither it nor this Court could force Shelby County to accept bailout. Thus, further factual investigation on this point would reveal only whether Shelby County is eligible for relief that it explicitly has not sought. The parties have pointed to no authority, and the Court is unaware of any, that would support discovery under such circumstances.

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[4] Although the government did not press the point at oral argument, the government's motion asserts that, even if Shelby County is correct in the reasons it recites for why it is ineligible for bailout, discovery should ensue because there may be additional reasons for ineligibility. *See* Gov't's Mot. at 10 ("Whether or not one or two bailout criteria might defeat bailout . . . it is relevant for the Attorney General to be allowed to discover . . whether those are the only criteria that might keep Shelby County from bailing out, or whether there are other areas of potential non-compliance."). That is hardly a justification to embark upon broad discovery.

3. Constitutionality of the VRA

Shelby County's complaint seeks a declaratory judgment that Sections 4(b) and 5 of the VRA are unconstitutional. *See* Compl., Prayer ¶ 44(a). It does not request any relief specific to Shelby County itself. Accordingly, the county's suit is properly deemed a facial challenge. *See Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010) (for a challenge to be facial, "[t]he important point is that plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs"). Indeed, at oral argument Shelby County explicitly waived any as-applied challenge in this case.[5]

Because Shelby County brings only a facial challenge to the VRA, discovery into that claim is unwarranted. As a three-judge court of this district recently noted, a court's role in resolving a facial challenge to the 2006 extension of the VRA is limited to assessing whether "the 2006 legislative record contain[s] sufficient evidence of contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years." *Nw. Austin I*, 573 F. Supp. 2d at 265. In other words, a court's analysis "is limited to the actual evidence Congress considered." *Id.* at 247. Because of this, no discovery is warranted in this case.[6]

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[5] Defendant-intervenors have expressed concerns that in prior cases challenging the constitutionality of the VRA, plaintiffs have shifted between facial and as-applied challenges as the case progressed. Their fears that the same could happen here are unfounded. The Court will permit no gamesmanship: Shelby County insists that its challenge is facial, and the Court will hold it to that assurance throughout the litigation.

The government protests that, in its summary judgment briefing, Shelby County has introduced county-specific facts that were not in the legislative record. *See* Gov't's Opp'n at 9; *see also* Pl.'s Statement of Mat'l

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[6] The government cites the Supreme Court's statement that "the [VRA] imposes current burdens and must be justified by current needs," *Nw. Austin Mun. Util. Dist. No. One v. Holder (Nw. Austin II)*, 129 S. Ct. 2504, 2512 (2009), as an indication that this Court should order additional discovery into present-day voting practices in Shelby County. But nothing in the Supreme Court's opinion suggests that the "current needs" to which it referred are anything other than those identified by Congress in 2006. Indeed, in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) -- a case that, like this one, turned on whether Congress exceeded its enforcement authority under the Fourteenth Amendment -- the Court assessed the constitutionality of the Age Discrimination in Employment Act ("ADEA") solely on the record created by Congress twentyfive years earlier. *See id.* at 89 ("Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem.").

Facts Not in Dispute [Docket Entry 5], at ¶¶ 4-5, 7-8. According to the government, "[w]ithout knowing the basis for the Plaintiff's assertions, the data or methodologies underlying them, or other facts related to the Plaintiff's assertions, the Attorney General cannot adequately respond to them." Gov't's Opp'n at 9.

Shelby County has explained, however, that it offered these facts "merely to buttress its already strong claim for standing." Pl.'s Reply at 13 n.1. And the county acknowledged at oral argument that, when assessing the VRA's facial constitutionality, the Court cannot rely on these facts, at least to the extent that they are not in the legislative record. Consistent with the above discussion, the Court agrees. Indeed, a contrary conclusion would be absurd. If the VRA's facial constitutionality turns -- even in part -- on present-day facts outside the legislative record, then discovery could not even properly be limited to Shelby County alone. Rather, the Court would need to consider in its analysis evidence relating to *every* covered jurisdiction and subjurisdiction. No authority requires or permits the Court to undertake such a massive factual inquiry, extending well beyond the record on which Congress relied in extending the VRA in 2006.

The government and defendant-intervenors have also pointed to several cases to support their argument that discovery is warranted on Shelby County's facial constitutional claim. They point, for example, to *Northwest Austin I*, where the plaintiff brought a constitutional challenge to the VRA, but the parties still engaged in extensive discovery. But in that case, plaintiff -- in addition to its constitutional challenge -- sought bailout under Section 4(b) of the VRA, and also presented "two arguments . . . that could be construed as reflecting an as-applied challenge." *Nw. Austin I*, 573 F. Supp. 2d at 235. Shelby County has brought no such fact-dependent claims here. Defendant-intervenors also cite *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), for the proposition that in assessing whether Congress has exceeded its enforcement authority under the Fourteenth Amendment, "the [Supreme] Court has not always limited itself to the legislative record alone for evidence of discrimination." Def.-Intervenors' Opp'n to Pl.'s Mot. [Docket Entry 36], at 14. In those two cases, however, the Supreme Court merely referenced state laws and prior judicial opinions, and even then only to present the historical "backdrop" of the challenged legislation. *Lane*, 541 U.S. at 524; *see Hibbs*, 538 U.S. at 729. Those cases do not, therefore, stand for the proposition that extensive fact discovery is warranted to evaluate the facial constitutionality of congressional legislation. Indeed, at oral argument the Court asked if any counsel -- who collectively have a very broad experience -- could identify a case in which the Supreme Court decided the facial constitutionality of an act of Congress based on facts unique to the specific plaintiff bringing the lawsuit. None could. Yet that is the discovery the government and defendant-intervenors seek here.

Evaluating the constitutionality of a congressional statute -- especially one as storied as the VRA -- is "the gravest and most delicate duty that this Court is called on to perform." Nw. Austin II, 129 S. Ct. at 2513. The Court therefore must be both cautious and thorough. Nonetheless, the constitutionality of the VRA must rise or fall on the record that Congress created when it extended that act in 2006. Accordingly, it is hereby

ORDERED that [7] the government's request for discovery pursuant to Federal Rule of Civil Procedure 56(f) is **DENIED**; and it is further

ORDERED that the government and defendant-intervenors shall file an opposition to [5] Shelby County's motion for summary judgment by not later than November 15, 2010; Shelby County may file a reply in support of its motion by not later than December 15, 2010.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: September 16, 2010

APPENDIX E — RELEVANT CONSTITUTIONAL AMENDMENT & STATUTORY PROVISIONS

Fifteenth Amendment to the United States Constitution

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1973b. Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate

unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race

or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to

vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973f or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote

of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds

that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. § 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

OPPOSITION
BRIEF

RECORD
AND
BRIEFS

No. 12-96

Supreme Court, U.S.
FILED
SEP 24 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

—v.—

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COUNTER-QUESTION PRESENTED

Whether Congress properly exercised its enforcement powers under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) of the Voting Rights Act in 2006 based upon the record of ongoing discrimination in the covered jurisdictions.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the Respondents-Intervenors in this case has a parent corporation or issues any stock. The Alabama State Conference of the National Association of Colored People is an affiliate of the national NAACP.

TABLE OF CONTENTS

COUNTER-QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE WRIT 1

I. The Court of Appeals and District Court Applied a Standard of Review That Followed This Court's Precedents 3

II. The Court of Appeals and District Court Directly Answered the Questions Set Forth in *Nw. Austin* 6

III. The Court of Appeals Correctly Rejected Shelby County's Attempts to Arbitrarily Define Away Relevant Evidence..................... 21

IV. Post-Enactment Evidence Corroborates the Court of Appeals... 26

V. The Constitutionality of the 2006 Amendments is Not Properly Before the Court........ 30

VI. The Question Presented is Incorrect 32

CONCLUSION.. 35

TABLE OF AUTHORITIES

CASES

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 23

Bd. of Trustees of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 5, 11, 33

City of Boerne v. Flores, 521 U.S. 507 (1997)....*passim*

City of Rome v. United States,
446 U.S. 156 (1980) ....*passim*

Crawford v. Marion County Election Bd.,
553 U.S. 181 (2008) 2

Eldred v. Ashcroft, 537 U.S. 186 (2003).................... 24

Florida v. United States, no. 1:11-cv-01428,
2012 U.S. Dist. LEXIS 115647
(D.D.C. August 16, 2012) 27

Georgia v. Ashcroft, 539 U.S. 461 (2003) 31

Georgia v. United States,
411 U.S. 526 (1973) 18, 20, 23

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 34

Hunter v. Underwood, 471 U.S. 222 (1985) 33

Janis v. Nelson, 2009 U.S. Dist. LEXIS 121086
(D. S.D. Dec. 30, 2009) 3

Jeffers v. Clinton,
740 F.Supp. 585 (E.D. Ark. 1990).......................... 13

Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)..... 19

Lopez v. Monterey County,
525 U.S. 266 (1999) 18, 19, 33

Louisiana v. United States, 380 U.S. 145 (1965)..... 34

LULAC v. Perry, 548 U.S. 399 (2006) 19, 29, 33

Nev. Dep't. of Human Res. v. Hibbs,
538 U.S. 721 (2003) 5, 20

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) ....*passim*

Nw. Austin Mun. Util. Dist. No. One v. Mukasey,
573 F.Supp.2d 221 (D.D.C. 2008) 9

Reno v. Bossier Parish School Board,
528 U.S. 320 (2000) 31

Rogers v. Lodge, 458 U.S. 613 (1982) 33

Shelby County v. Holder,
811 F.Supp. 2d 424 (2011) 2

Singleton v. Wulff, 428 U.S. 106 (1976) 30

Smith v. Allwright, 321 U.S. 649 (1944) 34

South Carolina v. Katzenbach,
383 U.S. 301 (1966) ....*passim*

Spietsma v. Mercury Marine, 537 U.S. 51 (2002) 30

Tennessee v. Lane, 541 U.S. 509 (2004) 5, 20

Texas v. Holder, no. 1:12-cv-00128,
2012 U.S. Dist. LEXIS 127119 (D.D.C.) 28

Texas v. United States, no. 1:11-cv-1303,
2012 U.S. Dist. LEXIS 121685 (D.D.C.) 28, 29

Turner Broadcasting System, Inc. v. F.C.C.,
520 U.S. 180 (1997) 24

United States Dept. of Labor v. Triplett,
494 U.S. 715 (1990) 24

*Washington State Grange v. Washington State
Republican Party*, 552 U.S. 442 (2008) 2

White v. Regester, 412 U.S. 755 (1973) 33, 34

Youakim v. Miller, 425 U.S. 231 (1976) 30

CONSTITUTION & STATUTES

U.S. Const. amend. XIV .... *passim*

U.S. Const. amend. XV .... *passim*

Voting Rights Act, 42 U.S.C. § 1973 *et seq.* ...... *passim*

  42 U.S.C. § 1973a 15

  42 U.S.C. § 1973aa 22

  42 U.S.C. § 1973a(c) 16

  42 U.S.C. § 1973b(a) 15

  42 U.S.C. 1973b(b) .... *passim*

  42 U.S.C. 1973c .... *passim*

120 Stat. 577, sec. 2(b) 12

120 Stat. 577, sec. 2(b)(4)&(5) 13

120 Stat. 577, sec. 2(b)(6) 31

ADMINISTRATIVE & LEGISLATIVE MATERIALS

152 Cong. Rec. H5143-5207
  (daily ed. July 13, 2006) 27

152 Cong. Rec. S8012
  (daily ed. July 20, 2006) 27

H.R. Rep. No. 109-478 .... *passim*

Renewing the Temporary Provisions of the
  Voting Rights Act: Legislative Options After
  LULAC v. Perry: Hearing Before the Subcomm.
  on the Constitution, Civil Rights and Property

Rights of the S. Comm. on the Judiciary, 109th Cong. (2006) 7, 14

S. Rep. No. 109-295 (2006) 27

S. Rep. No. 417 (1982).. 15

Section 5 Objection Letter from Grace Chung Becker, Acting Assistant Attorney General, to Dan Head, Esq., August 25, 2008... 8

Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 90 (2006) 7

Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. (2006) 14, 21

Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. (2005)................. 7, 8, 10, 21

OTHER AUTHORITIES

Blacksher, et al., Voting Rights In Alabama: 1982-2006, 17 SO. CAL. REV. L.AW & SOC. JUST. 249, (2008) 10

Respondents-Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris respectfully submit this Brief in Opposition to the Petition for Certiorari filed in this case.

REASONS FOR DENYING THE WRIT

After giving due consideration to this Court's decision in *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) ("*Nw. Austin*"), the Court of Appeals for the District of Columbia Circuit correctly upheld the constitutionality of the 2006 reauthorization of Section 5 and Section 4(b) of the Voting Rights Act of 1965 against Shelby County's facial challenge. 42 U.S.C. 1973c; 42 U.S.C. 1973b(b). Review by this Court is not required.

Shelby County's primary argument for granting certiorari is insubstantial. The decisions below by the Court of Appeals and the District Court follow – and do not conflict with – this Court's previous decisions. The Court of Appeals, like the District Court, upheld Section 5 and Section 4(b) based upon the rationale and clear dictates of *Nw. Austin*. The decision of the Court of Appeals -- written by Judge Tatel and joined by Judge Griffith -- carefully and scrupulously considered whether Section 5's "'current burdens'" are "'justified by current needs,'" and whether Section 4(b)'s "'disparate geographic coverage is sufficiently related to the problem that it targets.'" App. at 14a-15a; 679

F.3d 848, 858-59 (D.C. Cir. 2012) (quoting *Nw. Austin*, 557 U.S. at 203). Likewise, the District Court's detailed and tightly reasoned opinion fully weighed the lengthy record upon which the Court of Appeals subsequently relied, applied the same legal standards, and arrived at the same conclusions. App. at 111a; *Shelby County v. Holder*, 811 F.Supp. 2d 424 (2011).

No other jurisprudential concerns weigh heavily in favor of granting certiorari. If certiorari is denied the facial constitutionality of Section 5 in the District of Columbia Circuit will be settled with no further need for this Court's review. Facial challenges being generally disfavored,[1] as-applied challenges would remain available if certiorari is denied. Should a federal court in another circuit reach a different conclusion on the facial question (assuming that anything other than as-applied challenges can be raised in a Section 5 enforcement action), then a grant of certiorari at that time to resolve the circuit split would be consistent with this Court's jurisprudence.[2]

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[1] *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200 (2008); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008).

[2] There is no split among the lower courts on the questions presented here. Only one other court, the United States District Court for the District of South Dakota, has confronted the question of Section 5's constitutionality since the 2006 reauthorization. In that case, the State of South Dakota challenged the constitutionality of the 2006 reauthorization of Section 5, relying on the same arguments made in this case; the district court rejected the state's argument that Section 5 preclearance and the Section 4(b) coverage provision are now

I. The Court of Appeals and District Court Applied a Standard of Review That Followed This Court's Precedents

The Court of Appeals began its analysis with an extended consideration of the appropriate standard of review. The court noted that the disagreement which *Nw. Austin* had left unresolved – whether the constitutionality of the 2006 reauthorization should be analyzed via "congruence and proportionality," as set out in *City of Boerne v. Flores*, 521 U.S. 507 (1997), or via the "any rational means" standard discussed in *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) – had continued, with Shelby County arguing for the former and the Attorney General advocating for the latter.

The Court of Appeals concluded that *Nw. Austin* sent "a powerful signal that congruence and proportionality is the appropriate standard of review." App. at 16a.[3] The court then considered in detail how this standard should be applied, looking to this Court's prior decisions applying "congruence and proportionality," and this Court's decisions in

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outdated. *See Janis v. Nelson*, 2009 U.S. Dist. LEXIS 121086 at *26-30 (D. S.D. Dec. 30, 2009).

[3] Judge Tatel's opinion observed that the two questions posed by this Court in *Nw. Austin* define an inquiry that seems analogous to the *City of Boerne* "congruence and proportionality" inquiry. By applying this standard, which is "arguably more rigorous" than what is generally described as the "'rationality'" standard employed in *South Carolina v. Katzenbach*, App. at 16a, the ruling of the Court of Appeals should stand regardless of whether *City of Boerne* or *Katzenbach* controls.

Katzenbach and *City of Rome v. United States*, 446 U.S. 156 (1980), upholding the constitutionality of Section 5. As the Court of Appeals noted, *City of Boerne* itself "relied quite heavily on *Katzenbach* for the proposition that section 5, as originally enacted and thrice extended, was a model of congruent and proportional legislation." App. at 16a. The District Court similarly conducted its comprehensive review of the record employing a "congruence and proportionality" analysis. App. at 161a-162a.

Shelby County asserts that the Court of Appeals "deferred to Congress in ways alien to the *Boerne* line of decisions," Petition at 23, and that this "infected every aspect of [the court's] analysis." *Id.* at 24. Yet, the County nowhere identifies precisely how or where the Court of Appeals introduced such "alien" deference. This Court in fact has emphasized, as the Court of Appeals recognized, that the deference about which Shelby County complains is a core constitutional principle: "when Congress acts pursuant to its enforcement authority under the Reconstruction Amendments, its judgments about 'what legislation is needed . . . are entitled to much deference.'" App. at 21a (quoting *Boerne*, 521 U.S. at 535) (ellipses in original). This is uniquely the case when Congress legislates with respect to racial discrimination in voting. As the Court explained in *Nw. Austin*, "the Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 557 U.S. at 205.

This Court's "*Boerne* line of decisions" repeatedly has identified the Voting Rights Act as a model of congruence and proportionality, and consistently has cited with approval to this Court's decisions upholding the constitutionality of Section 5. *See, e.g., Boerne*, 521 U.S. at 531-33 (contrasting Section 5 favorably to the Religious Freedom and Restoration Act, and noting that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide'") (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (op. of Harlan, J.)); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (comparing Section 5 favorably to Title I of the Americans With Disabilities Act, and observing that Section 5 "was 'appropriate' legislation to enforce the Fifteenth Amendment's protection against racial discrimination in voting.") (citing *Katenzbach*, 383 U.S. at 308); *Nev. Dep't. of Human Res.. v. Hibbs*, 538 U.S. 721, 736 (2003) (observing that, when Congress enacts legislation designed to combat forms of discrimination that trigger a heightened level of scrutiny, such as gender- or race-based discrimination, it is "easier for Congress to show a pattern of state constitutional violations" to justify remedial legislation) (citing, *inter alia*, *Katzenbach*, 383 U.S. at 308-313); *Tennessee v. Lane*, 541 U.S. 509, 520, n.4 (2004) (describing cases upholding various provisions of the Voting Rights Act). All of these decisions suggest that some degree of judicial deference is appropriate where, as here, Congress enacts legislation designed to protect the express Constitutional prohibition on racial discrimination in voting.

II. The Court of Appeals and District Court Directly Answered the Questions Set Forth in *Nw. Austin*

Both the Court of Appeals and the District Court directly and explicitly employed the analytic framework set forth by this Court in *Nw. Austin*, centering their reviews on the "two principal inquiries": whether the "'current burdens'" imposed by Section 5 "are 'justified by current needs,'" and whether Section 5's "'disparate geographic coverage is sufficiently related to the problem it targets.'" App. at 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203); App. at 114a, 280a (same).

1. This Court recognized in *Nw. Austin* that "Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the [*Nw. Austin*] District Court determined 'document[ed] contemporary racial discrimination in covered states.'" 557 U.S. at 205. The Court of Appeals independently "thoroughly scrutinize[d] the record" and found that "overt racial discrimination persists in covered jurisdictions." App. at 48a. The District Court's own "assessment of all the evidence in the legislative record" similarly concluded that "[a]lthough some scholars voiced concern during the 2006 reauthorization hearings that 'the Act has been so effective it will be hard to produce enough evidence of *intentional discrimination by the states* so as to justify the extraordinary preclearance remedy for another 25 years' . . . Congress succeeded in doing just that." App. at 196a-97a (internal citations omitted) (emphasis in original).

The record before Congress included: (1) 626 DOJ objections from 1982 to 2004 to voting changes that would have the purpose or effect of discriminating against minorities; (2) "more information requests" from DOJ regarding Section 5 submissions which resulted in the withdrawal or modification of over 800 potentially discriminatory voting changes; (3) 653 successful lawsuits under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, between 1982 and 2005 providing relief from discriminatory practices in at least 825 covered counties; (4) tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions; (5) 105 successful Section 5 enforcement actions brought against covered jurisdictions between 1982 and 2004; (6) 25 preclearance denials by the District Court for the District of Columbia between 1982 and 2004; (7) examples of "overt hostility to black voting power by those who control the electoral process"; (8) evidence that Section 5 has a strong deterrent effect; and (9) that Section 2 is not an adequate remedy for racial discrimination in voting in the covered jurisdictions. App. at 24a, 29a-46a.[4]

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[4] For example, the State of Alabama's record since the extension of Section 5 in 1982 showed that the Attorney General objected to 46 Section 5 submissions from Alabama, including seven from the state itself and 39 from local jurisdictions. Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 371 (2006) ("Legislative Options Senate Hearing"); Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 90 (2006). Many of the objections were based upon evidence of purposeful discrimination. 1 Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing

Within that record the Court of Appeals noted "numerous examples of modern instances of racial discrimination in voting" relied upon by Congress in amending and extending the Act in 2006. *Id.* at 29a (internal quotation marks omitted). In addition to these "flagrant" examples, the Court of Appeals reviewed "several categories of evidence in the record [that] support Congress's conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." *Id.* at 31a. The District Court similarly concluded after reviewing the record of Section 5 objections that the "House Committee on the Judiciary had good reason to conclude in 2006 that Section 5 was still fulfilling its intended function of preventing covered jurisdictions from implementing voting changes 'intentionally developed to keep minority voters and candidates from succeeding in the political process.'" App. at 220a (quoting H.R. Rep. No. 109-478, at 36 (2006)).

The substantial evidence of intentional racial discrimination in the record is particularly significant. Between 1980 and 2004, the Attorney General issued at least 423 objections based in whole

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Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. 264, 267, 275, 321, 350, 415, 435 (2005); Legislative Options Senate Hearing, at 383-84. And on August 25, 2008, the Attorney General objected to annexations and a redistricting plan for the City of Calera in Shelby County, Alabama, because the city failed to show the absence of a discriminatory purpose or effect. Section 5 Objection Letter from Grace Chung Becker, Acting Assistant Attorney General, to Dan Head, Esq., August 25, 2008. Available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.pdf (last visited Sep. 20, 2012).

or in part on discriminatory purpose. App. at 33a. As recently as the 1990s, 43 percent of all objections were based on intent alone, while another 31 percent were based on a combination of intent and effect. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d 221, 252 (D. D.C. 2008). Congress found that "such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21.

Shelby County argues that Section 5 is no longer needed because there has been an increase in the number of minority elected officials and because (according to the County) minority voter registration and turnout are approaching parity with the white population. Petition at 27. These gains are important, but they are the very things that will be at risk if the Section 5 remedy is ended prematurely. H.R. Rep. No. 109-478, at 56. Furthermore, as the courts below noted, these gains have not been uniform, nor have they been independent of Section 5 and other federal remedies.

Congress found that gains by minority candidates remain uneven, both geographically and by level of office. H.R. Rep. No. 109-478, at 33-34. The Court of Appeals noted the congressional findings that no African American candidates had been elected to statewide office in Mississippi, Louisiana or South Carolina. App. at 23a; *see also* App. at 204a-205a. The District Court similarly noted the extent to which the election of African-American and Latino candidates lagged their respective shares of the voting age population in the covered states. App. at 204a-205a. The House committee report noted that African Americans accounted for only 21 percent of state legislators in six southern states where the black population averaged 35 percent – Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina. H.R. Rep. No. 109-478, at 33. The House committee report further found that the number of Latinos and Asian Americans elected to office nationwide "has failed to keep pace with [the] population growth" of those two communities. *Id.*

Moreover, minority electoral success largely has been a function of the creation of majority-minority election districts. For example, Congress found that as of 2000, only 8 percent of African American Congressmen were elected from majority-white districts, and that no Native Americans or Hispanics "have been elected to office from a majority white [Congressional] district."[5] H.R. Rep. No. 109-

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[5] Alabama well illustrates this pattern. As of 2005 no African Americans held statewide office in Alabama. Two incumbent African American state Supreme Court justices, who initially had been appointed, were defeated by white opponents in 2000. Every African American member of the Alabama Legislature was elected from a single member district with an effective black voter majority. 2 Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. at 3199 (2005) (statement of James U. Blacksher). See also Blacksher, *et al.*, Voting Rights In Alabama: 1982-2006, 17 SO. CAL. REV. L. & SOC. JUST. 249, 249 (2008) ("voting remains largely racially polarized, and black candidates rarely are elected in majority-white districts"). And most of the majority black districts had to be ordered by federal courts. *Id.* at 260 *et seq.*

478, at 34, citing *Protecting Minority Voters: The Voting Rights Act at Work 1982–2005*, The National Commission on the Voting Rights Act, February 2006, at 38, 43-46.

With respect to voter registration and turnout, the Court of Appeals noted the congressional findings showing "continued registration and turnout disparities" in South Carolina, and in particular in Virginia. App. at 23a. The District Court found that the disparities in voter registration and turnout were "comparable to the disparity the *City of Rome* Court called 'significant.'" App. at 202a-203a (citations omitted). The District Court further noted that disparities affecting Hispanic voter registration were "more severe" than Congress had credited due to the double-counting of white Hispanics. *Id.* at 202-203a.

In sum, the Court of Appeals concluded that: "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference." App. at 48a. The District Court concluded that "Congress satisfied its burden in 2006 of identifying a continuing 'history and pattern of unconstitutional . . . discrimination by the States' . . . which was sufficient to justify the reauthorization of Section 5 as remedial, prophylactic enforcement legislation." App. at 270a, (quoting *Garrett,* 531 U.S. at 368). The District Court further noted that "the evidence of unconstitutional voting discrimination in the 2006 legislative record far exceeds the evidence of unconstitutional discrimination found sufficient to uphold the challenged legislation in *Hibbs* and *Lane.*"

Id. at 260a. *See also* 120 Stat. 577, sec. 2(b) (Congress' summary of the findings and evidence upon which it relied in extending and amending the preclearance requirement). These conclusions were entirely in keeping with *City of Rome,* where this Court upheld the 1975 reauthorization of Section 5 based upon largely the same categories of evidence.[6]

2. With respect to the Section 4(b) coverage provisions, the Court of Appeals and District Court correctly found that voting discrimination remains concentrated in the Section 5 covered jurisdictions, based upon an intensive review of the legislative record.

Shelby County's argument that the Section 2 data relied upon by Congress "fails to show a meaningful difference between covered and noncovered jurisdictions," Petition at 32-33, is contradicted by the Court of Appeals' findings. The "most concrete evidence comparing covered and noncovered jurisdictions," App. at 49a, came from studies of vote dilution litigation brought under Section 2 of the Voting Rights Act, including a study of published Section 2 decisions entered into the legislative record (the "Katz study"). These data showed a significant difference between covered and non-covered jurisdictions. Among the 114 published decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. *Id.* Thus, while the covered jurisdictions contain less than 25 percent of the country's population, they accounted for 56 percent of successful reported Section 2 litigation since 1982. *Id.* The pattern shown in the published decisions was corroborated by a summary of unpublished Section 2 decisions predating the 2006 reauthorization, which showed "even more pronounced" differences between the covered and non-covered jurisdictions. *Id.* at 51a-52a[7] Moreover, because Section 5 "deters or blocks many discriminatory voting laws before they can ever take effect and become the target of section 2 litigation," the Court of Appeals observed that "if discrimination was evenly distributed throughout the nation, we would expect to see fewer successful section 2 cases in covered jurisdictions than in non-covered jurisdictions. . . . Yet we see substantially more." *Id.* at 55a.[8]

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[6] The House committee report concluded that during the 1982-2006 period, "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at large voting and implementing majority vote requirements." H.R. Rep. No. 109-478, at 36.

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[7] Since 1982, there have been at least 686 unpublished successful Section 2 cases, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. Of these, approximately 81 percent were brought against Section 5 covered jurisdictions. App. 51a. Of the eight states with the highest number of successful Section 2 cases per million residents, all but one was covered in whole or in part. The only exception was Arkansas. While it was not covered by Section 4(b), in 1990 Arkansas was bailed-in to Section 5 coverage by a court order. *See Jeffers v. Clinton*, 740 F.Supp. 585, 601-02 (E.D. Ark. 1990). Congress concluded that the need for Section 5 was evident from "the continued filing of section 2 cases that originated in covered jurisdictions," many of which resulted in findings of intentional discrimination. 120 Stat. 577, sec. 2(b)(4)&(5).

The District Court likewise examined the pattern of reported Section 2 decisions and found that "the fact that more than 56% of the successful Section 2 suits since 1982 have been filed in covered jurisdictions -- even though those jurisdictions contain only 39.2% of the country's African-American population, 31.8% of the Latino population, 25% of the Native American population, and less than 25% of the overall population -- suggests that unconstitutional discrimination remains more prevalent in covered than in non-covered jurisdictions." App. at 288a. The District Court further noted that "the disproportionate number of successful Section 2 suits in covered jurisdictions is all the more remarkable considering that Section 5 blocks and deters discrimination in covered jurisdictions, and, consequently, one would expect to see fewer Section 2 cases there." *Id.* (internal quotation marks omitted).

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[8] In Alabama alone, during this period there were 12 successful reported Section 2 cases and a total of 192 successful Section 2 cases, reported and unreported. 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. at 251 tbl. 5 (2006). As further appears from the legislative history, decisions since 1982 have found numerous and ongoing examples of intentional discrimination in Alabama at the state and local levels. Senate Hearing, Legislative Options Senate Hearing, at 372.

The Court of Appeals emphasized that, in examining Section 5's geographic coverage, the entire coverage scheme must be considered, which includes not only the Section 4(b) coverage formula, but also the bailout provisions of Section 4 and the bail-in provisions of Section 3, 42 U.S.C. § 1973a. "[W]e look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout." App. at 61a. The bailout and bail-in provisions of Section 5 address the theoretical possibilities of over and under inclusiveness and help "ensure Congress' means are proportionate to [its] ends."[9] *Boerne*, 521 U.S. at 533. Bailout plays an "important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting," App. at 62a, by providing those jurisdictions with "a clean record on voting rights" the means for terminating coverage. *Id.* at 63a. Thus, bailout "helps 'ensure Congress' means are proportionate to [its] ends,'" *id.* at 62a (quoting *Boerne*, 521 U.S. at 533), and "that section 5 is

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[9] In 1982, Congress altered the bailout formula so that jurisdictions down to the county level could bail out independently. One of the main purposes of the new bailout provision was to provide local jurisdictions with an incentive to change their voting practices by eliminating structural and other barriers to minority political participation. To be eligible for bailout, a jurisdiction must show that it has not used a discriminatory test or device within the preceding ten years, has fully complied with the Voting Rights Act, and has engaged in constructive efforts to facilitate equal access to the electoral process. 42 U.S.C. § 1973b(a); S. Rep. No. 417, at 43-62 (1982). *Nw. Austin* further liberalized bailout by holding that "all political subdivisions," and not only those that conduct voter registration, are entitled to seek exemption from Section 5. *Nw. Austin*, 557 U.S. at 211.

'sufficiently related to the problem it targets,"' *id.* at 64a (quoting *Nw. Austin*, 557 U.S. at 203).[10] Bail-in under Section 3(c) continues to address the theoretical underinclusiveness of the coverage formula. App. at 65a.[11]

Although Judge Williams' dissent differed with the majority's conclusions concerning the Section 4(b) coverage provisions, he did not dispute that successful reported Section 2 cases were disproportionately concentrated in the covered jurisdictions, which was the principal factor upon which the majority relied. Instead, Judge Williams' dissent would have placed greater emphasis on a state-by-state comparison, and would not have credited other evidence that the majority found corroborated the Katz study. The Katz study showed a clear disproportion of successful, reported Section 2 decisions in the covered jurisdictions as a whole, whereas Judge Williams' dissent broke the data into state-by-state figures; even those disaggregated data, however, showed that four of the five top states (using his methodology) are covered by Section 5. App. at 91a-92a.

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[10] As of May 9, 2012, as a result of the liberalized bailout system, 136 jurisdictions had bailed out after demonstrating that they no longer discriminated in voting. App. 62a. The jurisdictions included 30 counties, 79 towns and cities, 21 school boards, and six utility or sanitary districts. In addition, the Attorney General is actively considering more than 100 additional jurisdictions for bailout. *Id.* at App. 61a-63a.

[11] Pursuant to 42 U.S.C. § 1973a(c), a court that has found a violation of the Fourteenth or Fifteenth Amendment may retain jurisdiction for an appropriate period of time and subject a jurisdiction to the preclearance requirements of Section 5. Two non-covered states, Arkansas and New Mexico, were subjected to partial preclearance under the bail-in provision, as well as jurisdictions in California, Florida, Nebraska, New Mexico, South Dakota, and the city of Chattanooga. App. 61a-62a.

Judge Williams' dissent would not have credited, on the "covered jurisdictions" side of the discrimination ledger, the 626 objections interposed by the Attorney General from 1982 to 2006, as well as other evidence of ongoing discrimination in the covered states identified by Congress. Judge Williams' conclusion that Section 5 objections do not represent probative evidence of discriminatory conduct, *id.* at 94a, is inconsistent with this Court's holding in *Rome*, where the Court upheld the 1975 reauthorization of Section 5 specifically by crediting Congress' conclusion that the Attorney General's objections do constitute significant evidence of ongoing discrimination. 446 U.S. at 181 ("'The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism.'") (ellipses in original).[12] Furthermore, while Judge Williams declined to consider the substantial information relating to unpublished Section 2 decisions, his dissent fails to show that the majority erred by treating this evidence as corroborating the Katz study, while still "approach[ing] this data with caution."[13] App. at 54a.

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[12] For example, Judge Williams' analysis ranks Georgia as the 21st state in Section 2 cases, however, as the majority discussed, there is a wealth of other information showing that voting discrimination remains a substantial problem in that state. App. at 58a-59a.

[13] Shelby County's complaint about post-enactment evidence concerns the McCrary declaration submitted by the United

3. The decision of the Court of Appeals was entirely consistent with other decisions by this Court, and Shelby County's claim that the "decision below cannot be squared with any of the Court's decisions," Petition at 29, is patently incorrect. While Shelby County acknowledges that this Court "has twice upheld" the constitutionality of Section 5 in *South Carolina v. Katzenbach*, *supra*, and *City of Rome v. United States*, *supra*, Petition at 3, its Petition fails to cite either *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), which upheld the constitutionality of Section 5 as reauthorized in 1982,[14] or *Georgia v. United States*, 411 U.S. 526, 535 (1973), in which this Court upheld the constitutionality of Section 5 as reauthorized in 1970 ("for the reasons stated at length in *South Carolina v. Katzenbach* . . . we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment.").

States, which corroborated the evidence from the Katz study of published Section 2 decisions, by compiling data – largely in the reauthorization congressional record, App. at 54a [679 F3d at 878] – which addressed unpublished Section 2 decisions. It follows, therefore, that this evidence is not post-enactment evidence as such, since it dealt with litigation that both occurred before the 2006 reauthorization and generally was before Congress. Accordingly, the limited sense in this evidence might be labeled as "post-enactment" provides no basis upon which to exclude it.

[14] In *Lopez* this Court rejected a claim by the State of California that "§ 5 could not withstand constitutional scrutiny if it were interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere." *Id.*

Lopez in particular undercuts Shelby County's attempts to limit the scope of Section 5 to intentional discrimination, reaffirming the holding in *City of Rome* that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." 525 U.S. at 282-83. The Court, reaffirming its ruling in *Katzenbach*, further held "once a jurisdiction has been designated, the Act may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws in that jurisdiction." *Id.* at 283. *Cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

In addition, one month before the extension of Section 5 in 2006, this Court decided *LULAC v. Perry*, 548 U.S. 399 (2006) (finding that a Texas congressional redistricting plan violated Section 2 of the Voting Rights Act), in which all eight justices who addressed the issue agreed that states have a "compelling state interest" in complying with the Section 5 preclearance requirement. *Id.* at 475 n.12, 485 n.2, 518.

4. Shelby County contends that "Section 2 is now the 'appropriate' prophylactic remedy for any pattern of discrimination documented by Congress in 2006." Petition at 29. But as Congress concluded in

extending Section 5 in 2006, the "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action." H.R. Rep. No. 109-478, at 57. This conclusion was entirely consistent with this Court's prior decisions,[15] and was based upon extensive contemporary evidence that reliance upon Section 2 litigation would place the burden of proof on the victims of discrimination rather than its perpetrators and impose a heavy financial burden on minority plaintiffs, and that Section 2 litigation is heavily work-intensive, cannot prevent enactment of discriminatory voting measures, and allows discriminatorily-elected officials to remain in office for years until litigation is concluded. App. at 45a-46a. *See, e.g.*, 1 Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. 92, 97, 101 (2005) (testimony of Nina Perales); *id.* at 79, 83-84 (testimony of Anita Earls); 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. 97 (2006) (testimony of Joe Rogers). A Federal Judicial Center study, for example, found that voting cases required nearly four times more work than the average district court case and ranked as the fifth most work-intensive of the 63 types of cases analyzed. App. at 45a.

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[15] In *Katzenbach*, the Court stressed that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." 383 U.S. at 328; *see also id.* at 313-15 (explaining why case-by-case litigation had "proved ineffective"). *City of Rome* also found that: "Case-by-case adjudication had proved too ponderous a method to remedy voting discrimination." 446 U.S. at 174. *Accord*, *Boerne*, 521 U.S. at 526 (Section 5 was "deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation"); *Georgia v. United States*, 411 U.S. at 538 n.9 ("[t]he very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting"). The Court relied on similar findings in *Tennessee v. Lane*, 541 U.S. at 511, to sustain the constitutionality of a challenged statute: "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response'" (alteration in original) (quoting *Hibbs*, 538 U.S. at 737).

III. The Court of Appeals Correctly Rejected Shelby County's Attempts to Arbitrarily Define Away Relevant Evidence

The Court of Appeals considered and correctly rejected Shelby County's efforts to exclude evidence plainly relevant to *Nw. Austin's* "two principal inquiries." The County's arguments in this regard are inconsistent with the Supreme Court's directives in *Nw. Austin*, and are contrary to the Supreme Court's holding in *Katzenbach* that, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." 383 U.S. at 330.

1. With respect to identifying the "current needs" for the Section 5 remedy, Shelby County sought to prevent a genuine review of the current record by insisting that only "evidence . . . of the sort present at the time of Katzenbach," App. at 25a, is

relevant, and by "urg[ing the D.C. Circuit to disregard much of the evidence Congress considered," *id.* at 26a, which showed that covered jurisdictions have engaged in repeated acts of intentional vote dilution.

The Court of Appeals correctly rejected Shelby County's argument that, in 2006, the court (and thus Congress) could only take into account the most prevalent form of discrimination that existed in 1965, *i.e.*, interference with the right to register and cast ballots. To accept this argument necessarily would turn the "current needs" inquiry on its head by arbitrarily excluding from consideration other current forms of voting discrimination. Indeed, the circa-1965 discrimination affecting voter registration and ballot access largely has been outlawed by the Voting Rights Act, which prohibits use of the discriminatory tests and devices that many covered jurisdictions relied upon prior to the Act's adoption. 42 U.S.C. § 1973aa. Shelby County thus seeks to cloak its desired foreordained conclusion in the garb of a decision rule. Shelby County's related argument – that only evidence of widespread "gamesmanship" (*i.e.*, the evasion of judicial injunctions by the adoption of new discriminatory provisions) can justify reauthorization of Section 5 – is no less tendentious, as it would require evidence of conduct that "section 5 preclearance makes . . . virtually impossible." App. at 25a.

Similarly, Shelby County demanded that the Court of Appeals ignore repeated instances of intentional and unconstitutional minority vote dilution because, according to the County, such discrimination is prohibited only by the Fourteenth

Amendment, and Section 5 is solely a Fifteenth Amendment remedy. However, "Congress expressly invoked its authority under both the Fourteenth and Fifteenth Amendments" in reauthorizing Section 5, which was well within its province to do when confronted with a record of unconstitutional schemes to dilute minority voting strength. *Id.* at 27a. Shelby County's argument to the contrary is squarely contradicted by this Court's ruling in *City of Rome*, which sustained the 1975 reauthorization of Section 5 based on Congress' finding that "'[a]s registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength.'" *Id.* at 28a (quoting *Rome*, 446 U.S. at 181). As this Court explained in its very first decision construing Section 5, *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." This Court has never held that, in reauthorizing Section 5, Congress may not rely on evidence of unconstitutional schemes to dilute minority voting power;, nor has this Court held that vote dilution is not a type of voting discrimination addressed by Section 5. *See also Georgia v. United States*, 411 U.S. at 534 (redistricting plans "have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5").

Shelby County further argues that Congress' findings concerning the deterrent effect of Section 5 must be disregarded. At the outset, it would seem nonsensical to ignore evidence that remedial legislation has operated to deter unconstitutional conduct in considering whether that legislation was properly reauthorized, and, indeed, Shelby County does not appear to go that far. Instead, Shelby County repeats Judge Williams' dissenting view that Section 5's deterrent effect is speculative and cannot serve as a perpetual justification. Petition at 27-28. However, Congress cited specific evidence supporting its conclusion as to Section 5's important deterrent effect. App. 42-43aa, 55a. Congress described preclearance as a "vital prophylactic tool," and that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21. Congress found that "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes is the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24. Congress concluded based on the abundant evidence before it that Section 5 had a deterrent effect, a finding the Court of Appeals declined to "second guess." App. at 44a.[16] *Cf. Northwest Austin*, 557 U.S. at 205 (noting that the District Court in that case also found that "the record 'demonstrat[ed] that section 5 prevents discriminatory voting changes' by 'quietly but effectively deterring discriminatory changes.'"). Moreover, Section 5's deterrent effect was just one of many categories of evidence that Congress relied upon, so this in no sense resembles the "worst case" situation – where deterrence is claimed as the sole reason for reauthorizing Section 5 -- about which Judge Williams' dissent expressed concern.

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[16] *See Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (courts "are not at liberty to second-guess congressional determinations and policy judgments"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("courts must accord substantial deference to the predictive judgments of Congress"); *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (noting "the heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of Government' is entitled").

2. The Court of Appeals also correctly rejected Shelby County's efforts to exclude evidence relevant to determining whether Section 5's geographic coverage remains sufficiently well targeted.

Shelby County complains that the coverage formula "rel[ies] on 'decades-old data." App. at 56a. But as the Court of Appeals observed, the issue presented is not whether the initial coverage determinations were correct; instead, "[t]he question [is] whether [the coverage formula], together with bail-in and bailout, continues to identify [for coverage] the jurisdictions with the worst problems," *id.* at 57a, which necessarily involves a review of current data. As discussed above, a review of the current data demonstrates the continued fit between Section 5 coverage and contemporary voting discrimination in the United States.

The Court of Appeals also correctly rejected Shelby County's argument that evidence of vote dilution is irrelevant to the geographic coverage question. Shelby County contends that there is a statutory bar to considering evidence of vote dilution in evaluating the statute's geographic coverage because the Section 4(b) coverage formula relies on factors related to ballot access. But, as the Court of Appeals explained, this contention "rests on a misunderstanding of the coverage formula." *Id.* at

56a. Congress relied on ballot access factors to make the initial coverage determinations not because that was "all it sought to target, but because [these factors] served as accurate proxies for pernicious racial discrimination in voting." *Id.* at 57a.

IV. Post-Enactment Evidence Corroborates the Court of Appeals

This Court is not foreclosed from considering post-enactment evidence that bears directly upon the constitutionality of congressional legislation. The Court of Appeals appropriately recognized that a court may consider relevant and probative "post-enactment evidence." App. at 54a (citing *Tennessee v. Lane*, 541 U.S.at 524-25 nn. 6-9 & 13).

Shelby County appears to be of two minds on this issue. On one hand, it asserts that its challenge "is based on the 2006 legislative record and no other evidence is constitutionally cognizable." Petition at 22. On the other hand, the County repeatedly relies in its Petition upon post-enactment evidence, referring to Section 5 objections and litigation regarding photo identification requirements in South Carolina and Texas, and litigation regarding changes to Florida's early voting law; the County claims that this post-enactment evidence shows improper enforcement of Section 5 by the Attorney General.[17]

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[17] Shelby County also faults Congress for not conducting hearings or proposing bills following the decision in *Nw. Austin*. Petition at 21. But Congress conducted extensive hearings in 2005 and 2006 to consider the need for continuation of Section 5. It held 21 hearings, heard from more than 90 witnesses, and compiled a massive record of more than 15,000 pages of evidence, including testimony on the burdens of Section 5. *See* H.R. Rep. No. 109-478, at 5 (2006); S. Rep. No.

Since Shelby County filed its Petition, however, the District Court for the District of Columbia has issued rulings in the Texas and Florida cases, as well as in another Section 5 declaratory judgment action brought by Texas, that put Shelby County's arguments in a rather different light.

Shelby County claims that Florida was "forced into preclearance litigation" to prove that reducing early voting is not discriminatory, when other states "have no early voting at all." Petition at 20. On August 16, 2012, however, the three-judge court in *Florida v. United States* denied Section 5 preclearance to Florida's early voting changes, finding that they would likely result in retrogression within Florida's five covered counties. *Florida v. United States*, no. 1:11-cv-01428, 2012 U.S. Dist. LEXIS 115647 (D.D.C. August 16, 2012). Contrary to Shelby County's claim that the Department of Justice somehow forced Florida to file suit, the State in fact withdrew its early voting changes from administrative review and filed suit before the Attorney General had rendered a decision. *Id.* at *18. Moreover, following the denial of preclearance by the district court, the Attorney General precleared new non-retrogressive early voting hours for the five

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109-295, at 2-4 (2006). At the conclusion of its deliberations Congress, by a vote of 390 to 33 in the House and by a unanimous vote in the Senate, 90 to 0, amended and extended Section 5 for an additional 25 years. 152 Cong. Rec. S8012 (daily ed. July 20, 2006); 152 Cong. Rec. H5143-5207 (daily ed. July 13, 2006). Given its careful consideration of the continue need for Section 5, Congress cannot be faulted for not conducting additional subsequent hearings.

covered counties, thus completely refuting Shelby County's suggestion of Department of Justice intransigence. ECF docket no. 161.

On August 30, 2012, the three-judge court in *Texas v. Holder*, no. 1:12-cv-00128, 2012 U.S. Dist. LEXIS 127119 (D.D.C.), denied Section 5 preclearance on retrogression grounds to a requirement that voters present certain limited forms of government-issued photo identification in order to cast a ballot at the polls, which the Texas legislature had added to the state's existing voter identification law.[18] The three-judge court's unanimous decision refutes Shelby County's suggestion that the Attorney General's earlier decision denying administrative Section 5 preclearance was an abuse of discretion.

Two days earlier, on August 28, 2012, the three-judge court in *Texas v. United States*, no. 1:11-cv-1303, 2012 U.S. Dist. LEXIS 121685 (D.D.C.), denied Section 5 preclearance to three statewide redistricting plans. The court found that the congressional redistricting plan both had a retrogressive effect, *id.* at *53, and a racially discriminatory purpose. *Id.* at *71.[19] The state senate plan was denied preclearance because the court found that it was motivated in part by a racially discriminatory purpose. *Id.* at *92. And the court denied preclearance to the state house plan on retrogression grounds, *id.* at *94; in addition, while it did not make a "purpose" determination on this plan, the court noted that, "at a minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id.* at *131. Texas did not make an administrative Section 5 submission of any of these plans before it filed suit. *Id.* at *5.

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[18] Although it did not make conclusions as to discriminatory purpose in light of its retrogression determination, the court noted that: "Ignoring warnings that SB 14, as written, would disenfranchise minorities and the poor, the legislature tabled or defeated amendments that would have: waived all fees for indigent persons who needed the underlying documents to obtain an EIC [Election Identification Certificate]; reimbursed impoverished Texans for EIC-related travel costs; expanded the range of identifications acceptable under SB 14 by allowing voters to present student or Medicare ID cards at the polls; required [Department of Public Safety] offices to remain open in the evening and on weekends; and allowed indigent persons to cast provisional ballots without photo ID." 2012 U.S. Dist. LEXIS at *96-97 (record citations omitted).

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[19] The court found retrogression in several districts including District 23, an earlier version of which this Court found to violate Section 2 of the Voting Rights Act in 2006: "West Texas's CD 23 has a complicated history under the VRA. In 2006, the Supreme Court held that CD 23, as then constituted, violated section 2. *See LULAC v. Perry*, 548 U.S. 399, 425-42 (2006). In response, the U.S. District Court for the Eastern District of Texas redrew its boundaries in 2006 to be an 'opportunity district,' or one in which Hispanic voters would have an opportunity to elect their preferred candidates, as required by section 2. We now find that the Hispanic voters in CD 23 turned that opportunity into a demonstrated ability to elect, but that the 2010 redistricting took that ability away." 2012 U.S. Dist. LEXIS 121685 at *55 (record citations omitted).

V. The Constitutionality of the 2006 Amendments is Not Properly Before the Court

The constitutionality of Congress' 2006 amendments to the Section 5 preclearance standards is not properly presented for review by this Court.

In the Court of Appeals, "Shelby County neither challenge[d] the constitutionality of the 2006 amendments or even argue[d] that they increase section 5's burdens." App. at 66a. *See also id.* at 76a ("Shelby did not argue that either of these amendments is unconstitutional") (Williams, J., dissenting). The Court of Appeals properly declined to consider these issues since they were "entirely unbriefed, and as we have repeatedly made clear, 'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" *Id.* at 66a-67a (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). Since Shelby County neither challenged in the lower courts the constitutionality of the 2006 amendments, nor argued that they increase Section 5's burdens, the County has waived any such arguments.[20]

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[20] *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below."); *Spietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (deeming argument as to application of federal maritime law waived because it was not raised below).

In addition, as the Court of Appeals correctly observed, the 2006 amendments "are implicated only in a subset of cases," *id.* at 67a, and thus are best addressed in the context of a preclearance dispute that substantively presents the question of the amendments' nature and scope. Accordingly, since the instant case presents no such preclearance dispute, this is an independent reason for not addressing the 2006 amendments in this litigation.[21]

Shelby County contends, in its Statement of the Case, that the 2006 amendments "increased the already significant federalism burden preclearance imposes of covered jurisdictions." Petition at 10. Nonetheless, the County's Petition does not appear to assert that the constitutionality of the 2006 reauthorization is affected by the 2006 amendments to the Section 5 preclearance standards. The Petition does not assert that the D.C. Circuit erred when it concluded that these amendments may not properly be considered in this case. Nor does Shelby

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[21] For these reasons, the majority did not address, on the merits, Judge Williams' assertion that the amendments have created new burdens on covered jurisdictions. Judge Williams' dissent incorrectly describes the history of Section 5 and is contrary to Congress' findings, as the amendments, in fact, merely restored the longstanding interpretations and applications of Section 5 which had been abrogated by *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*). As Congress stated: "The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act." 120 Stat. 577, sec. 2(b)(6); H.R. Rep. No. 109-478, at 2 (2006).

County ask this Court to review either of the alternative legal determinations made by the D.C. Circuit in this regard – that Shelby County's failure to brief the "preclearance amendments" issue below precluded consideration of this issue, and that Shelby County's facial challenge fails to present the requisite concrete circumstances in which the judiciary may appropriately consider the nature and scope of the amendments.

For these reasons, any grant of certiorari in this appeal should preclude consideration of a facial challenge to the 2006 amendments.

VI. The Question Presented is Incorrect

Finally, should certiorari be granted, the correct question before the Court would be whether Congress acted within its authority under both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) in 2006. Thus, if certiorari is granted, the Court should reject Shelby County's proposed "question presented" because it ignores the explicit congressional invocation of enforcement authority under the Fourteenth Amendment. Intervenors have submitted the correct "question presented" for consideration by the Court.

As discussed above, Congress specifically relied upon its enforcement authority under both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006. H.R. Rep. No. 109-478, at 90 ("[T]he Committee finds the authority for this legislation under amend. XIV, § 5 and amend. XV, § 2); *id.* at 53 n. 136 (stating that the reauthorization is based on both Amendments).

Congress' Fourteenth Amendment authority, therefore, would be integral to the question before the Court.

Shelby County has provided no substantial reason to disregard Congress' stated reliance upon both the Fourteenth and Fifteenth Amendments. Shelby County does not – and could not – contend that the Fourteenth Amendment fails to reach racial discrimination in voting, nor does Shelby County identify any limitation in that Amendment's enforcement clause that would preclude Congress from enacting remedial legislation to prevent and deter such discrimination. It is well established that the Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination in voting by state and local governments. ***E.g.***, ***Hunter v. Underwood***, 471 U.S. 222 (1985); ***Rogers v. Lodge***, 458 U.S. 613 (1982); ***White v. Regester***, 412 U.S. 755 (1973). *See also* ***LULAC v. Perry***, 548 U.S. at 440 (Texas' congressional redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation."). And the enforcement clauses of the Fourteenth and Fifteenth Amendments grant Congress "parallel power," ***Boerne***, 521 U.S. at 518, and, in fact, use "virtually identical" language. *Garrett*, 531 U.S. at 873. Accordingly, it was entirely proper for Congress to rely on both Amendments when it acted to reauthorize Section 5 and Section 4(b) in 2006.

Shelby County observes that this Court's prior decisions upholding the constitutionality of Section 5 relied exclusively on the Fifteenth Amendment. Petition at 26 (citing *Katzenbach*, 383 U.S. at 308-10; *Rome*, 446 U.S. at 180-82). *See also Lopez v.*

Monterey County, 525 U.S. at 283-84. While true, this also says very little since these cases included no discussion of the Fourteenth Amendment, and thus included no ruling on whether Congress may rely on both Amendments in enacting remedies for racial discrimination in voting. Instead, it merely seems that the Supreme Court's past focus on the Fifteenth Amendment was a function of jurisprudential historical development, and carried no substantive significance.[22]

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[22] In 1966, when the Court in *Katzenbach* first addressed the constitutionality of the Voting Rights Act, constitutional rulings regarding discrimination in voting generally relied on the Fifteenth Amendment. *E.g.*, *Louisiana v. United States*, 380 U.S. 145, 153 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *Smith v. Allwright*, 321 U.S. 649, 666 (1944). However, beginning in the 1970s, the Supreme Court built upon its one-person, one-vote rulings under the Fourteenth Amendment to hold that a different form of vote dilution – one that denies minority voters the opportunity to elect candidates of choice – also violates the Fourteenth Amendment. *See White v. Regester*, *supra*. Thus, constitutional law as applied to discrimination in voting has progressed to including the prohibitions in both the Fourteenth and Fifteenth Amendments.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: September 24, 2012

OPPOSITION BRIEF

No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress acted within its authority to enforce the constitutional prohibition against discrimination in voting when it reauthorized Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (Section 5), in 2006, on the basis of an extensive record demonstrating that, despite considerable progress under Section 5's remedial framework, discrimination against minority voters continues to be a serious problem in covered jurisdictions and that Section 5 remains a valuable tool in preventing, remedying, and deterring such discrimination.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 15
Conclusion 34
Appendix A — Jurisdictions that have been ordered by a district court to comply with preclearance requirement 1a
Appendix B — Covered jurisdictions that have successfully terminated Section 5 coverage 4a

TABLE OF AUTHORITIES

Cases:

Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 22

City of Boerne v. *Flores*, 521 U.S. 507 (1997) ... 8, 16, 24, 28, 30

City of Rome v. *United States*, 446 U.S. 156 (1980) 5, 16, 19, 28

Crawford v. *Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) 31

Georgia v. *Ashcroft*, 539 U.S. 461 (2003) 6

Georgia v. *United States*, 411 U.S. 526 (1973) 5, 16

Gonzales v. *Raich*, 545 U.S. 1 (2005) 22

Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 30

Lopez v. *Monterey Cnty.*, 525 U.S. 266 (1999) 5, 16, 28

Nevada Dep't of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) 21, 28, 29, 30

Northwest Austin Mun. Util. Dist. No. One v. *Holder*, 557 U.S. 193 (2009) .... *passim*

Northwest Austin Mun. Util. Dist. No. One v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) 7, 19

Cases—Continued: Page

Reno v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000)..............6
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966)......*passim*
Tennessee v. *Lane*, 541 U.S. 509 (2004)........................ 21, 29, 30
Texas v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012)... 32
Texas v. *United States*, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012)... 21, 22
Thornburgh v. *Gingles*, 478 U.S. 30 (1986).............................. 27
Woods v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948)............... 22

Constitution and statutes:

U.S. Const.:
  Art. IV 8
  Amend. X...8
  Amend. XIV ....*passim*
  Amend. XV...*passim*
Act of Aug. 6, 1975, Pub. L. No. 94-73, Tit. II, 89 Stat. 400.. 5
Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 2
Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.........2
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. I, 78 Stat. 241 2
Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 5
    § 2(b)(1)-(2), 120 Stat. 577.. 5, 6
    § 2(b)(7), 120 Stat. 578...6
    § 2(b)(9), 120 Stat. 578...5

Statutes—Continued: Page

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 937:
  § 4, 79 Stat. 938 (42 U.S.C. 1973b) 4
  § 4(a), 79 Stat. 938 (42 U.S.C. 1973b(a) 4
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* 3
  42 U.S.C. 1973 (§ 2) .... *passim*
  42 U.S.C. 1973(a) 9
  42 U.S.C. 1973a(c) (§ 3(c)) 4, 24
  42 U.S.C. 1973b(a) (§ 4(a)) 4, 7, 24, 27
  42 U.S.C. 1973b(a)(7) 25
  42 U.S.C. 1973b(b) (§ 4(b)) .... *passim*
  42 U.S.C. 1973c (§ 5) .... *passim*
  42 U.S.C. 1973c(b) 6
  42 U.S.C. 1973c(c) 6
  42 U.S.C. 1973c(d) 6
Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 4
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 5
  § 2(b)(2), 96 Stat. 131 5

Miscellaneous:

30 Fed. Reg. 9897 (Aug. 7, 1965) 7
H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 23
H.R. Rep. No. 478, 109th Cong., 2d Sess. (2006) 9, 20, 21
Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. (2005) 19, 20, 21

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-110a) is reported at 679 F.3d 848. The opinion of the district court (Pet. App. 111a-291a) is reported at 811 F. Supp. 2d 424.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2012. The petition for a writ of certiorari was filed on July 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Although the Fourteenth and Fifteenth Amendments have since 1870 guaranteed United States citizens' right to vote free of discrimination on the basis of race, "the blight of racial discrimination in voting * * * infected the electoral process in parts of our

country for nearly a century" thereafter. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Beginning in 1890, some States—located mostly in the South—undertook a systematic campaign to disenfranchise minority voters. *Id.* at 310-312. After many decades of inaction, Congress eventually responded, first by enacting the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, which authorized the Attorney General to seek injunctions against public and private interference with voting on racial grounds. *South Carolina*, 383 U.S. at 313. When that measure proved insufficient, Congress enacted the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86, which expanded the Attorney General's litigation power by authorizing him to join States as party defendants, giving him access to local voting records, and empowering courts to register voters in areas where there had been systematic discrimination. *South Carolina*, 383 U.S. at 313. That legislative response also proved insufficient, prompting Congress to enact Title I of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, which provided for expedited treatment of voting cases before three-judge courts and made illegal some of the tactics that had been used to disenfranchise African-Americans in federal elections. *South Carolina*, 383 U.S. at 313.

With each legislative response, Congress intended to further "facilitat[e] case-by-case litigation against voting discrimination." *South Carolina*, 383 U.S. at 313. But each measure "proved ineffective for a number of reasons." *Id.* at 314. As this Court explained in *South Carolina*, voting litigation is "unusually onerous to prepare" and is "exceedingly slow." *Ibid.* In addition, "some of the States affected" by litigation authorized by these congressional enactments "merely switched to discriminatory devices not covered by" favorable federal decrees. *Ibid.*

Faced with the fact that a serious and invidiously discriminatory obstacle to the proper functioning of our democracy had proved nearly impervious to traditional legislative remedies, Congress enacted more aggressive and unusual measures as part of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.* The purpose of the VRA, as this Court put it, was to "rid the country of racial discrimination in voting." *South Carolina*, 383 U.S. at 315. The VRA combined permanent enforcement measures applicable nationwide with temporally and geographically limited measures applicable to the areas in which Congress had found pervasive voting discrimination. *Id.* at 315-316. Section 5 of the Act applies to specified jurisdictions and prohibits such covered jurisdictions from adopting or implementing any change in a "standard, practice, or procedure with respect to voting" without first obtaining a preclearance determination from either the Attorney General of the United States or the United States District Court for the District of Columbia. 42 U.S.C. 1973c. In order to obtain preclearance, the jurisdiction must demonstrate that the proposed change does not have the purpose and will not have the effect of discriminating on the basis of race. *Ibid.* Section 5 addressed the problems Congress had identified with case-by-case adjudication by "prescrib[ing] remedies" that "go into effect without any need for prior adjudication." *South Carolina*, 383 U.S. at 327-328.

When Congress enacted Section 5, "[i]t knew precisely which states it sought to cover and crafted the criteria" set forth in the statutory coverage provision in order "to capture those jurisdictions." Pet. App. 6a-7a.

Rather than identify particular States by name in the statute's text, Congress chose to describe (in Section 4(b) of the VRA, 42 U.S.C. 1973b(b)) the jurisdictions it wished to cover by listing two voting-related criteria shared by each such jurisdiction: (1) the use of a defined voting test or device as of November 1, 1964, and (2) a voter registration or turnout rate that was below 50% in the 1964 presidential election. § 4, 79 Stat. 438. Those criteria—often referred to as the "coverage formula"—were thus "reverse-engineer[ed]" to describe the jurisdictions Congress knew it wanted to cover based on "evidence of actual voting discrimination." Pet. App. 56a.

In order to address any potential over- and under-inclusiveness attributable to using the Section 4(b) criteria to specify the geographic scope of Section 5's coverage, Congress included "bail-in" and "bail-out" procedures. Under Section 3(c)'s bail-in standard, a federal court may order a jurisdiction found to have violated the Constitution's prohibition on voting discrimination to obtain preclearance for some or all future voting changes. 42 U.S.C. 1973a(c). Under Section 4(a)'s original bailout standard, a jurisdiction could terminate its coverage by demonstrating that it had not used a test or device for a discriminatory purpose (and therefore should not have been covered in the first place). VRA, 79 Stat. 438.

This Court upheld the temporary provisions of the VRA, including Sections 4(b) and 5, as appropriate means of enforcing the guarantees of the Fifteenth Amendment. *South Carolina*, 383 U.S. at 323-337.

b. Congress reauthorized Sections 4(b) and 5 in 1970 (for five years), 1975 (for seven additional years), and 1982 (for 25 additional years). See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314;

Act of Aug. 6, 1975 (Act of 1975), Pub. L. No. 94-73, Tit. II, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendment), Pub. L. No. 97-205, 96 Stat. 131. In 1975, Congress also significantly expanded Section 5's reach to cover jurisdictions that had engaged in widespread discrimination against minority voters including members of identified racial groups described in the statute as "language minority" groups. Act of 1975, 89 Stat. 401-402; Pet. App. 8a. In 1982, Congress significantly eased the bailout standard by allowing jurisdictions and subjurisdictions to bail out if they could demonstrate that they had complied with specified nondiscrimination requirements for ten years. 1982 Amendment, § 2(b)(2), 96 Stat. 131; see Pet. App. 9a, 128a-129a. This Court upheld the constitutionality of Sections 4(b) and 5 after each reauthorization. See *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999).

c. In 2006, Congress again reauthorized Section 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 2(b)(1)-(2), 120 Stat. 577. After holding extensive hearings to learn about ongoing voting discrimination in the country and whether there remained a need for Section 5 in covered jurisdictions in particular, Congress concluded that, "without the continuation of the [VRA's] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9), 120 Stat. 578. Congress also determined that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the" Fifteenth Amendment. *Id.* § 2(b)(7), 120 Stat. 578. Although Congress recognized that, as a "direct result" of the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters," it concluded that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." *Id.* § 2(b)(1)-(2), 120 Stat. 577.

In addition to reauthorizing Section 5 for an additional 25 years, Congress amended Section 5's substantive standard in two ways. The first amendment provides that an election change motivated by any racially discriminatory purpose may not be precleared, regardless of whether the change is retrogressive. See 42 U.S.C. 1973c(c). That change supplanted this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), that changes motivated by discrimination, even though unconstitutional, were not a basis for denying preclearance if the intent was "discriminatory but nonretrogressive." *Id.* at 341. The second amendment provides that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. 1973c(b) and (d). That change supplanted this Court's statutory holding in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), that a proposed redistricting plan was not retrogressive even though it reduced minority voters' ability to elect their candidates of choice because it created new districts in which minority voters could potentially influence the outcome of an election. *Id.* at 480-482.

d. Immediately after the 2006 reauthorization, a jurisdiction in Texas filed suit seeking to bail out of coverage under Sections 4(b) and 5, and in the alternative challenging the constitutionality of the 2006 reauthorization of Section 5. A three-judge court held that the jurisdiction was ineligible to apply for bailout and rejected the constitutional challenge. *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 235-283 (D.D.C. 2008).

On appeal, this Court reversed the statutory bailout holding and declined to reach the constitutional question. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193 (2009) (*Northwest Austin*). The Court's resolution of the statutory question significantly expanded the number of jurisdictions eligible to apply for bailout compared to the Department of Justice's previous understanding of the scope of Section 4(a). *Id.* at 206-211. Although the Court did not decide the constitutional question, the Court acknowledged (as Congress did in 2006) the progress minority voters have made in covered jurisdictions. *Id.* at 202. Like Congress, the Court attributed a "significant" portion of that progress "to the Voting Rights Act itself." *Ibid.* Noting that "these improvements" may be "insufficient and that conditions [may] continue to warrant preclearance under the Act," the Court observed that "the Act imposes current burdens and must be justified by current needs." *Id.* at 203. The Court also noted Section 5's unusual differentiation between covered and noncovered States, and explained that its "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Ibid.*

2. The State of Alabama has been a covered jurisdiction subject to Section 5 since 1965. 30 Fed. Reg. 9897 (Aug. 7, 1965). As a subdivision of Alabama, petitioner is also subject to Section 5. Pet. App. 112a, 145a. In April 2010, petitioner filed suit in the District Court for the District of Columbia, seeking a declaratory judgment that Sections 4(b) and 5 of the VRA are facially unconstitutional and a permanent injunction barring enforcement of those provisions. *Id.* at 145a, 149a. Petitioner alleges that Congress exceeded its authority under the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 in 2006, thereby violating the Tenth Amendment and Article IV of the Constitution. Pet. App. 149a-150a.

The district court granted summary judgment to the Attorney General, holding that Congress validly acted pursuant to its authority to enforce the guarantees of the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 of the VRA in 2006. Pet. App. 114a-115a, 291a. The district court acknowledged this Court's questions, expressed in *Northwest Austin,* about the continued constitutional viability of Section 5 and the scope of its geographic coverage. *Id.* at 142a-144a. With those concerns in mind, the court undertook a detailed review of the "extensive 15,000-page legislative record" supporting the 2006 reauthorization. *Id.* at 114a, 191a-255a, 288a-290a. Applying the congruence-and-proportionality inquiry of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (*Boerne*), the district court examined the evidence before Congress about the state of voting discrimination since the 1982 reauthorization—including testimony, reports, and data that revealed persisting racial disparities in voter registration, turnout, and minority electoral success; the nature and number of Section 5 objections, including a significant number of objections based on discriminatory intent; the number of successful Section 5 enforcement actions; Section 2 lawsuits with outcomes favorable to minority voters[1]; the Attorney General's requests for more information from jurisdictions submitting changes for preclearance and those jurisdictions' reaction to such requests; the Attorney General's use of federal observers; the prevalence of racially polarized voting and the role it plays in jurisdictions' use of dilutive techniques; and Section 5's deterrent effect. Pet. App. 12a, 130a-132a, 191a-255a.

Based on its exhaustive review of the record, the court confirmed that Congress had found ample evidence of a history and ongoing pattern of purposeful, state-sponsored voting discrimination in covered jurisdictions. Pet. App. 189a-270a. The court also credited Congress's conclusion that Section 2 alone would be an "inadequate remedy" for discrimination in covered jurisdictions. *Id.* at 269a-270a (quoting H.R. Rep. No. 478, 109th Cong., 2d Sess. 57 (2006)). The court further concluded that Section 5's preclearance remedy is a congruent and proportional means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments, particularly in light of the meaningful limitations built into Section 5, including the bailout mechanism. *Id.* at 270a-280a.

The district court also considered petitioner's challenge to the scope of Section 5's geographic coverage, as embodied in Section 4(b). Pet. App. 280a-290a. Cognizant of this Court's observation that Section 4(b)'s disparate geographic coverage need be "sufficiently related" to the problem Section 5 targets, *id.* at 281a (quoting *Northwest Austin*, 557 U.S. at 203), the district court concluded that Congress appropriately retained the existing coverage scope only after examining whether voting discrimination both "persisted in the jurisdictions traditionally covered by Section 4(b)" and "remained more prevalent in these jurisdictions than in the [non-covered] jurisdictions." *Id.* at 282a.

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[1] Section 2 of the VRA applies nationwide and prohibits the imposition of any voting practice or procedure in a manner that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a).

The court rejected petitioner's argument that Section 4(b) was invalid because it retained "triggers" tied to decades-old election data. The court explained that the triggers "were never selected because of something special that occurred in those years; instead, they were chosen as mere proxies for identifying those jurisdictions with established histories of discriminating against racial and language minority voters." Pet. App. 285a. "Notwithstanding the passage of time since the coverage formula was last updated," the court concluded, discrimination in voting remained a serious problem in covered jurisdictions. *Id.* at 285a-286a. The court also explained that Congress had compared contemporary voting discrimination in covered and non-covered jurisdictions based on, *inter alia*, evidence revealing that covered jurisdictions accounted for more than twice their proportional share (adjusted for population) of Section 2 lawsuits with outcomes favorable to minority voters—even with Section 5's preclearance remedy in place in those covered jurisdictions. *Id.* at 288a-289a. The court therefore concluded that Congress's decision to maintain the existing scope of coverage (*i.e.*, jurisdictions previously covered that had not bailed out) was a constitutional means of combating voting discrimination because it was "sufficiently related to the problem that it targets." *Id.* at 290a.

5. The court of appeals affirmed in a divided decision. Pet. App. 1a-110a.

a. The court of appeals relied on this Court's decision in *Northwest Austin* as the framework for its analysis, noting that the relevant inquiry is "whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem." Pet. App. 16a. Applying the *Boerne* framework, the court of appeals embarked on a "searching" and "probing" review of the legislative record, cognizant that Congress "acts at the apex of its power" when it "seeks to combat racial discrimination in voting." See *id.* at 19a-22a.

The court first addressed whether Section 5's burdens are justified by current needs. The court rejected petitioner's argument that the only evidence relevant to the inquiry is evidence of "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment." Pet. App. 24a. The court explained that the validity of Section 5 does not rest on "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965," noting that such behavior is "virtually impossible" with Section 5 in place. *Id.* at 24a-26a. The inquiry turns instead, the court explained, on "whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." *Id.* at 25-26a. The court also rejected petitioner's argument that it could only consider evidence of direct and intentional interference with the right to register and vote, to the exclusion of evidence of intentional vote dilution. *Id.* at 26a-27a. The court explained that such discrimination violates the Fourteenth Amendment and is therefore relevant to the inquiry given that Congress relied on both the Fourteenth and Fifteenth Amendments in reauthorizing Section 5. *Id.* at 27a-28a. The court further explained that "tactics like intentional vote dilution are in fact decades-old forms of gamesmanship" that discriminate against minority voters and were "well known" to Congress in 1965 and in 2006. *Id.* at 28a-29a.

Examining the legislative record, the court found substantial probative evidence of ongoing constitutional violations that justified Congress's conclusion "that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy." Pet. App. 29a. In particular, the court cited "[j]ust a few" of the "numerous" examples of "flagrant racial discrimination" and "overt hostility to black voting power by those who control the electoral process." *Id.* at 29a-31a. It also emphasized the more than 600 objections interposed by the Attorney General between 1982 and 2004, including at least 423 objections based on discriminatory purpose; more than 800 voting changes withdrawn or modified by covered jurisdictions in response to the Attorney General's "more information requests," from which Congress could reasonably infer at least some discriminatory intent; 653 successful Section 2 actions in covered jurisdictions, some with findings of intentional discrimination, providing relief from discriminatory practices in at least 825 counties; 622 separate dispatches of multiple observers to covered jurisdictions based on the likelihood of Fourteenth or Fifteenth Amendment violations; 105 successful Section 5 enforcement actions against recalcitrant jurisdictions;

and 25 unsuccessful judicial preclearance actions by covered jurisdictions. *Id.* at 31a-42a. The court further explained that Congress had reached a reasoned and well-supported judgment that Section 2 was inadequate to combat the serious and widespread intentional voting discrimination that persisted in covered jurisdictions. *Id.* at 45a-47a. Based on its independent examination of the record, the court therefore concluded that "overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance" and that "section 5's 'current burdens' are indeed justified by 'current needs.'" *Id.* at 48a.

The court next turned to whether Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets." Pet. App. 48a. The court emphasized that the answer "depends not only on section 4(b)'s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout." *Ibid.* The court considered evidence before Congress comparing the degree of voting discrimination in covered and non-covered jurisdictions, including a study (known as the Katz study) of reported Section 2 decisions nationwide between 1982 and 2004. *Id.* at 49a; see also *id.* at 130a. When the data was adjusted to reflect population differences in covered and non-covered jurisdictions, the study showed that "the rate of successful section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions," and that the overall success rates of Section 2 cases are higher in covered jurisdictions. *Id.* at 49a-51a. Those findings, the court concluded, indicate that "racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'" *Id.* at 49a (quoting *Northwest Austin*, 557 U.S. at 203). The court also took account of unpublished Section 2 decisions with outcomes favorable to minority plaintiffs, which revealed that 81% of successful Section 2 cases nationwide were filed in the covered jurisdictions. *Id.* 51a-55a. The court found that especially notable because one might expect to find fewer such suits in covered jurisdictions given that Section 5 would be expected to halt the implementation of discriminatory voting changes. *Id.* at 55a.

The court rejected petitioner's argument that it was irrational for Congress to maintain the criteria in Section 4(b) because it was tied to decades-old data and untied to the types of second-generation barriers with which Congress was primarily concerned in 2006. Pet. App. 55a-61a. The court explained that "Congress identified the jurisdictions it sought to cover—those for which it had 'evidence of actual voting discrimination,' [*South Carolina*], 383 U.S. at 329—and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Id.* at 56a. Congress thus originally selected the criteria in Section 4(b) because they "served as accurate proxies for pernicious racial discrimination in voting," and the relevant question in 2006 therefore was whether the VRA "continues to identify the jurisdictions with the worst problems." *Id.* at 57a. In addition, the court explained that the statute's bail-in and bailout provisions further ensure that Section 5 applies only to those jurisdictions with the worst recent records of voting discrimination. *Id.* at 61a-65a. The court also pointed to this Court's decision in *Northwest Austin*, which greatly increased the number of jurisdictions eligible to apply for bailout, noting that 30% of successful bailout actions since 1965 had occurred in the three years between *Northwest Austin* and the court of appeals' decision. *Id.* at 63a. Considering the statute as a whole, the court concluded that Section 4(b), together with the bail-in and bailout mechanisms, "continues to single out the jurisdictions in which discrimination is concentrated." *Id.* at 65a.

c. Judge Williams dissented, explaining that he would find Section 4(b)'s coverage provision unconstitutional even if Congress might be justified in continuing to impose Section 5's preclearance remedy in some covered jurisdictions. Pet. App. 70a, 78a, 104a. Judge Williams considered Section 5's "mandate[d] anticipatory review," its placement of the burden of proof on the jurisdiction submitting a change, and its substantive purpose and retrogression standards (as amended in 2006) in concluding that Section 5 imposes substantial burdens on covered jurisdictions. *Id.* at 71a-77a. Judge Williams also disagreed with Congress's judgment that Section 2 alone would be an inadequate means of remedying and deterring voting discrimination in covered jurisdictions. *Id.* at 77a-78a. After reviewing the legislative record, *id.* at 79a-102a, Judge Williams would have held that the 2006 reauthorization of Section 4(b) was not a congruent and proportional means of enforcing the guarantees of the Fourteenth and Fifteenth Amendment.

ARGUMENT

Petitioner asks this Court to review the court of appeals' determination that Congress validly acted pursuant to its constitutional authority to enforce the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 of the Voting Rights Act in 2006. Although that is certainly an important question of federal law, review by this Court is not warranted.

This Court has "acknowledge[d] the necessity of" Congress's use of "strong remedial and preventive measures" under its Fourteenth and Fifteenth Amendment enforcement powers "to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997). Section 5 of the VRA is the quintessential example of such a remedy. See *id.* at 525-527. Prior to the 2006 reauthorization, this Court had already upheld the constitutionality of Section 5 on four occasions, spanning multiple reauthorizations. *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177-178 (1980); *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1966).

With regard to the latest reauthorization in 2006, the court of appeals correctly applied settled legal principles in reviewing the 15,000-page legislative record, determining that Congress correctly identified a pervasive constitutional problem, and concluding that Congress's reauthorization of Section 5 (including its maintenance of the existing coverage scope) was a congruent and proportional means of enforcing the Fourteenth and Fifteenth Amendments. In particular, the court of appeals conformed its analysis to the framework this Court set forth only three years ago in *Northwest Austin Municipal Utility District Number One* v. *Holder*, 557 U.S. 193 (2009), correctly rejecting petitioner's facial challenge. Petitioner did not seek en banc review of the panel decision. Review by this Court is not warranted.

1. The court of appeals correctly rejected petitioner's facial challenge to the constitutionality of Sections 4(b) and 5 of the VRA. From the outset of its analysis, the court of appeals embraced this Court's opinion in *Northwest Austin*, noting the Court's specific questions concerning assessment of the continued constitutionality

of Section 5, and tailoring its own analysis to account for those concerns. See Pet. App. 14a ("*Northwest Austin* sets the course for our analysis.").

a. Attempting first to answer this Court's question whether Section 5's current burdens are justified by current needs, see *Northwest Austin*, 557 U.S. at 202, the court of appeals engaged in an exhaustive review of the 15,000-page legislative record assembled by Congress in 2006. Pet. App. 9a, 24a-55a, 58a-64a. "Congress," this Court explained in *Northwest Austin*, "amassed a sizeable record in support of its decision to extend the preclearance requirements." 557 U.S. at 205. Applying the analysis described in this Court's decision in *Boerne*, the court of appeals correctly concluded that the evidence of voting discrimination in covered jurisdictions was more than enough to justify Congress's reliance on its authority to enforce the Fourteenth and Fifteenth Amendments in reauthorizing Section 5.[2]

Although the court of appeals expressly found that Congress appropriately relied on its authority to enforce the protections of both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5, see Pet. App. 27a-28a, petitioner makes no suggestion that the record was insufficient to justify Congress's reliance on its authority under Section 5 of the Fourteenth Amendment. If the only question petitioner would have this Court address is whether the 2006 reauthorization can be justified under the Fifteenth Amendment, the resolution of that constitutional question will have no practical consequence because the statute has been upheld under the Fourteenth Amendment as well. Even with respect to Congress's exercise of its authority to enforce the Fifteenth Amendment, petitioner does not argue that, taken as a whole, the record before Congress in 2006 was insufficient to establish that voting discrimination continues to be widespread in covered jurisdictions. Petitioner instead attempts to pare down the relevant evidence based on a mistaken understanding of the Constitution and the history of Section 5 of the VRA.

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[2] Although the government disagrees with the court of appeals that *Boerne* provides the appropriate framework for reviewing the constitutional questions presented in this case, that is not a reason to grant the petition for a writ of certiorari. As the court of appeals explained, the result in this case would have been the same if the court had applied the rationality standard of *South Carolina* rather than the congruence-and-proportionality framework of *Boerne*. Pet. App. 16a.

First, petitioner argues (Pet. 24-25, 27-28) that, in considering whether to reauthorize Section 5 in 2006, Congress was limited to considering evidence that covered jurisdictions continued to engage in "systematic resistance to the Fifteenth Amendment." Pet. 27 (quoting *South Carolina*, 383 U.S. at 328). The court of appeals correctly rejected that argument, which misunderstands this Court's decision in *South Carolina* and Congress's original intent in enacting Section 5. The type of gamesmanship petitioner would have Congress rely on, to the exclusion of all other evidence of discrimination (even unconstitutional discrimination), was not Congress's sole focus in originally enacting Section 5 or the focus of this Court in upholding it. Although the Court in *South Carolina* noted that "some" jurisdictions had engaged in evasion of the Constitution's antidiscrimination mandates, it also acknowledged that it was the cumbersome nature of case-by-case adjudication that prompted Congress to adopt the preclearance requirement. 383 U.S. at 314-315, 327-328. To the extent gamesmanship did play a role in the adoption of Section 5, the preclearance mechanism constrains the opportunity for such behavior. See Pet. App. 25a. Jurisdictions must now demonstrate that new voting practices are not discriminatory *before* implementing them. Although Congress did find evidence of some covered jurisdictions' continued efforts to evade the nondiscrimination mandate of Section 5, see *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 273 (D.D.C. 2008),[3] the lack of additional evidence of that kind simply demonstrates that Section 5 is working in this regard.

Second, petitioner argues (Pet. 26) that, even within the narrow category of evidence of systematic resistance to the Fifteenth Amendment, Congress was limited to considering evidence of intentional interference with the right to register to vote and to cast a ballot, and could not rely on evidence of vote dilution. The court of appeals correctly rejected that argument, see Pet. App. 26a-29a, which finds no basis in law or logic. Even assuming petitioner were correct that the Fifteenth Amendment does not prohibit intentional acts of vote dilution on the basis of race—a point the government does not concede—it is well established that the Fourteenth Amendment does prohibit such action. It defies common sense to suggest that Congress was prohibited from considering evidence of unconstitutional discrimination by covered jurisdictions in deciding whether to exercise its authority to enforce constitutional guarantees. This Court's statement in *South Carolina* that Section 5 is a valid means of enforcing the Fifteenth Amendment does not mean that it cannot also be a valid means of enforcing the Fourteenth Amendment.

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[3] For examples of Section 5 objections induced by recalcitrant jurisdictions' attempts to evade the force of successful Section 2 actions, see *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 330-332, 340-343, 429-434, 607-608, 678-680, 795-797, 812-814, 907-910, 1141-1144, 1207-1210, 1360-1361, 1384-1386, 1388-1390, 1402-1404, 1516-1521, 1538-1540, 1574-1579, 1730-1732, 1823-1825, 1833-1836, 1935-1937, 1957-1959, 2041-2043, 2212-2213, 2269-2271, 2300-2303, 2307-2311 (2005).

As the court of appeals' exhaustive opinion reveals, the record before Congress of recent voting discrimination in covered jurisdictions is extensive. That record is "replete with direct and circumstantial evidence of contemporary voting discrimination by covered jurisdictions—voting discrimination that occurred despite the existence of Section 5." Pet. App. 270a. For example, Congress examined the Attorney General's enforcement of Section 5—just as previous Congresses had with the approval of this Court, see *City of Rome*, 446 U.S. at 181—and learned that the Attorney General had interposed more than 750 objections (administratively and in judicial preclearance actions) between 1982 and 2006, see H.R. Rep. No. 478 at 21-22, and that those objections had prevented implementation of more than 2400 discriminatory voting changes. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 104-2595 (2005) (*History, Scope, & Purpose*) (reproducing objection letters). Significantly, Congress learned that a sizeable portion of the Attorney General's objections (at least 423 between 1982 and 2004, see Pet. App. 33a) were interposed at least in part because a jurisdiction had acted with a discriminatory purpose. Intentional discrimination against minority voters is exactly the type of action the Fourteenth and Fifteenth Amendments empower Congress to prevent.

Examples of intentional discrimination blocked by Section 5 are numerous. As but one notable example, in 2001, the Attorney General interposed an objection regarding Kilmichael, Mississippi, after the all-white incumbent town governance tried to cancel an election shortly after black citizens had become a majority. *History, Scope, & Purpose* 1616-1619. When the citizens of Kilmichael finally voted, they elected the town's first African-American mayor and three African-American aldermen. H.R. Rep. No. 478, *supra*, at 36-37. There are numerous additional examples. See Pet. App. 29a-31a; see also, *e.g.*, *History, Scope & Purpose* 830-833 (2000 objection to redistricting plan for Webster County, Georgia, school board undertaken to "intentionally decreas[e] the opportunity of minority voters to participate in the electoral process" after majority black board was elected); *id.* at 1606-1612 (1998 objection to redistricting plan for Grenada, Mississippi, adopted with "purpose to maintain and strengthen white control of a City on the verge of becoming majority black").

Very recently, a three-judge court found that Texas engaged in intentional discrimination against its black and Latino citizens when it drew new boundaries for its congressional and State Senate districts following the 2010 decennial census. *Texas* v. *United States*, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), notice of appeal filed, Docket entry No. 234 (D.D.C. Aug. 31, 2012).[4] The court concluded, for example, that Texas had redrawn congressional district lines to remove the home offices of numerous incumbent minority legislators from their districts without inflicting the same burden on even one Anglo legislator—a pattern the court determined was "unexplainable on grounds other than race." 2012 WL 3671924, at *20 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). The court also noted that, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Ibid.* (citing cases). Such a pattern confirms Congress's determination that Section 5 is still needed in covered jurisdictions.

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[4] Although petitioner contends (Pet. 33-34) that the only evidence relevant to the continuing viability of Section 5 is the evidence that was presented to Congress in 2006, that assertion is at odds with this Court's approach to congressional-authority questions. The Court considers post-enactment evidence when determining whether Congress had the constitutional authority to promulgate a law, including

In addition to considering evidence of intentional discrimination, Congress relied on other types and sources of evidence that previous Congresses had relied on to justify prior reauthorizations. Based on that evidence, the court of appeals concluded that Section 5's "'current burdens' are indeed justified by 'current needs.'" Pet. App. 48a; see *id.* at 29a-48a, 194a-196a, 198a-270a.[5] That material included evidence of the inadequacy of Section 2 as a remedy for voting discrimination in covered jurisdictions due to the cost and time-consuming nature of

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laws enacted pursuant to Congress's authority to enforce the Reconstruction Amendments. See *Tennessee* v. *Lane*, 541 U.S. 509, 524-525 & nn.6-8, 11, 13-14 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 733-734 & nn.6-9 (2003); cf. *Gonzales* v. *Raich*, 545 U.S. 1, 19 n.28, 21 n.31 (2005); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 143 n.6 (1948).

[5] Nor did the court of appeals fill any gap in the record by "speculat[ing]" about either Section 5's deterrent effect or "a latent desire [by covered jurisdictions] to discriminate." Pet. 27. The court reasonably deferred to Congress's predictive judgment, based on the record, that current levels of voting discrimination in the covered jurisdictions would be substantially worse without Section 5. Pet. App. 42a-44a; see *id.* at 252a-255a, 267-270a.

case-by-case adjudication. *Id.* at 45a-47a; see *id.* at 269a-270a, 277a-278a.

b. The court of appeals also correctly rejected petitioner's argument (see Pet. 29-35) that Congress acted irrationally in 2006 when it opted to maintain Section 5's existing geographic scope. As the court of appeals correctly explained, the coverage criteria included in Section 4(b) were "reverse-engineer[ed]" to describe in objective terms those jurisdictions Congress knew it wanted to cover because of their long histories of racial discrimination in voting. Pet. App. 56a-57a; see also *South Carolina*, 383 U.S. at 329; H.R. Rep. No. 439, 89th Cong., 1st Sess. 13-14 (1965); Pet. App. 285a-287a. The registration and turnout triggers included in Section 4(b) thus, along with the test-or-device requirement, simply provided a means of describing the jurisdictions with a history of "widespread and persistent discrimination in voting." *South Carolina*, 383 U.S. at 328.

When Congress considered whether to reauthorize Section 5 in 2006, it examined the current problem of voting discrimination in covered jurisdictions, *i.e.*, in jurisdictions described by the criteria in Section 4(b) that had not yet bailed out of coverage. And Congress determined that the record of discrimination in those jurisdictions continued to justify the imposition of Section 5's preclearance requirement. Because the purpose of Section 5 has always been to rid (or sufficiently ameliorate) widespread voting discrimination in particular areas, Congress did not devise new coverage triggers in 2006. See Pet. App. 285a-286a. Rather, it reasonably sought to determine whether indicia of ongoing voting discrimination in the currently covered jurisdictions warranted again extending Section 5.

Importantly, Congress retained the statutory bailout (and bail-in) provisions, such that a jurisdiction's status as a covered jurisdiction need not remain static. The constitutionality of the VRA's determination of covered jurisdictions can only be fairly judged in the context of the statute as a whole, including the statute's built-in mechanism for a jurisdiction to earn a change in its status from covered to non-covered (or vice-versa). Covered jurisdictions that can demonstrate they have complied with specific nondiscrimination requirements for a ten-year period can seek bailout. See 42 U.S.C. 1973a(c), 1973b(a); Supplemental Apps. A & B, *infra* (listing jurisdictions that have been subject to preclearance under Section 3(c) or have terminated coverage under Section 4(a)). This Court has consistently described bailout as a critical limiting feature contributing to Section 5's constitutionality, see *City of Boerne*, 521 U.S. at 533; *South Carolina*, 383 U.S. at 331, but petitioner disregards the statute's bailout feature. Moreover, this Court's recent decision in *Northwest Austin* significantly expanded the number of jurisdictions eligible to apply for bailout—an expansion that has already made a material difference in the rate at which nondiscriminating jurisdictions are opting out of Section 5, see Pet. App. 63a.[6] Section 5 is unique among legislation enacted pursuant to Congress's Reconstruction Amendments authority in that it both requires Congress to reconsider the propriety of the legislation on a regular basis, see 42 U.S.C. 1973b(a)(7) ("The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the [2006 reauthorization]."), and permits jurisdictions subject to the legislation to engage in self-help by demonstrating that they no longer deserve to be covered.

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[6] Since the current bailout provision became effective in 1984, bailout has been granted in 36 cases (reaching a total of 190 jurisdictions). Half of those cases (accounting for 64% percent of bailed-out jurisdictions) have been filed since this Court's decision in *Northwest Austin*. Supplemental App. B at 4a-8a. Those 18 cases include the first ever bailouts from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; and the largest ever bailout, in terms of population, in Prince William County, Virginia. See *Florida* v. *United States*, No. 11-cv-1428, Docket entry No. 122-3, at ¶¶ 34 (D.D.C. June 25, 2012)

The court of appeals properly credited the evidence before Congress demonstrating that "[t]he evil that § 5 is meant to address"—racial discrimination in voting—is "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S. at 203. In weighing that question, Congress and the court of appeals looked to evidence of voting discrimination arising outside of the Section 5 process, including successful Section 2 suits, data regarding minority voter registration and turnout, federal observer coverage, and the continued existence of racially polarized voting at every level of government and in both partisan and nonpartisan elections. Pet. App. 49a-61a; see *id.* at 232a-248a, 287a-290a.

The data regarding Section 2 suits with outcomes favorable to minority plaintiffs is particularly notable. As the court of appeals explained, if voting discrimination were distributed evenly throughout the country, one would expect to find a smaller proportion of successful Section 2 cases in covered jurisdictions, where Section 5 would have blocked implementation of new discrimina-

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(three-judge court) (Berman Decl.). There are also two pending bailout actions in which the Attorney General has notified the plaintiff jurisdictions that he will consent to their bailout. See Supplemental App. B at 8a-9a.

tory voting practices. Pet. App. 55a. But Congress learned that 56% of all reported Section 2 decisions with outcomes favorable to minority plaintiffs arose in covered jurisdictions, even though covered jurisdictions contain less than 25% of the nation's population. *Id.* at 49a. As the court of appeals explained, "the rate of successful [reported] section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions." *Id.* at 49a-50a. The absolute rate of success is also higher in covered jurisdictions, with "40.5 percent of published section 2 decisions in covered jurisdictions result[ing] in favorable outcomes for plaintiffs, compared to only 30 percent in non-covered jurisdictions." *Id.* at 51a.

That evidence is significantly fortified by taking into account unreported and settled Section 2 suits with outcomes favorable to minority plaintiffs. That information is contained in a study by the National Commission on the Voting Rights Act that was before Congress, and that was supplemented in this litigation with a study by Department of Justice historian Peyton McCrary.[7] Pet. App. 51a. It reveals that 81 percent of all Section 2 cases with outcomes favorable to minority plaintiffs were filed in the covered jurisdictions. *Ibid.* When the data are broken down by State, there is a very high correlation between the jurisdictions with the highest rate of such cases, adjusted for population, and the jurisdictions that are covered by Section 5. *Id.* at 51a-53a; see C.A. J.A. 436-444. And two of the non-covered States with a high rate of Section 2 outcomes favorable to minority plaintiffs—Arkansas and New Mexico—have at times been subject to preclearance through the bail-in mechanism. Pet. App. 52a; see Supplemental App. A, *infra*. That evidence reflects that the geographic scope of Section 5 continues to map onto the jurisdictions with the worst records of voting discrimination. And any covered jurisdiction that has ceased its discriminatory ways may take steps to terminate its coverage through bailout. See *South Carolina*, 383 U.S. at 331; 42 U.S.C. 1973b(a).

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[7] Petitioner insists (Pet. 33-34) that the court of appeals erred in considering the post-enactment McCrary study. As discussed at note 4, *supra*, this Court has previously relied on evidence that was not before Congress in determining whether there is a sufficient record of constitutional violations to warrant exercise of Congress's enforcement authority under the Reconstruction Amendments. Moreover, most of the data that formed the basis of the McCrary study (61 of 99 cases) was before Congress in 2006. See C.A. J.A. 88-101, 110-116, 436-444.

Petitioner argues (Pet. 32-33) that the court of appeals erred by relying on Section 2 outcomes that did not involve express findings of intentional discrimination. Some of the Section 2 cases Congress considered did include such findings of unconstitutional discrimination. See Pet. App. 232a. But because a court need not make an express finding of intentional discrimination in order to find that a voting practice violates Section 2, see 42 U.S.C. 1973—and because courts are appropriately reluctant to make constitutional findings when other grounds will suffice to resolve a particular case—it is unsurprising that there were not more judicial findings of unconstitutional conduct in the 2006 legislative record. And, although a finding of discriminatory effect does not always indicate an underlying discriminatory purpose, the "totality of the circumstances" test employed in Section 2 effects cases is designed to identify facially neutral practices that are likely to be intentionally discriminatory. See *Thornburgh* v. *Gingles*, 478 U.S. 30, 36-37 (1986).

In sum, the court of appeals carefully applied this Court's decisions in reviewing the expansive record of voting discrimination Congress considered in 2006. The court concluded that Section 5's current burdens on covered jurisdictions are justified by current needs, and that Section 5's preclearance remedy applies where it is most needed. Because Sections 4(b) and 5 are appropriate legislation to enforce the Fourteenth and Fifteenth Amendments, they do not violate the Tenth Amendment or Article IV of the Constitution, as petitioner argues (Pet. 1-2). This Court has explained that "the Reconstruction Amendments by their very nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez*, 525 U.S. at 282-283; see *id.* at 284-285; *Boerne*, 521 U.S. at 518; *City of Rome*, 446 U.S. at 179-180.

2. Petitioner is also incorrect in suggesting (Pet. 23-25) that the court of appeals' decision conflicts with decisions of this Court because the court of appeals mistakenly applied the type of "deferential review" applicable to "Article I authority or administrative agency actions" rather than the more stringent type of review applicable under *Boerne*'s congruence-and-proportionality analysis. As petitioner admits (Pet. 24), the court of appeals acknowledged its duty to engage in a "more searching" review of the legislative record in light of Section 5's unique features, see Pet. App. 21a. And the court did just that. The court of appeals carefully delved into the thousands of pages of evidence before Congress in order to ascertain "whether Congress had evidence of a pattern of constitutional violations on the part of the [covered jurisdictions] in th[e] area" of voting discrimination. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729 (2003). In light of Section 5's distinct federal-

ism implications, the court decided to conduct a "more searching" review than this Court's review in the *Boerne* line of cases. Pet. App. 20a-21a.

In reviewing the legislative record, the court of appeals applied the well-settled principle that it is "easier for Congress to show a pattern of * * * constitutional violations," *Hibbs*, 538 U.S. at 736, when strict scrutiny applies because classifications subject to strict scrutiny are presumptively invalid. See Pet. App. 19a. When a state actor discriminates in voting on the basis of race, it infringes the most fundamental constitutional right on the most constitutionally suspect basis. See *ibid.*; see also *Tennessee* v. *Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting) ("Giving § 5 [of the Fourteenth Amendment] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions."). The court of appeals' recognition that such discriminatory actions are likely to be unconstitutional was faithful to this Court's teachings in the area of Congress's authority to enforce the Fourteenth and Fifteenth Amendments.

Although the court of appeals did not defer to Congress's determination that there remains a constitutional problem in need of a legislative solution, it did accord some deference to Congress on its choice of a legislative response to the identified problem. Pet. App. 47a. That, too, is perfectly in keeping with this Court's cases. It is the role of this Court to define what the Constitution prohibits. But once Congress identifies a serious constitutional problem in accordance with this Court's holdings, the Constitution assigns to the legislature principal responsibility for determining how to remedy that problem. Congress is not without limits in its choices—the choice must at a minimum be rational and in the court of appeals' view must be a congruent and proportional response to the identified problem. But it is Congress that has expertise in choosing among available legislative options. This Court reaffirmed that principle in *Northwest Austin*, stating that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 557 U.S. at 205; see *Boerne*, 521 U.S. at 536; cf. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) ("I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States.").

That is particularly true—and deference is particularly warranted—when Congress "ha[s] already tried unsuccessfully to address" the relevant problem through other legislative means, *Hibbs*, 538 U.S. at 737, but has found the problem to be "difficult and intractable," *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). That is quintessentially the situation here. Before it resorted to the strong medicine of Section 5, Congress tried unsuccessfully to address the problem of voting discrimination in particular areas of the country through other means. See *South Carolina*, 383 U.S. at 313. Cognizant of the unusual nature of Section 5, Congress has required itself to periodically review the statute's operation. In the course of doing so, Congress has become exceedingly familiar with its implementation and has periodically amended aspects of its operation (by, *e.g.*, extending its geographic scope, liberalizing the bailout mechanism, and amending its substantive standard). In 2006, Congress again familiarized itself with the operation of the statute; 98 Senators and 390 Representatives then voted to extend Section 5's application in the currently covered jurisdictions for an additional 25 years, subject to a review by Congress after 15 years. The court of appeals applied settled legal principles in affirming Congress's nearly unanimous determination that Section 5 remains an appropriate means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments.

3. Petitioner urges this Court to grant the petition for a writ of certiorari in order to review particular (sometimes hypothetical) applications of Section 5. See Pet. 19-20. Dissenting Judge Williams also expressed concern about particular (sometimes hypothetical) Section 5 objections. See Pet. App. 73a, 103a-110a.[8] Even if there were merit to those concerns, such case-specific issues would not provide a legitimate basis for sustaining a facial attack on the constitutionality of Section 5—and therefore provide no basis for granting the petition in this case.

For example, petitioner and Judge Williams both cite recent state laws requiring in-person voters to show identification in order to cast a vote. Pet. 20; Pet. App. 103a. Relying on this Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), both argue that it is unfair that non-covered jurisdictions can enact such laws while covered jurisdictions cannot. This premise is mistaken. Although the Attorney General has objected to voter-ID requirements recently enacted by two covered States (South Carolina and Texas), he has not objected to voter-ID requirements adopted by several other fully or partially covered States (*e.g.*, Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia). A three-judge court recently concluded that Texas's voter-ID law could not be implemented because the State failed to establish that it will not discriminate against minority voters. *Texas* v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012). But the Texas law at issue in that case significantly differs from the Indiana law at issue in *Crawford*. See *id.* at *13. Moreover, the Court in *Crawford* had no occasion to consider whether Indiana's law had the effect or intent of discriminating on the basis of race. See 553 U.S. at 202-203 (noting that the Court was considering the law's application to "all Indiana voters"). Because all States are subject to Section 2, all States are prohibited from adopting voter-ID requirements that have the purpose or effect of discriminating on the basis of race. It is true that jurisdictions covered by Section 5 bear the burden of demonstrating that their laws do not have such an intent or effect; but the shift of the burden that comes with Section 5 coverage is justified for the reasons set forth above.

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[8] Certain of the burdens Judge Williams identified were based either on hypothetical applications of Section 5 that Judge Williams did not indicate had ever been found in covered or non-covered jurisdictions, or on a misunderstanding of the way in which Section 5 is and has been applied. See Pet. App. 73a (hypothesizing computer-based redistricting that does not take into account any communities of interest, racial or otherwise); *id.* at 103a (suggesting that covered jurisdictions are not permitted to adopt voter ID requirements); *id.* at 104a-110a (suggesting that Section 5 protects the right of "a minority group's majority" to elect its candidate of choice without taking into account whether there is material racially polarized voting in the relevant jurisdiction) (emphasis omitted).

Petitioner also complains (Pet. 20) that the State of Florida was required to preclear its changes to early voting hours while non-covered States are not required to have early voting hours at all. Of course, covered jurisdictions are also not required to provide early voting hours. But once they do, they may not change existing practices if the change would be discriminatory. In any case, this Court may review any particular application of Section 5 on direct appeal from a three-judge court. The concerns expressed by petitioner and Judge Williams that Section 5 is being applied in an inappropriate manner—concerns the government vigorously disputes—are properly raised in challenges to particular applications rather than in this facial challenge to the constitutionality of an act of Congress.

4. Denying review of this facial challenge would enable development of a more complete record on the operation and effect of the statute's bailout mechanism following this Court's decision in *Northwest Austin.* As explained, the ability of covered jurisdictions to make use of the bailout mechanism has increased substantially in the wake of that decision. See pp. 24-25 & n.6, *supra.* An understanding of the way in which the bailout mechanism works in practice is critical to an informed assessment of the constitutionality of the statutory coverage provision. Insofar as the Court may be inclined in the future to grant review of the question of the constitutionality of the 2006 reauthorization, awaiting review until a more fulsome record on bailouts develops in the wake of *Northwest Austin* would facilitate a more informed analysis of the statute's continued constitutionality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

Jurisdictions That Have Been Ordered by a District Court to Comply With Preclearance Requirement Pursuant to Bail-in Mechanism in Section 3(c) of the Voting Rights Act

1. Thurston County, Nebraska, see *United States* v. *Thurston Cnty.*, C.A. No. 78-0-380 (D. Neb. May 9, 1979);
2. Escambia County, Florida, see *McMillan* v. *Escambia Cnty.*, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979);
3. Alexander County, Illinois, see *Woodring* v. *Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983);
4. Gadsden County School District, Florida, see *N.A.A.C.P.* v. *Gadsden Cnty Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984);
5. State of New Mexico, see *Sanchez* v. *Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984);
6. McKinley County, New Mexico, see *United States* v. *McKinley Cnty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986);
7. Sandoval County, New Mexico, see *United States* v. *Sandoval Cnty.*, C.A. No. 88-1457-SC (D.N.M. May 17, 1990);
8. City of Chattanooga, Tennessee, see *Brown* v. *Board of Comm'rs of City of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990);

9. Montezuma-Cortez School District RE01, Colorado, see *Cuthair* v. *Montezuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D. Colo. Apr. 8, 1990);
10. State of Arkansas, see *Jeffers* v. *Clinton*, 740 F. Supp. 585 (E.D. Ark. May 16, 1990), appeal dismissed, 498 U.S. 1129 (1991);
11. Los Angeles County, California, see *Garza & United States* v. *Los Angeles Cnty.*, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 25, 1991);
12. Cibola County, New Mexico, see *United States* v. *Cibola Cnty.*, C.A. No. 93-1134-LH/LFG (D.N.M. Apr. 21, 1994);
13. Socorro County, New Mexico, see *United States* v. *Socorro Cnty.*, C.A. No. 93-1244-JP (D.N.M. Apr. 11, 1994);
14. Alameda County, California, see *United States* v. *Alameda Cnty.*, C.A. No. C95-1266 (SAW) (N.D. Cal. Jan. 22, 1996);
15. Bernalillo County, New Mexico, see *United States* v. *Bernalillo Cnty.*, C.A. No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998);
16. Buffalo County, South Dakota, see *Kirke* v. *Buffalo Cnty.*, C.A. No. 03-CV-3011 (D.S.D. Feb. 10, 2004);
17. Charles Mix County, South Dakota, see *Blackmoon* v. *Charles Mix Cnty.*, C.A. No. 05-CV-4017 (D.S.D. Dec. 4, 2007); and

18. Village of Port Chester, New York, see *United States* v. *Village of Port Chester*, C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

APPENDIX B

Covered Jurisdictions That Have Successfully Terminated Section 5 Coverage Pursuant to Bail-out Mechanism in Section 4(a) of the Voting Rights Act

Jurisdictions Successfully Bailed Out of Section 5 Coverage Before August 5, 1984

1. Wake County, North Carolina, see *Wake Cnty.* v. *United States*, No. 1198-66 (D.D.C. Jan. 23, 1967);
2. Curry, McKinley, and Otero Counties, New Mexico, see *New Mexico* v. *United States*, No. 76-0067 (D.D.C. July 30, 1976);
3. Towns of Cadwell, Limestone, Ludlow, Nashville, Reed, Woodland, Connor, New Gloucester, Sullivan, Winter Harbor, Chelsea, Sommerville, Carroll, Charleston, Webster, Waldo, Beddington, and Cutler, Maine, see *Maine* v. *United States*, No. 75-2125 (D.D.C. Sept. 17, 1976);
4. Choctaw and McCurtain Counties, Oklahoma, see *Choctaw and McCurtain Cntys.* v. *United States*, No. 76-1250 (D.D.C. May 12, 1978);
5. Campbell County, Wyoming, see *Campbell Cnty.* v. *United States*, No. 82-1862 (D.D.C. Dec. 17, 1982);
6. Towns of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham, Massachusetts, see *Massachusetts* v. *United States*, No. 83-0945 (D.D.C. Sept. 29, 1983);

7. Towns of Groton, Mansfield, and Southbury, Connecticut, see *Connecticut* v. *United States*, No. 83-3103 (D.D.C. June 21, 1984);
8. El Paso County, Colorado, see *Board of Cnty. Comm'rs* v. *United States*, No. 84-1626 (D.D.C. July 30, 1984);
9. Honolulu County, Hawaii, see *Waihee* v. *United States*, No. 84-1694 (D.D.C. July 31, 1984); and
10. Elmore County, Idaho, see *Idaho* v. *United States*, No. 82-1778 (D.D.C. July 31, 1984).

Jurisdictions Successfully Bailed Out of Section Coverage After August 5, 1984

1. City of Fairfax, Virginia (including City of Fairfax School Board), see *City of Fairfax* v. *Reno*, No. 97-2212 (D.D.C. Oct. 21, 1997);
2. Frederick County, Virginia (including Frederick County School Board; Towns of Middletown and Stephens City; and Frederick County Shawneeland Sanitary District), see *Frederick Cnty.* v. *Reno*, No. 99-941 (D.D.C. Sept. 10, 1999);
3. Shenandoah County, Virginia (including Shenandoah County School Board; Towns of Edinburg, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock; Stoney Creek Sanitary District; and Toms Brook-Maurertown Sanitary District), see *Shenandoah Cnty.* v. *Reno*, No. 99-992 (D.D.C. Oct. 15, 1999);

4. Roanoke County, Virginia (including Roanoke County School Board and Town of Vinton), see *Roanoke Cnty.* v. *Reno*, No. 00-1949 (D.D.C. Jan. 24, 2001);
5. City of Winchester, Virginia, see *City of Winchester* v. *Reno*, No. 00-3073 (D.D.C. June 1, 2001);
6. City of Harrisonburg, Virginia (including Harrisonburg City School Board), see *City of Harrisonburg* v. *Reno*, No. 02-289 (D.D.C. Apr. 17, 2002);
7. Rockingham County, Virginia (including Rockingham County School Board and Towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville), see *Rockingham Cnty.* v. *Reno*, No. 02-391 (D.D.C. May 24, 2002);
8. Warren County, Virginia (including Warren County School Board and Town of Front Royal), see *Warren Cnty.* v. *Ashcroft*, No. 02-1736 (D.D.C. Nov. 26, 2002);
9. Greene County, Virginia (including Greene County School Board and Town of Standardsville), see *Greene Cnty.* v. *Ashcroft*, No. 03-1877 (D.D.C. Jan. 19, 2004);
10. Pulaski County, Virginia (including Pulaski County School Board and Towns of Pulaski and Dublin), see *Pulaski Cnty.* v. *Gonzales*, No. 05-1265 (D.D.C. Sept. 27, 2005);

11. Augusta County, Virginia (including Augusta County School Board and Town of Craigsville), see *Augusta Cnty.* v. *Gonzales*, No. 05-1885 (D.D.C. Nov. 30, 2005);
12. City of Salem, Virginia, see *City of Salem* v. *Gonzales*, No. 06-977 (D.D.C. July 28, 2006);
13. Botetourt County, Virginia (including Botetourt County School Board and Towns of Buchanan, Fincastle, and Troutville), see *Botetourt Cnty.* v. *Gonzales*, No. 06-1052 (D.D.C. Aug. 28, 2006);
14. Essex County, Virginia (including Essex County School Board and Town of Tappahannock), see *Essex Cnty.* v. *Gonzales*, No. 06-1631 (D.D.C. Jan. 31, 2007);
15. Middlesex County, Virginia (including Middlesex County School Board and Town of Urbanna), see *Middlesex Cnty.* v. *Gonzales*, No. 07-1485 (D.D.C. Jan. 7, 2008);
16. Amherst County, Virginia (including Town of Amherst), see *Amherst Cnty.* v. *Mukasey*, No. 08-780 (D.D.C. Aug. 13, 2008);
17. Page County, Virginia (including Page County School Board and Towns of Luray, Stanley, and Shenandoah), see *Page Cnty.* v. *Mukasey*, No. 08-1113 (D.D.C. Sept. 15, 2008);
18. Washington County, Virginia (including Washington County School Board and Towns of Abington, Damascus, and Glade Spring), see *Washington Cnty.* v. *Mukasey*, No. 08-1112 (D.D.C. Sept. 23, 2008);

19. Northwest Austin Municipal Utility District Number One, Texas, see *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, No. 06-1384 (D.D.C. Nov. 3, 2009);
20. City of Kings Mountain, North Carolina, see *City of Kings Mountain* v. *Holder*, No. 10-1153 (D.D.C. Oct. 22, 2010);
21. City of Sandy Springs, Georgia, see *City of Sandy Springs* v. *Holder*, No. 10-1502 (D.D.C. Oct. 26, 2010);
22. Jefferson County Drainage District Number Seven, Texas, see *Jefferson Cnty. Drainage Dist. No. Seven* v. *Holder*, No. 11-461 (D.D.C. June 6, 2011);
23. Alta Irrigation District, California, see *Alta Irrigation Dist.* v. *Holder*, No. 11-758 (D.D.C. July 15, 2011);
24. City of Manassas Park, Virginia, see *City of Manassas Park* v. *Holder*, C.A. No. 11-749 (D.D.C. Aug. 3, 2011);
25. Rappahannock County, Virginia (including Rappahannock County School Board and Town of Washington), see *Rappahannock Cnty.* v. *Holder*, C.A. No. 11-1123 (D.D.C. Aug. 9, 2011);
26. Bedford County, Virginia (including Bedford County School Board), see *Bedford Cnty.* v. *Holder*, No. 11-499 (D.D.C. Aug. 30, 2011);
27. City of Bedford, Virginia, see *City of Bedford* v. *Holder*, No. 11-473 (D.D.C. Aug. 31, 2011);

28. Culpeper County, Virginia (including Culpeper County School Board and Town of Culpeper), see *Culpeper Cnty.* v. *Holder*, No. 11-1477 (D.D.C. Oct. 3, 2011);
29. James City County, Virginia (including Williamsburg-James City County School Board), see *James City Cnty.* v. *Holder*, No. 11-1425 (D.D.C. Nov. 9, 2011);
30. City of Williamsburg, Virginia, see *City of Williamsburg* v. *Holder*, No. 11-1415 (D.D.C. Nov. 28, 2011);
31. King George County, Virginia (including King George County School District), see *King George Cnty.* v. *Holder*, No. 11-2164 (D.D.C. April 5, 2012);
32. Prince William County, Virginia (including Prince William County School District and Towns of Dumfries, Haymarket, Occoquan, and Quantico), see *Prince William Cnty.* v. *Holder*, No. 12-14 (D.D.C. April 10, 2012);
33. City of Pinson, Alabama, see *City of Pinson* v. *Holder*, No. 12-255 (D.D.C. April 20, 2012);
34. Wythe County, Virginia (including Wythe County School Board and Towns of Rural Retreat and Wytheville), see *Wythe Cnty.* v. *Holder*, No. 12-719 (D.D.C. June 18, 2012);
35. Grayson County, Virginia (including Grayson County School Board and Towns of Fries, Independence, and Troutdale), see *Grayson Cnty.* v. *Holder*, No. 12-718 (D.D.C. July 20, 2012); and

36. Merced County, California (including approximately 84 subjurisdictions), see *Merced Cnty.* v. *Holder*, No. 12-354 (D.D.C. Aug. 31, 2012).

Bailout Actions Currently Pending

1. Carroll County, Virginia (including Carroll County School District and Town of Hillsville), see *Carroll Cnty.* v. *Holder*, No. 12-1166 (D.D.C.), complaint filed July 17, 2012; and
2. Craig County, Virginia (including Craig County School District and Town of New Castle), see *Craig Cnty.* v. *Holder*, No. 12-1179 (D.D.C.), complaint filed July 18, 2012.

REPLY
BRIEF

RECORD
AND
BRIEFS

No. 12-96

Supreme Court, U.S.
FILED
OCT 9 2012
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IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 8

TABLE OF CITED AUTHORITIES

Page

CASES

City of Rome v. Unites States,
446 U.S. 156 (1980) 7

Georgia v. Ashcroft,
539 U.S. 461 (2003) 2

Georgia v. United States,
411 U.S. 526 (1973) 7

Lopez v. Monterey Cnty.,
525 U.S. 266 (1999) 7

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 1, 3, 4, 7

Reno v. Bossier Parish School Board,
528 U.S. 320 (2000) 2

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 4, 7

Yee v. City of Escondido,
503 U.S. 519 (1992) 2

Page

STATUTES

42 U.S.C. § 1973b. 5

DOCKETED CASES

City of Pinson v. Holder,
12-cv-255 (D.D.C. Apr. 20, 2012) 6

City of Sandy Springs v. Holder,
No. 10-cv-1502 (D.D.C. Oct 26, 2010) 6

Nix v. Holder,
No. 12-81 (S. Ct.) 1

REPLY BRIEF FOR PETITIONER

Respondent Holder ("Respondent") concedes that Petitioner Shelby County ("Petitioner") has presented what "is certainly an important question of federal law." Brief for the Respondents in Opposition ("BIO") at 15; *see also Nix v. Holder*, No. 12-81, Brief for the Respondents in Opposition ("Nix BIO") at 27 ("[T]he constitutionality of Section 5 is an important federal question."). Effectively conceding that certiorari is appropriate, *see* Nix BIO at 27 (acknowledging that the Court "may ... be inclined to grant certiorari" in this case), Respondent and Respondents-Intervenors principally use their briefs in opposition to preview their merits arguments.

It would serve no purpose for Petitioner to further burden the certiorari record with the many reasons why the majority decision below and Respondents' arguments fail to respond adequately to the concerns expressed by this Court in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009) ("*Northwest Austin*"). The petition, Justice Thomas's opinion in *Northwest Austin*, and Senior Judge Williams's dissent demonstrate why the majority opinion below should not be the final word on whether this "unusual" statute, BIO at 30, "is justified by current needs," *Nw. Austin*, 557 U.S. at 203. Given its substantial federalism costs and enormous practical burdens on States and other covered jurisdictions, there are grave doubts about the constitutionality of preclearance under any applicable standard, *see* Brief of the National Black Chamber of Commerce as Amicus Curiae in Support of Petitioner, No. 12-96 (filed Aug. 23, 2012) at 23-28. Moreover, the amicus briefs filed by several covered States on their own behalf and their pursuit of constitutional challenges in on-going preclearance litigation reinforce both the importance and inevitability of having the question presented by Petitioner "settled by this Court" in accordance with Rule 10(c). *See* Brief of Arizona, Alabama, Georgia, South Carolina, South Dakota, and Texas as Amici Curiae in Support of Petitioner ("Covered States Amicus Brief") at 3 ("If this Court denies certiorari now, it will only delay the inevitable—the increasing costs associated with preclearance under the VRA, the statute's decreasing benefits, and the ever-increasing number of appeals that Covered Jurisdictions will be forced to file before Section 5's inevitable demise.").

Respondent does not contest that this case is an appropriate vehicle for definitively resolving the facial constitutionality of Section 5 and Section 4(b). *Compare* Nix BIO at 15-27. Nor could he. As previously explained, there is no justiciability problem, and the decision below comprehensively addressed Petitioner's claims. *See* Pet. 22. In addition, as Respondent acknowledges, all of the relevant issues are squarely before the Court, including Petitioner's argument that the federalism burden of Section 5 has been exacerbated by the provisions of the 2006 amendments to Section 5 of the Voting Rights Act that overruled *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* Nix BIO 28 ("[T]here is no apparent obstacle to this Court's consideration" of the impact of the revisions to the "substantive standard when assessing the constitutionality of Section 5's reauthorization" in this case.) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)); Br. of Former Department of Justice Officials as Amicus Curiae in Support of Petitioner at 14 ("Congress' abrogation of *Georgia* and *Bossier Parish II* is properly before the

Court, and only underscores the unconstitutionality of Section 5."). Petitioner is prepared to fully brief all of these issues on the merits.

With little to say after having effectively conceded that the Petition meets this Court's criteria for a grant of certiorari, Respondent creates and then attacks a straw man. He claims that "Petitioner urges this Court to grant the petition ... in order to review particular (sometimes hypothetical) applications of Section 5," BIO at 31, such as preclearance denials of voter ID requirements and early voting changes. He then urges the Court to consider those issues in as-applied challenges to Section 5 rather than in the present facial challenge. BIO at 32. But Petitioner does not seek the resolution of those particular applications of Section 5 here. Rather, Petitioner referenced those particular applications of Section 5 solely to highlight how DOJ's response to *Northwest Austin* has exacerbated the problematic aspects of the preclearance regime. They illustrate the practical effect of Section 5's severe federalism burdens, as well as the disparate treatment of covered and non-covered States under the statute's selective and outdated coverage formula. In short, these applications underscore the need for prompt review by this Court.

Respondent's only argument, then, for deferring resolution of the facial constitutionality of Section 5 and Section 4(b) is to await "a more fulsome record on bailouts ... in the wake of *Northwest Austin*." BIO at 33. But that argument has no merit for several reasons. First, *Northwest Austin*'s interpretation of bailout eligibility did not expand bailout availability for the covered States or sub-jurisdictions responsible for voter registration whose bleak bailout prospects are well documented by amici covered States. *See* Covered States Amicus Brief at 26-27. As those States explained, even if a State or political subdivision has had a perfect record of compliance since 1965, each failure by a governmental unit within its geographic boundaries resets the ten-year clock on that jurisdiction's ability to bailout. *Id.* at 27. Accordingly, any impact of increased bailout eligibility is limited to smaller sub-jurisdictions so numerous that envisioning the withering away of the preclearance obligation through statutory bailout is a "mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in the judgment in part and dissenting in part). Indeed, even crediting Respondent's bailout statistics, which are inflated by post-enactment evidence, *see* Pet. at 34-35 & n.5, only a tiny percentage (approximately 1.5%) of the more than 12,000 covered jurisdictions have bailed out of coverage since 1984. *See* BIO at 24 n.6 ("[B]ailout has been granted in 36 cases (reaching a total of 190 jurisdictions).")

Second, bailout is not responsive to Shelby County's challenge to Section 4(b) either in "theory" or in "practice," *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), and cannot save the ill-fitting coverage formula. Unlike in 1965, the current problems with the coverage formula are so pronounced that tinkering at the margins will not render it constitutional. App. 99a-101a (Williams, J., dissenting). As the Court has explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. Because Congress refused to examine that issue, this Court's review is needed.

Bailout is neither responsive to over-inclusiveness nor a complete remedy. As originally enacted in 1964, bailout was intended to address the inadvertent overreach of the coverage formula as to jurisdictions that "should not have been covered in the first place." BIO at 4. But after the 1982 amendments to the VRA, that is no longer the case. Under the current statute, a covered jurisdiction cannot secure bailout by demonstrating that it should not have been subject to preclearance in the first place. Nor are the bailout criteria purely objective. Rather, covered jurisdictions also must prove to the satisfaction of the DOJ and the federal district court in Washington, D.C. that they:

> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected [under the Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

42 U.S.C. § 1973b(a)(1)(F)(i)-(iii).

Moreover, even if a covered jurisdiction can satisfy these highly subjective criteria, it remains subject to Section 5's clawback provision, *id.* § 1973b(a)(5), which essentially requires a jurisdiction to continue to satisfy the statutory criteria for bailout for a ten-year period before that jurisdiction is fully removed from coverage. Thus, bailout does not afford a jurisdiction "a change in its status from covered to non-covered." BIO at 24. And it certainly does not exonerate jurisdictions that should have never been covered in the first place. Rather, it basically turns covered jurisdictions into parolees that may ultimately be liberated from coverage only if they continue to comply with the statutory criteria for an additional ten-year period of supervised release.

DOJ's implementation of the bailout mechanism illustrates the point. For example, DOJ required Pinson, Alabama, as a condition of bailout, to take "certain additional constructive measures" including the formation of a "citizens' advisory group that is representative of the City's diversity" to make election recommendations to the City and a reporting requirement to the United States within 90 days after any municipal election administered by the City that details the "steps taken to increase opportunities for recruitment and participation of a diverse group of poll officials as well as the total number of persons by race who served as election officials in the election." *City of Pinson v. Holder*, 12-cv-255 (D.D.C. Apr. 20, 2012) (Doc. 11) (¶¶ 47-50); *see also City of Sandy Springs v. Holder*, No. 10-cv-1502 (D.D.C. Oct 26, 2010) (Doc. 8) (¶¶ 44-51) (imposing similar "administration and reports requirements" as a condition to bailout). If DOJ viewed bailout as an acknowledgement of the formula's over-inclusiveness, it would not require a jurisdiction to agree to onerous conditions to secure bailout (even beyond the onerous statutory criteria themselves).

In short, there is no nexus between bailout under the current version of the VRA and the over-inclusiveness of

Section 4(b)'s coverage formula. It is, at most, a "modest palliative" that can in no way solve the massive problems with the current coverage formula. App. 101a (Williams, J., dissenting). The post-1982 bailout has not had, and cannot be expected in the foreseeable future to have, any significant impact on the actual coverage triggered by the Section 4(b) formula. Waiting for confirmation that bailout will not redress the constitutional injury being suffered by covered States thus will only make matters worse. Pet. 34-35.

* * *

As Respondent repeatedly emphasizes, it was *this* Court that spoke definitively to the constitutionality of the VRA's 1965 enactment in *Katzenbach*, 383 U.S. 301, and after each subsequent reauthorization of the statute as measured against the applicable Congressional record. BIO at 5 (citing *Georgia v United States*, 411 U.S. 526 (1973); *City of Rome v. Unites States*, 446 U.S. 156 (1980); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999)). Principles of constitutional avoidance foreclosed prompt review of the 2006 reauthorization in *Northwest Austin* and sensibly afforded Congress the opportunity to address the "serious constitutional questions" the Court raised in that decision. 557 U.S. at 204. But given Congress' failure to respond, covered States "likely will be forced to continue to operate under the unconstitutional burdens of Sections 4 and 5 of the VRA unless and until this Court removes them. The Court should do so now." Covered States Amicus Brief at 27.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 9, 2012

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF OF *AMICUS CURIAE* STATE OF ALASKA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 3

This Court Should Grant Certiorari Because § 5 Imposes an Extraordinary Burden on Covered Jurisdictions Without Sufficient Evidence that They Have Serious and Established Records of Intentional Voting Discrimination, as Alaska's Experience Demonstrates 3

- I. Section 5 Has Significantly Interfered With Alaska's Ability to Conduct Timely and Efficient Elections, as Illustrated by its 2010 Redistricting Process and the 2012 Election Cycle 4
- II. Congress Reauthorized § 5's Application to Alaska in 2006 Without the Requisite Evidence that the State Has a Record of Voting Discrimination 10

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002) 16

Baldus v. Members of Wis. Government Accountability Board, 2012 WL 983685 (E.D. Wis. Mar. 22, 2012) 17

Black Political Task Force v. Galvin, 300 F. Supp. 2d 291 (D. Mass. 2004) 16

Bush v. Vera, 517 U.S. 952 (1996) 5

City of Boerne v. Flores, 521 U.S. 507 (1997) 11

Georgia v. Ashcroft, 539 U.S. 461 (2003) 7

Hickel v. Southeast Conference, 846 P.2d 38 (Alaska 1992) 4, 5

In Re 2011 Redistricting Cases, 274 P.3d 466 (Alaska 2012) 4, 5

In Re 2011 Redistricting Cases, 2012 WL 2748214 (Alaska 2012) 6

Kenai Peninsula Borough v. State of Alaska, 743 P.2d 1352 (Alaska 1987) 4

Large v. Fremont County, Wyoming, 709 F. Supp. 2d 1176 (D. Wyo. 2010) 17

Luper v. Municipality of Anchorage, 268 F. Supp. 2d 1110 (D. Alaska 2003) 15

Miller v. Johnson, 515 U.S. 900 (1995) 5

TABLE OF AUTHORITIES – Continued

Page

Nick et al. v. Bethel, No. 3:07-cv-0098-TMB (D. Alaska) 18

Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) 3, 13, 17

Rudolph v. Treadwell, No. 3:10-cv-00268-RRB (D. Alaska) 10

Samuelsen v. Treadwell, No. 3:12-cv-00118-RRB-AK-JKS (D. Alaska) 8, 9, 12, 13

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 10, 11, 13, 14, 17

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 17, 18

United States v. Berks County, Pennsylvania, 277 F. Supp. 2d 570 (E.D. Pa. 2003) 17

United States v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004) 16

United States v. City of Euclid, 580 F. Supp. 2d 584 (N.D. Ohio 2008) 16

United States v. State of Louisiana, 265 F. Supp. 703 (E.D. La. 1966) 15

United States v. Village of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) 16

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

U.S. Const. amend. XIV 7, 9

U.S. Const. amend. XV.....................................9, 17, 18

STATUTES

§ 2 of the VRA, 42 U.S.C. § 1973(a) ....*passim*

§ 4 of the VRA, 42 U.S.C. § 1973b(b) ....*passim*

§ 5 of the VRA, 42 U.S.C. § 1973c(a), 1973c(d) ....*passim*

42 U.S.C. § 1973b(a)...14, 15

42 U.S.C. § 1973f 15

REGULATIONS

28 C.F.R. § 51.9 8

UNITED STATES SUPREME COURT RULES

37.2 1

ALASKA CONSTITUTION

Article VI, § 1...4

Article VI, § 2...4

Article VI, § 6...4

Article VI, § 8...4

Article VI, § 11...7

TABLE OF AUTHORITIES – Continued

Page

ALASKA RULES OF APPELLATE PROCEDURE

216.5 7

OTHER AUTHORITIES

KRISTEN CLARKE, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?* 43 HARV. C.R.-C.L. L. REV. 285 (2008) 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Alaska is a covered jurisdiction under the formula set out in § 4(b) of the Voting Rights Act ("VRA"). 42 U.S.C. § 1973b(b). For this reason, Alaska must comply with § 5 of the VRA, which requires it to seek approval from the Department of Justice for every proposed change to its election procedures—ranging from implementation of new state redistricting plans to grammatical changes to forms. 42 U.S.C. § 1973c. Over the past thirty years, the Alaska Division of Elections has made nearly 500 preclearance submissions, some major, some minor, to secure this federal approval for changes to state laws and practices. Alaska faces challenges unique to its own territory, including remote precincts inaccessible by roads, severe weather, and a small population spread over a vast area. These and other challenges often create issues that require quick and practical resolutions—not always covered in existing, precleared law—by state officials who understand which practices are sensible and likely to succeed. But because it is covered by § 5, Alaskan officials have been frustrated in their efforts to best serve the Alaskan public by attorneys in Washington, D.C. who most likely have never set foot in this state.

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[1] Consistent with Rule 37.2, counsel for the State of Alaska gave more than ten days' notice of the state's intent to file this *amicus* brief to the counsel of record for all parties.

But § 5's impact on Alaska extends far beyond the administrative burden and loss of local control over elections. It requires the state to engineer election districts based on factors related to race, which both offends state and federal constitutional prohibitions against race discrimination and compromises the Alaska Constitution's neutral, non-partisan principles of redistricting. Further, § 5 interferes with Alaska's ability to conduct timely and orderly elections. Indeed, it so significantly impeded Alaska's ability to create new districts after the 2010 census that the state was not able to finalize a redistricting plan in time for the 2012 elections and nearly had to postpone them.

Alaska has been subject to § 5's burdensome federal oversight despite a dearth of evidence before Congress—either in 1965 when Congress enacted § 5 or as it has subsequently reauthorized it—that the state has a record of voting discrimination that would justify any remedial measures, much less the oppressive federal control effected by § 5. As a result, the state has recently filed suit in the United States District Court for the District of Columbia challenging the constitutionality of § 5. *See State of Alaska v. Holder*, 1:12-cv-01376-RLW (D.D.C.). Grant of this petition could resolve the important question of law at the heart of Alaska's lawsuit.

◆

ARGUMENT

This Court Should Grant Certiorari Because § 5 Imposes an Extraordinary Burden on Covered Jurisdictions Without Sufficient Evidence that They Have Serious and Established Records of Intentional Voting Discrimination, as Alaska's Experience Demonstrates.

Section 5 of the VRA as reauthorized in 2006 implicates important principles of federalism and equal sovereignty and, perhaps even more significantly, the appropriate application of the Reconstruction Amendments upon whose authority it relies. This Court has already expressed concern about, but has not ruled on, § 5's constitutionality. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions . . . ."). Because § 5 significantly interferes with the elections of covered jurisdictions such as Alaska, the Court should grant certiorari in this case and determine § 5's constitutionality.

Section 5's crippling effect on Alaska's effort to redistrict in 2010, described below, illustrates the extraordinary burden that it imposes. But as a "remedy," § 5 is not a rational means—much less a congruent and proportional one—to resolve any actual problem, as Congress did not have before it in 2006 any record of voting discrimination by Alaska.

I. Section 5 Has Significantly Interfered With Alaska's Ability to Conduct Timely and Efficient Elections, as Illustrated by its 2010 Redistricting Process and the 2012 Election Cycle.

While the time, hassle, and expense of preparing and submitting preclearance submissions for review and approval by the DOJ undeniably place significant administrative burdens on covered jurisdictions, § 5's negative impacts run much deeper than logistical troubles. Alaska's 2010 redistricting experience is a paradigmatic example. Section 5 prevented Alaska from redistricting according to legitimate, non-discriminatory principles of fair representation; forced it to abandon fundamental principles enshrined in its own constitution; and nearly required it to postpone its elections.

After the 2010 decennial census, the Alaska Redistricting Board redrew all of Alaska's electoral districts, as required by Alaska's Constitution. ALASKA CONST., art. VI., §§ 1, 2, 8. The Alaska Constitution identifies specific traditional redistricting principles that combat the natural tendency toward partisanship in the redistricting process: electoral districts must be contiguous, compact, and relatively socio-economically integrated. ALASKA CONST., art. VI, § 6; *In re 2011 Redistricting Cases*, 274 P.3d 466, 467 (Alaska 2012); *Hickel v. Southeast Conference*, 846 P.2d 38, 44-47 (Alaska 1992); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1360-61 (Alaska 1987). These requirements were designed to combat gerrymandering and to "help to ensure that the election district boundaries fall along natural or logical lines rather than political" ones, ensuring public trust in the redistricting process. *Hickel*, 846 P.2d at 45; *see also 2011 Redistricting Cases*, 274 P.3d at 467-68.

But the Alaska Redistricting Board must compromise these principles in order to comply with § 5, vastly complicating the redistricting process. Although Alaska law requires that these foundational redistricting principles yield only to the extent necessary for compliance with the VRA, *2011 Redistricting Cases*, 274 P.3d at 467-68; *Hickel*, 846 P.2d at 51 n.22—a limitation consistent with this Court's admonition that a jurisdiction may not unnecessarily depart from traditional redistricting principles to create districts using race as "the predominant, overriding factor," *Miller v. Johnson*, 515 U.S. 900, 920-22 (1995); *see also Bush v. Vera*, 517 U.S. 952, 958-59 (1996)—in practice the preclearance process has essentially displaced these state constitutional requirements.

For example, in 2011 the redistricting board attempted to ensure that Alaska's new plan would secure § 5 preclearance by first drawing several districts along racial lines to maintain minority voting strength. *2011 Redistricting Cases*, 274 P.3d at 467. The Alaska Supreme Court found that this approach frustrated the court's ability to determine whether the plan compromised state constitutional principles of contiguity, compactness, and relative socio-economic integration beyond the minimum extent necessary to secure preclearance. *Id.* Yet even after the board redrew the plan with closer consideration of these constitutional requirements, neither the board nor the court could set aside the overriding concern that the DOJ would deny preclearance and indefinitely delay Alaska's scheduled elections. *In re 2011 Redistricting Cases*, 2012 WL 2478214 (Alaska) (Winfree, J., and Stowers, J., dissenting) (includes majority order dated May 10, 2012) [hereinafter *2011 Redistricting* Dissents].

Over strenuous dissents, the Alaska Supreme Court eventually approved an interim plan that is plainly inconsistent with the state constitution's requirements, but that may have been necessary to ensure preclearance by the DOJ. *Id.* As one Alaska Supreme Court justice remarked, "[T]he court blinked in the face of threats of VRA objections to DOJ." *Id.* at *7 (Stowers, J., dissenting). The specter of DOJ disapproval and the state's overarching responsibility to provide a timely election for Alaskans therefore produced an interim redistricting plan for Alaska that violates its own core constitutional principles.

Even more troubling, the explicit command of § 5 that changes may not "diminish[ ]" a minority group's ability "to elect their preferred candidates of choice," 42 U.S.C. § 1973c(d), required the redistricting board to act in apparent defiance of both state and federal constitutional prohibitions against race discrimination. *See, e.g., 2011 Redistricting* Dissents at *3 (Alaska 2012) (Stowers, J., dissenting) (noting "the tension between complying strictly with the Alaska Constitution (which prohibits discrimination based on race, even when discrimination may promote a minority's ability to maintain its historical, numerical level of representation in the Alaska Legislature) and the contrary requirement of the federal Voting Rights Act (which mandates that in states subject to VRA oversight, a minority's historical, numerical level of representation in the legislature may not be diminished by a redistricting plan because this could be considered illegally retrogressive under federal law)" (citations omitted)); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."). Section 5 therefore required Alaska to compromise its core redistricting principles far beyond the extent necessary under § 2's substantive non-discrimination standards.

The intrusive effect of § 5 then continued, hindering the state's ability to hold timely elections in 2012. Despite expedited judicial procedures built into Alaska law, *see* ALASKA CONST., art. VI, § 11 (providing that challenge to redistricting plan must be filed within thirty days of plan's adoption and that courts give redistricting cases priority over everything else); ALASKA R. APP. PROC. 216.5 (establishing deadlines for expedited appeals in redistricting cases), litigation over the plan did not produce an order finally designating an interim plan until May 22, 2012. The board submitted this plan to the DOJ for preclearance three days later, requesting expedited review.

Alaska was then placed in an untenable position. The state was obligated under state and federal law to meet statutory election deadlines, covering a full schedule of preparatory tasks such as candidate filing, eligibility challenges, ballot printing, and absentee ballot mailings. At the same time, § 5 prohibited it from performing any preparations dependent on the redistricting plan before the plan was precleared. Whatever the state chose to do—prepare for the election or not prepare for the election—would violate the law. The state faced massive disruption and disenfranchisement if primary elections were not held as scheduled, but delaying preparations pending preclearance of the redistricting plan would have altered many state law deadlines. Those changes themselves would have required preclearance, and the DOJ gives itself expansive timelines for considering preclearance requests. 28 C.F.R. § 51.9.[2] With no good choices available, Alaska moved forward with preparatory steps for the election without prior approval of the DOJ.

A week after the candidate filing deadline, on June 7, 2012, private parties sued the Alaska Division of Elections for implementing the plan without preclearance. *Samuelsen v. Treadwell*, No. 3:12-cv-00118-RBB-AK-JKS (D. Alaska). They demanded an injunction prohibiting any further election preparations until the DOJ precleared the redistricting plan. They did not allege that the redistricting plan violated the substantive requirements of the Fourteenth or Fifteenth Amendments, or that the plan was discriminatory toward minority voters; they sued on the sole ground that the state was implementing an unprecleared change in election procedures and therefore was in violation of § 5. *Id.* at Docket 1. The lawsuit was eventually mooted by DOJ's early preclearance of the interim plan, two days before the state's deadline to mail advanced absentee ballots. Had the plaintiffs succeeded in obtaining the injunction and had the DOJ not precleared the plan when it did, Alaska likely would not have been able to hold a timely 2012 primary or general election. Thus, even though the plaintiffs did not allege that the redistricting plan actually abridged or denied the right to vote of any Alaskans, this § 5 litigation jeopardized Alaska's ability to hold timely elections.

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[2] This regulation allows the DOJ sixty days to respond to a preclearance submission. The sixty-day clock can be reset by the DOJ at any time with a request for more information. Multiple such requests are permitted. As a result, a jurisdiction can never be sure how long the preclearance process will take.

As Alaska's recent experience illustrates, § 5's requirements—and the extended review period permitted the DOJ for preclearance—can place jurisdictions in impossible situations. Because *every proposed change*, no matter how minor, and no matter the reason for it, must be submitted at least 60 days before it needs to be implemented, § 5 requires states like Alaska to either abandon hope of a timely election cycle or risk a technical § 5 violation that could trigger the kind of federal court enforcement action that was filed against Alaska. Similarly, covered jurisdictions often are unable to respond to unexpected developments that occur close to elections, because they must wait for federal permission to do so or violate § 5. *See, e.g.*, *Rudolph v. Treadwell*, Case No. 3:10-cv-00268-RRB (D. Alaska) (Docket 1) (alleging state's compliance with Alaska Supreme Court Order less than a week before election violated § 5 because DOJ had not yet precleared court-ordered change).

Such significant interference with state elections and state sovereignty can be justified only by an egregious record of intentional voting discrimination. But as described below, Congress plainly lacked sufficient evidence that Alaska had such a record in 2006 when it most recently reauthorized § 5.

II. Congress Reauthorized § 5's Application to Alaska in 2006 Without the Requisite Evidence that the State Has a Record of Voting Discrimination.

The D.C. Circuit majority and some commentators have touted the extensive record of voting discrimination in the covered jurisdictions amassed by Congress for the Act's 2006 reauthorization. *See, e.g.*, *Shelby County, Alabama v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012); KRISTEN CLARKE, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385 (2008). But this aggregated evidence obscures the irrationality of the scope of § 5 coverage, a point that again is particularly well illustrated by Alaska. The record supporting the 2006 reauthorization shows that Congress could have had no basis to conclude that Alaska's record on voting discrimination was so egregious as to warrant § 5 coverage. And that reality illuminates the bankruptcy of the entire § 5 formula. Congress simply declined to reconsider the appropriate reach of this extraordinary intrusion on an area of traditional state concern.

In affirming § 5's constitutionality, the circuit court majority in this case discussed a variety of evidence that Congress had before it in 2006, including voter registration and turnout statistics; the number of minority elected officials; racially polarized voting; successful § 2 lawsuits; DOJ objections to preclearance submissions; DOJ requests for additional information; the deployment of federal observers tasked with monitoring elections; and § 5 enforcement actions. *Shelby County*, 679 F.3d at 863. It reviewed this evidence because it acknowledged that to survive constitutional scrutiny, § 5's burdens likely must be "congruent and proportional to the injury to be prevented," *id.* at 859 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (alterations omitted)), and this data purportedly evidenced the threat of current injury. Even assuming that evidence is relevant, ***but see*** Pet. 26-28, 30-34, the court employed a sleight of hand when assessing it: the court aggregated the data across all covered jurisdictions so that a problem in one could be attributed to all, rather than treating each state individually. This aggregated perspective obscures the fundamental flaws in the coverage formula and conceals the irrationality of continuing to designate covered jurisdictions based on decades-old data.

Alaska illustrates the shortcoming of this methodology. If Congress had considered information specific to Alaska rather than aggregated statistics, it would have seen that Alaska's coverage is unjustified. Although Alaska does not collect information about the race of voters and therefore can only estimate minority registration and turnout rates, the best available estimates show that Alaska Natives vote at rates comparable to non-Natives. *Samuelsen v. Treadwell,* No. 3:12-cv-00118-RBB-AK-JKS, at Docket 26, Exhibits N, O. These estimates are consistent with the state's strong record of electing Alaska Natives to state office, which compares favorably with most non-covered jurisdictions. In 2006, when the VRA was reauthorized, seven Alaska Native legislators sat in a body of sixty, making the ratio of the proportion of Alaska Native legislators (11.6%) against the Alaska Native share of voting-age population (13.7%) almost one-to-one (.847).

Similarly, the record before Congress in 2006 showed that a successful § 2 lawsuit had never been filed in Alaska; the DOJ had objected to only one preclearance submission in more than thirty years; only one § 5 lawsuit had ever been filed in Alaska (against the Municipality of Anchorage, a jurisdiction over whose elections the state exercises no control), and no federal observers had ever been certified for an election in Alaska. Thus, the evidence before Congress of Alaska's record on relevant matters does not provide a rational basis for § 5 coverage of the state, much less a congruent and proportional response to any actual problem. *See Shelby County,* 679 F.3d at 859.

Indeed, much of the evidence presented to Congress about Alaska in 2006 related to issues irrelevant to § 5 coverage, such as higher poverty rates or poorer educational outcomes among minorities. *Samuelsen v. Treadwell,* No. 3:12-cv-118-RBB-AK-JKS, at Docket 25, Exhibit E. But § 5 coverage must be based on evidence of current state discrimination, as "the Act imposes current burdens and must be justified by current needs." *Nw. Austin*, 557 U.S. at 203. And the evidence must be related to *voting* discrimination. Generalized evidence of disparities in life outcomes is insufficient to justify the federal infringement on state sovereignty represented by § 5. As this Court explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related *to the problem that it targets*." *Id*. (emphasis added). Extending § 5 coverage based on problems such as poverty would stretch federal power well beyond the limits of congruence and proportionality.

Alaska also starkly demonstrates that the VRA's bailout provision is "no more than a mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in part and dissenting in part). The circuit court in this case acknowledged the concern that the VRA imposes § 5's burdens on jurisdictions that no longer are the root of "[t]he evil that § 5 is meant to address," *Shelby County*, 679 F.3d at 873 (quoting *Nw. Austin*, 557

U.S. at 203), but the court dismissed this concern based in part on the VRA provision allowing jurisdictions to bail out if they can demonstrate a clean voting record under § 4(a), 42 U.S.C. § 1973b. *Shelby County*, 679 F.3d at 873-74. But the bailout provision cannot preserve § 5's constitutionality for two reasons: the standards for bailing out require absolute perfection, and failure can result from circumstances beyond the control of the covered jurisdiction.

To qualify for bailout, a jurisdiction must show that during the previous ten years: (A) it has not used a test or device with the purpose or effect of denying or curtailing the right to vote because of race or color; (B) no federal court has found that the right to vote has been denied or curtailed because of race or color anywhere in the jurisdiction; (C) federal examiners have not been certified to the jurisdiction; (D) it has complied with § 5; and (E) the DOJ has not objected to any preclearance submission. 42 U.S.C. §§ 1973b(a)(1)(A)-(E). In addition, the "jurisdiction also has the burden of presenting 'evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.' 42 U.S.C. § 1973b(a)(2)." *Nw. Austin*, 557 U.S. at 214 (Thomas, J., concurring in part and dissenting in part).

Under this standard, a single misstep in any of a wide variety of categories precludes a jurisdiction from qualifying for a bailout for the next *ten years*, and even after successfully bailing out, a jurisdiction must maintain its perfect record for another *ten years* to avoid the claw-back provision of 42 U.S.C. § 1973b(a)(5).[3] Moreover, bailout can be unobtainable to a jurisdiction based on conduct of election authorities over which it has no control. *See* 42 U.S.C. § 1973b(a)(1)(D) (providing that for a jurisdiction to qualify for bailout, all of its sub-jurisdictions must also have perfect records). For example, Alaska's ability to bail out was blocked by the actions of the Municipality of Anchorage, which in 2002 violated § 5 by failing to submit a change to its charter before its mayoral election. *See Luper v. Municipality of Anchorage*, 268 F. Supp. 2d 1110, 1111 (D. Alaska 2003). The state has no jurisdiction or authority to govern municipal elections, yet under the VRA, the sins of the municipality are visited upon the state. Similarly, a jurisdiction is unable to qualify for a bailout if the Attorney General certifies the jurisdiction for federal observers, 42 U.S.C. §§ 1973b(a)(1)(C), 1973f, a decision that is unreviewable, *United States v. State of Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966), *aff'd,* 386

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[3] 42 U.S.C. § 1973b(a)(5) provides, in part:

> The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection.

U.S. 270 (1967). Section 5 thus provides that a jurisdiction could remain under the exhaustive, unrelenting scrutiny of a federal agency for an indefinite period, based on an unwarranted and unreviewable decision by that same agency.

As a result, the bailout does not function as an escape valve for states caught up by the inaccuracies of the coverage formula. Rather, it operates to create a caste system among the states, distinguishing those who have been once tainted by the reach of § 5—who must maintain a record of perfection for twenty years to escape—from the rest, who may enact legislation that covered states cannot, like voter identification laws, and whose occasional misdeeds do not immediately relegate them to endless federal micromanagement of their elections.

Indeed, many non-covered states could not pass the bailout's purity test—for example, Hawaii, *see Arakaki v. Hawaii*, 314 F.3d 1091, 1095-97 (9th Cir. 2002) (finding trustee qualification violated § 2 of VRA); Massachusetts, *see Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 315-16 (D. Mass. 2004) (finding redistricting plan diluted voting power of African-Americans in violation of VRA); Montana, *see United States v. Blaine County, Montana*, 363 F.3d 897, 909 (9th Cir. 2004) (finding county's at-large voting system violated VRA); New York, *see, e.g., United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 446-47 (S.D.N.Y. 2010) (finding village's method of electing Board of Trustees violated VRA); Ohio, *see United States v. City of Euclid*, 580 F. Supp. 2d 584, 586 (N.D. Ohio 2008) (finding city council elections violated § 2 of VRA); Pennsylvania, *see United States v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 577-82 (E.D. Pa. 2003) (finding county's election practices violated § 2 of VRA); Wisconsin, *see Baldus v. Members of Wis. Gov't Accountability Bd.*, 2012 WL 983685, *12-16 (E.D. Wis. Mar. 22, 2012) (finding redistricting plan violated VRA by "cracking" Latino community into two Latino influence districts); and Wyoming, *see Large v. Fremont County, Wyoming*, 709 F. Supp. 2d 1176, 1231 (D. Wyo. 2010) (finding at-large system of electing county commissioners diluted Native American voting strength in violation of VRA).

Nor does Alaska pass the test. But nothing in the Constitution or the language of the precedents justifying earlier incarnations of the VRA suggests that perfection is the appropriate standard for determining whether a state should be subject to the extraordinary federal intrusion that § 5 represents. *See Nw. Austin*, 557 U.S. at 229 (Thomas, J., concurring in part and dissenting in part) ("Perfect compliance with the Fifteenth Amendment's substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment."). To the contrary, the key inquiry is whether a jurisdiction's record reflects a problem of such magnitude—of such "exceptional conditions," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)—that it cannot be dealt with through case-by-case litigation. *Shelby County*, 679 F.3d at 863-64.

Alaska's record on voting discrimination is not exceptional. Had Congress actually considered evidence specific to Alaska, it simply could not rationally have concluded in 2006 that case-by-case litigation is inadequate for a jurisdiction without a single successful § 2 lawsuit and only one DOJ objection to a preclearance submission in thirty years.[4]

Preclearance was initially imagined as a temporary measure, a five-year infringement on state sovereignty justified by the outrageous attempts of some southern jurisdictions to resist enforcement of the mandate of the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 309-14. Its reauthorization in 2006 for another twenty-five years, however, reflects not outrage at ongoing voting discrimination but a Congress unable or unwilling to re-evaluate the appropriateness of an entrenched bureaucracy of federal oversight, controlling the smallest details of election procedures in what now amounts to effectively a random selection of states and jurisdictions. The decision to renew the coverage formula for another twenty-five years was beyond Congress's authority and violated the Constitution.

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[4] Although the state of Alaska was sued under the language assistance provisions of the VRA in 2007, the case settled, *see Nick et al. v. Bethel*, No. 3:07-cv-0098-TMB (D. Alaska), and this single lawsuit only emphasizes the reality that any alleged problems of voting discrimination in Alaska can be handled through case-by-case litigation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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BRIEF

No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner.

v.

ERIC H. HOLDER, JR., Attorney General, et al.,

Respondents.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

◆

BRIEF OF ARIZONA, ALABAMA, GEORGIA, SOUTH CAROLINA, SOUTH DAKOTA, AND TEXAS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICI STATES 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Court of Appeals' Decision, Which Upholds Section 4(b)'s Outdated Coverage Formula and Section 5's Preclearance Requirement, Is Seriously Flawed and Undermines the Principle of Equal Sovereignty 5

  A. The Court of Appeals Erred in Finding that Congress Had Adequate Data to Justify the Continued Use of the Section 4(b) Formula 7

  B. Current Conditions Do Not Justify the VRA's Departure from the Fundamental Principle of Equal Sovereignty Among the States 16

    1. Arizona and Nevada Are Strikingly Similar in Population Makeup, Voter Registration, and Voter Turnout, but Are Treated Differently by the VRA 17

    2. Several States Adopted Voter-Identification Laws but Experienced Dramatically Different Treatment Under the VRA 20

TABLE OF CONTENTS – Continued

Page

C. The Preclearance Requirements Are Arbitrary and Burdensome 23

1. Updating Alabama's Voting Machinery to Comply with the Help America Vote Act of 2002 ("HAVA") 24

2. Arizona's Decision to Close Several Motor Vehicle Department Branches 25

D. The Prospect of Bailout for the Covered States Is Illusory 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006 21

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) 3, 21

Gonzalez v. Arizona, 624 F.3d 1162 (9th Cir. 2010) (en banc) 21, 22

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) .... *passim*

Shelby Cnty. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) 6, 26

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 4, 11, 16

United States v. Louisiana, 363 U.S. 1 (1960) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XV 6

U.S. Const. amend. XV, § 2 6

STATUTES

42 U.S.C. § 1973b 1, 8

42 U.S.C. § 1973b(a)(1) 27

42 U.S.C. § 1973b(c) 1, 8

42 U.S.C. § 1973c 8, 23

Page

42 U.S.C. § 15481 24

Ariz. Rev. Stat. § 16-122 25

Nev. Rev. Stat. § 293.2699 19

Nev. Rev. Stat. § 293C.282 19

Nev. Rev. Stat. § 293.296 19

S. Rep. No. 109-295 ....12, 14, 19

RULES

Sup. Ct. R. 37(2)(a) 1

Sup. Ct. R. 37(4) 1

OTHER AUTHORITIES

1 U.S. Census of Population: 1960, *Characteristics of the Population* (1964) 17

152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn) 11, 13, 16

152 Cong. Rec. S7983 (daily ed. July 20, 2006) (statement of Sen. Chambliss) 15

152 Cong. Rec. S7986-87 (daily ed. July 20, 2006) (statement of Sen. Sessions) 15

152 Cong. Rec. S7990 (daily ed. July 20, 2006) (statement of Sen. Coburn) 13

152 Cong. Rec. S8012 (daily ed. July 20, 2006) 12

28 C.F.R. § 51.1 23

28 C.F.R. § 51.13(a) 24

TABLE OF AUTHORITIES – Continued

Page

28 C.F.R. § 51.13(b) 24

28 C.F.R. § 51.13(d) 24

28 C.F.R. § 451.27 24

Census 2000 Brief on Population Change and Distribution: 1990-2000, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf 17

Census 2000 Brief on the Hispanic Population, http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf 18

Census 2010 Brief on Population Change and Distribution: 2000 to 2010, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf 17

Census 2010 Brief on the Hispanic Population, http://www.census.gov/prod/cen2010/briefs/ 18

Dave Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ 8

Department of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php 10

Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php 10, 11

Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (1965) 8

Determination Regarding Literacy Tests, 35 Fed. Reg. 12354 (1970) 8

Page

Extension of the Voting Rights Act of 1965: Hearing Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater)....................8

H.R. Rep. No. 109-478 (2006)....................13

S. Rep. No. 109-295 (2006)....................12, 14, 19

The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d Sess. (May 16, 2006)........14

U.S. Census Bureau, Voting and Registration in the Election of November 2000, http://www.census.gov/hhes/www/socdemo/voting/publications/....................18

U.S. Census Bureau, Voting and Registration in the Election of November 2004, http://www.census.gov/hhes/www/socdemo/....................18

Voter Identification Requirements, National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx....................20, 21

Voting Rights Act: An Examination of the Scope of Criteria for Coverage Under the Special Provisions of the Act, 109th Cong., 1st Sess. (Oct. 20, 2005)....................14

Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess. (May 4, 2006)....................14

INTERESTS OF THE AMICI STATES[1]

Under the Voting Rights Act ("VRA" or "Act"), there are two different classifications of States: covered and uncovered. Section 5 of the VRA, 42 U.S.C. § 1973c, requires federal approval of any change affecting voting in Alabama*, Alaska, Arizona*, Georgia*, Louisiana, Mississippi, South Carolina*, Texas*, and Virginia (and every sub-jurisdiction within those States), and portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota* (collectively "Covered Jurisdictions") based on the formula provided in Section 4(b) of the VRA, 42 U.S.C. § 1973b. This Court recognized that the Act imposes burdens on Covered Jurisdictions and "differentiates between the States" in a way that departs from the fundamental principle of equal sovereignty among States. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). The Amici States (*), which are all Covered Jurisdictions substantially burdened by the VRA, thus have a direct and compelling interest in having this Court grant review to evaluate whether the court of appeals correctly determined that the VRA's "severe remedy of preclearance remain[s] 'congruent and proportional'" (Pet. App. at 62a).

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[1] The Amici States gave notice of their intent to file this brief to counsel for the parties on August 14, 2012. *See* Sup. Ct. R. 37(2)(a). The Amici States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

In *Northwest Austin*, the only State that filed an amicus brief arguing that Section 5 should be declared unconstitutional was Georgia. Brief of Georgia Governor Sonny Perdue as Amicus Curiae Supporting Appellant, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322). The Governor of Alabama filed an amicus brief supporting neither party to provide the Court with information regarding Alabama's progress in voting rights and present anecdotal evidence regarding its experience under Section 5. Brief of the Hon. Bob Riley, Governor of the State of Alabama, Amicus Curiae Supporting Neither Party, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322). Several other States filed a brief in support of the VRA, arguing that the burdens imposed by Section 5 were not onerous and were justified by the benefits. Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York, as Amici Curiae Supporting Appellees, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

Since *Northwest Austin*, the "federalism costs, associated with Section 5 have only continued to increase while the statute's benefits have all but vanished. *Id.* at 202. In particular, the Department of Justice ("DOJ") has interpreted Section 5 to force the Covered Jurisdictions to spend millions of dollars and thousands of attorney hours to preclear an ever-expanding array of laws. The most vivid example comes from voter-identification laws: Indiana's sovereign policymakers are free to enact such requirements, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), but on account of DOJ's administrative fiat, the equally sovereign policymakers in Covered Jursidictions are not, *see* DOJ File Nos. 2011-2775 (Texas) and 2011-2495 (South Carolina).

Section 5 served a noble purpose, and America is a freer and better place for it. But Congress's refusal to amend the statute after this Court identified its infirmities in *Northwest Austin*, coupled with DOJ's willful applications of Section 5, means that this Court is the last and only branch of the federal government that can defend the States' coequal sovereignty. The Amici States have a common interest in resolving this issue now – before the Covered Jurisdictions have to spend still more money and time, and forgo still more elections without validly enacted state laws, on account of a statute premised on problems that are now two generations old. If this Court denies certiorari now, it will only delay the inevitable – the increasing costs associated with preclearance under the VRA, the statute's decreasing benefits, and the ever-increasing number of appeals that Covered Jurisdictions will be forced to file before Section 5's inevitable demise.

SUMMARY OF ARGUMENT

In *Northwest Austin*, the Court noted that Section 5's departure from traditional notions of equal sovereignty enjoyed by all of the fifty states "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203. When Congress reauthorized Section 5 of the VRA in 2006, it used the same coverage formula as previous enactments and failed to examine the current status of uncovered jurisdictions. As the Court noted, "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* The Court should grant certiorari here because the 2006 reauthorization of the VRA's antiquated formula is neither congruent nor proportional to the harm that the VRA was enacted to correct.

Because Section 5 applies arbitrarily to the Covered Jurisdictions, none of which uses discriminatory tests or devices, and many of which have higher voter turnout, or lower disparity in minority voter turnout, than many of the uncovered jurisdictions, the Covered States are denied the fundamental principles of equal sovereignty and equal footing. Because the VRA's purpose is to eradicate voting discrimination for *all* United States citizens,[2] treating States differently is not congruent with the Act's purpose. The Amici States respect the original purpose of the VRA but ask this Court to grant certiorari and hold that the current enactment of Section 5 under the pre-existing coverage formula of Section 4(b) is unconstitutional because it is not appropriately tailored to correct any current voting discrimination that may exist anywhere in the country.

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[2] "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

ARGUMENT

I. The Court of Appeals' Decision, Which Upholds Section 4(b)'s Outdated Coverage Formula and Section 5's Preclearance Requirement, Is Seriously Flawed and Undermines the Principle of Equal Sovereignty.

The court of appeals acknowledged that Congress did not make a finding that "racial discrimination in voting was 'concentrated in the jurisdictions singled out for preclearance'" when Congress reauthorized Section 5 of the VRA in 2006 under the pre-existing coverage formula of Section 4(b) of the VRA. (Pet. App. at 53a (quoting *Nw. Austin*, 557 U.S. at 203).) And the court acknowledged that the data it reviewed supported use of the outdated formula for only some of the Covered Jurisdictions. (*Id.* at 54a.) It nonetheless upheld Congress's continued use of Section 4(b)'s formula by speculating that the lack of evidence of discriminatory practices in the Covered Jurisdictions arose from Section 5's deterrent effect (*id.* at 42a-44a) and noting that bailout ensures that "section 5 covers only those jurisdictions with the worst records of racial discrimination in voting" (*id.* at 57a). The court's analysis is seriously flawed – the obsolete formula is not linked to current conditions and therefore intrudes on the Covered States' sovereignty and the supposed remedy of bailout is illusory. The Court should grant review to address the constitutionality of Sections 4(b) and 5 of the VRA because of significant and unjustified burdens that the law continues to impose on Covered Jurisdictions.

Congress passed the VRA under the authority of Section 2 of the Fifteenth Amendment to enact "appropriate" measures to effectuate the constitutional prohibition against racial discrimination in voting. *Katzenbach*, 383 U.S. at 308. Section 5 goes well beyond the Fifteenth Amendment's prohibition against racial discrimination in voting by "plac[ing] the burden on covered jurisdictions to show their voting changes are nondiscriminatory *before* those changes can be put into effect." *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 431 (D.D.C. 2011). The VRA thus treats some States differently "despite our historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). But Section 5's "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*

This Court issued a unanimous warning regarding Section 5's constitutional infirmities:

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions

> singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.

Id. at 203; *see also id.* at 216 (Thomas, J., concurring in judgment in part and dissenting in part). The Court further emphasized that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Id.* at 204. But the Court remained "keenly mindful of [its] institutional role," *id.* at 204, resolved the case on nonconstitutional grounds, and charged the political branches with fixing both the VRA's antiquated coverage formula and the blunt instrument of preclearance, *id.* at 205-06.

But Congress has done nothing since *Northwest Austin*, and the Covered Jurisdictions continue to labor under a coverage formula that is now 40 years old. And piling error on error, DOJ has exacerbated the VRA's federalism costs by broadening its interpretation of Section 5 and denying preclearance to an ever-widening array of sovereign state prerogatives.

A. The Court of Appeals Erred in Finding that Congress Had Adequate Data to Justify the Continued Use of the Section 4(b) Formula.

The VRA requires a jurisdiction to comply with the preclearance obligations if it satisfied two conditions. First, in 1964, 1968, or 1972, the jurisdiction must have required a person to satisfy the requirements of a "test or device"[3] in order to vote. 42 U.S.C. § 1973b. Second, the jurisdiction must have had – again in 1964, 1968, or 1972 – less than fifty percent of the citizens of voting age registered to vote, or less than fifty percent of the citizens in the jurisdiction voting in the then-most recent presidential election. 42 U.S.C. § 1973c.

Because the Act references specific years, some States such as Delaware remain uncovered even though they used a test or device prohibited by Section 4(c) in both 1964 and 1968; because voter registration fell below fifty percent *after* 1972 rather than during that year, Delaware need not seek preclearance for its laws. *See* Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (1965); Determination Regarding Literacy Tests, 35 Fed. Reg. 12354 (1970); Dave Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ (follow "1996" hyperlink; then follow "%VAP M" hyperlink). In contrast, Arizona was not using a test or device in 1975, when Congress amended the Act to add language minorities to the coverage formula. *See* Extension of the Voting Rights Act of 1965: Hearing

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[3] The VRA defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c).

Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater, explaining that Arizona did not use English-only ballots in 1974 or thereafter). But because Arizona did not include Spanish in its ballots in 1964, 1968, and 1972, it became and remains a Covered Jurisdiction.

Because Congress never intended the preclearance requirements to be permanent, fixing the determination on a then-recent presidential election year was logical when it originally enacted the VRA. As time passes, however, Congress's reasoning grows less justifiable.[4] No jurisdiction, covered or uncovered, currently uses a test or device, and Covered Jurisdictions are no more likely than uncovered jurisdictions to have low voter turnout. In eighteen of the forty-one States that are not Covered Jurisdictions in their entirety, the percentage of voting age persons who voted was less than fifty percent during one or more presidential elections since the 1982 amendment to the VRA: Arkansas (1988, 1996, 2000), California (1984, 1988, 1992, 1996, 2000), Delaware (1996), Florida (1984, 1988, 1996, 2000), Hawaii (1984, 1988, 1992, 1996, 2000, 2004, 2008), Illinois (1996), Indiana

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[4] In addition, the successive reauthorizations of the VRA have rendered the notion of its enactment as a temporary solution to an extraordinary problem a misnomer. Congress originally enacted the VRA for five years in 1965. Congress renewed it subsequently in 1970 (for five years), then in 1975 (for seven years), then in 1982 (for twenty-five years), and again in 2006 (for twenty-five years). *Nw. Austin*, 557 U.S. at 200.

(1996, 2000), Kentucky (1988, 1996), Maryland (1988, 1996), Nevada (1984, 1988, 1996, 2000), New Mexico (1988, 1996, 2000), New York (1988, 1996, 2000), North Carolina (1984, 1988, 1996, 2000), Oklahoma (1988, 1996, 2000), Pennsylvania (1996), Tennessee (1984, 1988, 1996, 2000), Utah (1996), and West Virginia (1988, 1996, 2000). *See* Dave Leip's Atlas, *supra* (select applicable election year on left panel and then select "%VAP M"). Eleven of these states have never been partially or fully Covered Jurisdictions: Arkansas, Delaware, Illinois, Indiana, Kentucky, Maryland, Nevada, Pennsylvania, Tennessee, Utah, and West Virginia. *Compare* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited August 13, 2012) *with* Department of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited August 13, 2012).

Congress made no findings concerning these factual anomalies when it reauthorized the Act in 2006. This is because Congress did not engage in in-depth deliberations regarding the coverage formula.

This Court detailed the congressional deliberations that went into the original enactment of the VRA:

> Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received

> testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.

Katzenbach, 383 U.S at 308-09.

In contrast, and despite the 12,000-plus pages of reports and numerous congressional hearings, Congress passed the VRA's reauthorization in 2006 on an expedited basis and without careful deliberation over the formula used to determine whether a jurisdiction should be covered by the Act. Senators John Cornyn[5] and Tom Coburn,[6] members of the Senate Judiciary Committee, explained their "significant reservations" about this rush to renew:

> Those concerns can generally be categorized as follows: (1) the record of evidence does not appear to reasonably underscore the decision to simply reauthorize the existing Section 5 coverage formula – a formula that is based on 33 to 41 year old data, and (2) the seemingly rushed, somewhat incomplete legislative process involved in passing the legislation prevented the full consideration of numerous improvements. . . . We also conclude that it would have been beneficial if

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[5] Senator Cornyn represents Texas, a Covered Jurisdiction.

[6] Senator Coburn represents Oklahoma, an uncovered jurisdiction. *See* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited August 13, 2012).

> the Section 4 coverage formula had been updated in order to adhere to constitutional requirements. . . .

S. Rep. No. 109-295 at 25-26 (2006). The Senators continued by stating that the formula should be updated to "reflect the problems where they really exist and where the record demonstrates some justification for the assertion of Federal power and intrusion into the local and State electoral processes," but noted that Congress did not take the time to have "a full discussion of ways to improve the Act to ensure its important provisions were narrowly tailored and applied in a congruent and proportional way." *Id.* at 33-34. After the Report was submitted and the bill was sent to the Senate floor, the Senate passed it unanimously the very next day with only a brief debate. 152 Cong. Rec. S8012 (daily ed. July 20, 2006). However, the Senate Report itself notes that it was not provided, even in draft form, to members of the Senate before the floor debate. S. Rep. No. 109-295 at 55 (2006).

During the Senate debate, Senator Coburn again voiced his concerns with the rush to renew the VRA:

> My point is that it is unfortunate that we insisted on doing this on an expedited basis when the act does not expire for a year. . . . Because of the political nature of this bill and the fear of being improperly classified as "racist," the bill was crafted and virtually passed before any Senator properly understood any of the major changes. For example,

> the bill that passed out of committee included a finding section before any hearings were held. No changes to those findings were made.

152 Cong. Rec. S7990 (daily ed. July 20, 2006) (statement of Sen. Coburn). Senator Cornyn echoed this sentiment, opining that the hurried process "prohibited the kind of debate and discussion and perhaps amendment process that might have been helpful to protect the act against future legal challenges." 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn).

Congress expressed the rationale for renewing the VRA with the laudable and necessary intention of protecting the voting rights of *all* citizens. *See* H.R. Rep. No. 109-478 at 6 (2006). But neither the House nor the Senate seriously considered modernizing the coverage formula to reflect current circumstances throughout the country.

The House Judiciary Committee, in fact, emphasized the strides made in the Covered Jurisdictions and did not discuss at any length the similar needs in the uncovered jurisdictions. The Committee noted the results from the previous incarnations of the VRA and summarized its findings that substantial discrimination continued to exist in 2006 in the Covered Jurisdictions. *Id.* at 25. The Committee referenced limited anecdotal evidence that allegedly justified continuing preclearance obligations for some of the Covered Jurisdictions, but failed to include any evidence in its findings concerning the rights of voters in uncovered jurisdictions. The House Report contains no findings regarding the non-covered States' population changes, voter registration and turnout, or record of minority individuals elected. *See Voting Rights Act: An Examination of the Scope of Criteria for Coverage Under the Special Provisions of the Act*, 109th Cong., 1st Sess., at 92 (Oct. 20, 2005) (statement of Hebert). Moreover, testimony showed that "most seem to agree that [the formula] is outdated" and that "this is an area that Congress should give serious consideration and study to." *Id.* Nonetheless, the issue was never "addressed in any detail in the [Senate] hearings or in the House" and "little evidence in the [legislative] record reexamines whether systematic differences exist between the currently covered and non-covered jurisdictions." *The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., at 200-01 (May 16, 2006) (testimony of Pildes); *Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 109th Cong., 2d Sess., at 21-22 (May 4, 2006) (testimony of Clegg) ("[V]ery little if any evidence compares covered jurisdictions to noncovered jurisdictions, and what comparisons there are undermine the bill.").

Likewise, the Senate Judiciary Committee Report barely examined the history or current record of voting discrimination in the uncovered jurisdictions. *See generally*, S. Rep. No. 109-295 (2006). The nearly

300 pages of appendices to the Report included (1) summaries of the reported cases or settlements finding discrimination against voters in the Covered Jurisdictions and the uncovered jurisdictions; (2) a summary of the evidence gathered by the House and Senate concerning voting discrimination; and (3) a discussion of the lawsuits or enforcement actions, statistics, and anecdotal evidence for thirty-five of the fifty states. *Id.* at 65-363. All of the Covered Jurisdictions were represented by pages of discussion, while some of the uncovered States, such as Nebraska or Tennessee, had only single paragraphs of anecdotal evidence presented. The Report and its appendices presented no evidence whatsoever regarding Arkansas, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Nevada, New Hampshire, North Dakota, Oregon, Utah, Vermont, or West Virginia. The absence of evidence does not compel the conclusion that there were no instances of voter discrimination in the listed states, but fortifies the claim that the Senate failed to collect and incorporate such evidence in its report.

Once the bill was sent to the floor, the Senate quickly passed it without engaging in meaningful debate regarding the outdated formula. Several Senators expressed concern, but recommended passage of the bill nonetheless. 152 Cong. Rec. S7983 (daily ed. July 20, 2006) (statement of Sen. Chambliss discussing some hesitation about leaving unaddressed the issue of modernizing the formula); 152 Cong. Rec. S7986-87 (daily ed. July 20, 2006) (statement of Sen.

Sessions discussing the significant progress that Alabama had made in eliminating voting discrimination while noting that the same could not be said of fourteen other jurisdictions that are not covered by Section 5 and noting that he "would have expected Congress" to take action by modernizing Section 5); 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn expressing a desire that Congress focus on "places where the problems really do exist and where the record demonstrates with some justification for the assertion of Federal power and intrusion into the local and State electoral processes").

Congress did not explore the problem of voting discrimination throughout the entire country, and therefore failed to demonstrate the "great care" that the *Katzenbach* Court required as justification for the "uncommon exercise of congressional power" contained in the1965 version of the VRA, power that was permissible only due to the "exceptional conditions" and "unique circumstances" present in 1965.

B. Current Conditions Do Not Justify the VRA's Departure from the Fundamental Principle of Equal Sovereignty Among the States.

When the VRA was initially enacted in 1965, Congress found that there was significant evidence of voting discrimination in the southern States. But the United States is a different country than it was forty-seven years ago. According to the U.S. Census Bureau, in 1960, there were approximately 183 million people in the country; in 2010, there were 308.7 million people – a 68% increase. *Compare* 1 U.S. Census of Population: 1960, *Characteristics of the Population*, at xvii (1964), *with* Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 1, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf. Certain regions have grown quickly while others have grown much more slowly. *Id.* As discussed below, these changes in the States' respective populations have significantly changed the picture regarding minority representation as voters and elected officials. Congress failed to analyze or even recognize these shifts, which leaves the VRA even further out of step with the current circumstances in this country.

1. Arizona and Nevada Are Strikingly Similar in Population Makeup, Voter Registration, and Voter Turnout, but Are Treated Differently by the VRA.

According to the 2000 and 2010 censuses, Nevada is by far the fastest growing State in the country, while Arizona is the second fastest. Census 2000 Brief on Population Change and Distribution: 1990-2000 at 3, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf; Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 2, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. Nevada's Hispanic population more than doubled in the last twenty years, increasing from 10.4% of the population to 26.5%. *Compare* Census 2000 Brief on the Hispanic Population at 4, http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf *with* Census 2010 Brief on the Hispanic Population at 6, http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf. During the same time period, Arizona's Hispanic population grew from 18.8% to 29.6%. *Compare* Census 2000 Brief on the Hispanic Population at 4, *with* Census 2010 Brief on the Hispanic Population at 6.

The voting registration and turnout records for Arizona and Nevada are also similar. During the 2000 election, 53.3% of Arizona's total citizenry were registered voters and 46.7% voted, and in Nevada 52.3% were registered and 46.5% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2000, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2000/tab04a.pdf (last visited November 7, 2011). But Nevada's Hispanic population was less represented. *Id.* In Arizona, 33.4% of its Hispanic population registered to vote and 27.1% voted; while in Nevada, 23.9% of its population registered and only 20.4% voted. *Id.*

In 2004, Arizona's record showed that 60.3% of the total population registered and 54.3% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (follow "Detailed Tables" hyperlink; then follow Table 4a "XLS" hyperlink). The Arizona Hispanic population's numbers were 30.5% and 25.5%, respectively. *Id.* Nevada, on the other hand, had 56.8% of its entire population registered, with 51.3% actually voting. *Id.* The Nevada Hispanic population's numbers were 27.6% and 23.8%, respectively. *Id.*

In the 1972 election, only 49.5% of Nevada's voting age residents voted. (*See* Dave Leip's Atlas, *supra* (follow "1972" hyperlink; then follow "%VAP" hyperlink).) Also, none of Nevada's current laws protecting non-English-speaking voters had been enacted. (*See* Nev. Rev. Stat. § 293.2699 (added 2003); Nev. Rev. Stat. § 293.296 (added 1973); Nev. Rev. Stat. § 293C.282 (added 1997).) In spite of these facts, Arizona is a Covered Jurisdiction while Nevada has never been covered.

Despite the similar populations, a smaller percentage of Hispanic voters in Nevada are voting than in Arizona. In the Senate Judiciary Committee Report, there were only two pieces of anecdotal evidence regarding possible voting discrimination in Nevada, but both involved discrimination against Hispanic voters. S. Rep. No. 109-295 at 277 (summarizing anecdotal evidence that Hispanics have been told they need to speak English or have a driver's license in order to vote and that voter registration forms for some Hispanics were found in dumpsters and not submitted). Congress made no findings concerning the number of minorities elected to office in Nevada or regarding the possibility of racial polarization in its elections. This lack of justification by Congress for the different treatment of Arizona and Nevada despite the stark similarities in their current populations and voter turnout records is evidence that the VRA's formula is neither congruent with, nor proportional to, the goal of eliminating discrimination in voting. Further, Congress's failure to take into account these similar statistics shows that its decision to continue using the outdated coverage formula is arbitrary.

2. Several States Adopted Voter-Identification Laws but Experienced Dramatically Different Treatment Under the VRA.

Thirty states presently have laws in place that may require voters to show identification at the polls in November. *Voter Identification Requirements*, National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last visited August 13, 2012). Whether the laws may be effective depends greatly on whether the jurisdiction is Covered or not. Since 2001, nearly 1,000 bills have been introduced in forty-six states. *Id.* Twenty-one states passed major legislation between 2003 and 2011. *Id.* New voter-identification laws were passed in Alabama, Colorado, Montana, North Dakota, and South Dakota in 2003; Alabama had to request preclearance (*id.*), which DOJ granted on August 15, 2003 (DOJ File Nos. 2003-2245; 2003-3434).[7] In 2004, Arizona voters passed a voter-identification law. *Gonzalez v. Arizona*, 624 F.3d 1162, 1169 (9th Cir. 2010) (en banc). The DOJ precleared Arizona's law. *See* DOJ File No. 2004-5004. In 2005, new laws were passed in Indiana, New Mexico, and Washington, while Georgia passed legislation to strengthen its existing voter-identification law. *See Voter Identification Requirements*, *supra*. Georgia had to request preclearance, while the other States did not. The DOJ precleared Georgia's law on August 26, 2005. *See Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294, 1303 (N.D. Ga. 2006).

Indiana enacted a law in which voters who were unable to produce photo identification on election day could cast a provisional ballot that would be counted only it they produced an appropriate affidavit or produced photo identification before the court clerk within ten days following the election. *Crawford*, 553 U.S. at 185-86. Because Indiana is not covered by Section 5, it did not have to seek preclearance. This Court upheld the facial validity of Indiana's law, stating that the Court could not "conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Id.* at 202.[8]

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[7] Alabama has enacted a new voter-identification law that has not yet been submitted for preclearance and which will not take effect until 2014.

South Carolina and Texas, both Covered Jurisdictions, have not yet been permitted to enforce their voter-identification requirements, despite the fact that these laws are similar to the Indiana law upheld in *Crawford*. The DOJ denied preclearance for South Carolina's voter-identification law. *South Carolina v. U.S.*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 1). South Carolina has filed a declaratory-judgment action, seeking reconsideration of DOJ's preclearance denial. *Id.* Trial begins on August 27, 2012. *Id.* at Doc. 155.

Texas, like South Carolina, requested DOJ's preclearance. Despite Texas's responses to DOJ's repeated requests for more information, DOJ still had not provided a preclearance decision six months after the State's initial submission. *Texas v. Holder*, D.D.C. Cause No. 1:12-cv-00128 (RMC, DST, RLW) (Doc. 1). By then, DOJ had rejected South Carolina's similar law and, facing a likely similar rejection, Texas opted to file a declaratory judgment seeking preclearance. *Id.* The DOJ eventually rejected Texas's request for administrative preclearance nearly seven months after the initial submission. Trial was held from July 10 through 13, 2012, and Texas is awaiting a preclearance decision from the district court – more than a year after its legislature enacted the voter-identification law.

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[8] The Ninth Circuit held that Arizona's voter-identification law did not violate Section 2 of the VRA. *Gonzalez*, 624 F.3d at 1194.

Judge Williams asked in his dissent in this case "Why should voter ID laws from South Carolina and Texas be judged by different criteria . . . from those governing Indiana?" (Pet. App. 94a.) Judge Williams could not find a rational explanation other than the *historical* records of the Covered Jurisdictions, but noted that such a focus appears to be "foreclosed by *Northwest Austin*'s requirement that current burdens be justified by current needs." (*Id.* at 95a.) This dramatic disparity in the treatment of similar States is incompatible with our history of treating the States as equal sovereigns and warrants this Court's review.

C. The Preclearance Requirements Are Arbitrary and Burdensome.

As with the voter-identification laws discussed above, Section 5's preclearance obligations lead to other absurdities. The Covered States and their political subdivisions must obtain federal preclearance before they enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.1. Changes requiring preclearance include:

- "Any change in qualifications or eligibility for voting";
- "Any change concerning registration, balloting, and the counting of votes and

any change concerning publicity for or assistance in registration or voting"; and

- "Any change in the boundaries of voting precincts or in the location of polling places."

28 C.F.R. § 51.13(a), (b), (d). At the state level, the various attorneys general monitor legislation for "covered" changes and submit those changes to DOJ for preclearance. If a change originates at the local level, the local officials identify and submit the change.

1. Updating Alabama's Voting Machinery to Comply with the Help America Vote Act of 2002 ("HAVA").

HAVA contains detailed standards for the type of voting machinery a State may employ. *See* 42 U.S.C. § 15481. In Alabama, each of the State's sixty-seven counties handled the process of purchasing HAVA-compliant machines. The Alabama Attorney General spearheaded a unified preclearance submission, which included the necessary information under 28 C.F.R. § 451.27 for each county. The DOJ precleared the changes for use in the June 2006 primary election.[9] But, because Alabama's 450 municipalities manage their own elections, when the time came for them to hold their own elections in 2008, they had to devote the time and expense to submit their own preclearance materials – even though they used the same voting machines as their corresponding counties. This example demonstrates both the burden and arbitrariness of the preclearance requirements. These requirements were all the more absurd because, at least in this instance, because the changes these governments had to preclear were simply their good-faith efforts to comply with *another* federal statute.

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[9] *See* DOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, and 2006-3583 through 2006-2594.

2. Arizona's Decision to Close Several Motor Vehicle Department Branches.

Because Arizona, like many other States, has faced serious budget concerns over the past several years, the Arizona Motor Vehicle Department ("MVD") opted to close several branch offices. Arizona citizens who apply for a driver license or license renewal may, if otherwise qualified, register to vote or update their voter registration at the same time. Ariz. Rev. Stat. § 16-122. Thus, this decision to close the branch offices was a change concerning registration that necessitated a preclearance submission.

On June 21, 2012, Arizona requested preclearance to close an MVD location within the Pima County Justice Court in Tucson, Arizona. The submission noted that there were three other voter registration locations in the immediate vicinity – one of which was the Pima County Recorder's Office in the very same building as the MVD office that was closing. This type of administrative decision should be left to the local jurisdictions. But because of Section 5, Arizona's MVD had to wait until it received DOJ's preclearance letter to effectuate that change. *See* DOJ File No. 2012-3656.

D. The Prospect of Bailout for the Covered States Is Illusory.

Congress justified the possibility that its coverage formula would be over- or under-inclusive, with the bailout and bail-in provisions. *Shelby Cnty.*, 811 F. Supp. 2d at 432-33. As discussed below, it will be extremely difficult for any of the currently Covered States to ever be able to bail out.

Like Congress, the majority below found solace in the bailout provision, stating that as of May 9, 2012, 136 jurisdictions and sub-jurisdictions had successfully bailed out. (Pet. App. 57a.) But no Covered State has ever been allowed to bail out, and as Judge Williams noted in his dissent, bailout does not remove federal oversight. (Pet. App. 92a (stating that "for a decade after bailout, the court 'retain[s] jurisdiction' just in case the Justice Department or 'any aggrieved person' wishes to file a motion 'alleging that conduct has occurred which . . . would have precluded' bailout in the first place.").) Further, the 1982 reauthorization of the VRA tightened the substantive standards for bailout:

> A covered jurisdiction can now obtain bailout if, and only if, it can demonstrate that, during the preceding *ten* years, it has (simplifying slightly): (1) effectively engaged in no voting discrimination (proven by the absence of any judicial finding of discrimination or even a Justice Department "objection" (unless judicially overturned); (2) faithfully complied with § 5 preclearance; (3) "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process"; and (4) engaged in "constructive efforts to eliminate intimidation and harassment of persons exercising rights protected" under the act and "in other constructive efforts, such as the expanded opportunity for convenient registration."

Id. citing 42 U.S.C. § 1973b(a)(1). No State is likely to ever successfully bail out because it must prove that it (and *all* of its sub-jurisdictions) meets all the bailout requirements for the ten years preceding its declaratory judgment seeking bailout. If even one sub-jurisdiction receives an objection letter from DOJ for a voting change, the ten-year time period starts anew. Covered Jurisdictions such as the Amici States likely will be forced to continue to operate under the unconstitutional burdens of Sections 4 and 5 of the VRA unless and until this Court removes them. The Court should do so now.

CONCLUSION

The Court should grant certiorari to Shelby County and declare Sections 4(b) and 5 of the Voting Rights Act unconstitutional.

Respectfully submitted this 23rd day of August, 2012.

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AMICUS CURIAE BRIEF

Nos. 12-81, 12-96

In the Supreme Court of the United States

John Nix, et al.
Petitioners,
v.
Eric H. Holder Jr., et al.
Respondents.

Shelby County, Alabama
Petitioner,
v.
Eric H. Holder Jr., et al.,
Respondents.

On Appeal from the U.S. Court of Appeals for the District of Columbia Circuit

Brief of *Amicus Curiae* Cato Institute In Support of Petitioners in Both Cases

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QUESTIONS PRESENTED

1. Has the modern application of the Voting Rights Act resulted in an exercise of extra-constitutional authority by the federal government that conflicts with the Act's very purpose?

2. Can Voting Rights Act Sections 2 and 5 coexist? If not, which section is the more appropriate remedy for remedying voter disenfranchisement?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT MUST RECONSIDER THE CONTINUING VIABLITY OF THE VOTING RIGHTS ACT BECAUSE THIS HISTORIC LEGISLATION NO LONGER SERVES ITS ORIGINAL PURPOSE 4

  A. The VRA, Once Justified by Jim Crow, Is Now an "Eye Glazing Mess" 4

    1. Successful at First 4

    2. Moving in the Wrong Direction 6

    3. Congress Exacerbates the Anachronism... 8

  B. Section 5 Conflicts with the Constitution 11

    1. Substantial Federalism Costs 12

    2. Equal Protection Problems 14

    3. Confusing Purpose and Effect 17

II. SECTIONS 2 AND 5 ARE AT A "BLOODY CROSSROADS" 20

  A. The Conflict between Sections 2 and 5 Creates Bad Law 20

  B. Section 2 is the Proper Remedy for the Problems Congress Identified 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Abrams v. Johnson, 521 U.S. 74 (1997) 15

Bartlett v. Strickland, 556 U.S. 1 (2009) 15, 20

Beer v. United States, 425 U.S. 130 (1976) 21

Branch v. Smith, 538 U.S. 254 (2003) 15

Colleton County Council v. McConnell,
201 F. Supp. 2d 618 (D.S.C. 2002) 21

Georgia v. Ashcroft, 539 U.S. 461 (2003) .... *passim*

Lopez v. Monterey County, 525 U.S. 266 (1999) 5

LULAC v. Perry, 548 U.S. 399 (2006) 15

Metts v. Murphy, 347 F.3d 346 (2003) 20-21

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) .... *passim*

Reno v. *Bossier Parish School Bd.*,
520 U.S. 471 (1997) 20

Ricci v. DeStefano, 129 S. Ct. 2658 (2009) 18

Roe v. Wade, 410 U.S. 113 (1973) 3

Shaw v. Reno, 509 U.S. 630 (1993) 7

Shelby County v. Holder,
679 F.3d 848 (D.C. Cir. 2012) .... *passim*

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 5, 11, 23

United States v. Bd. of Comm'rs of Sheffield,
435 U.S. 110 (1978) 12

Uno v. Holyoke, 72 F.3d 973 (1995) 11

Upham v. Seamon, 456 U.S. 37 (1982) 21

Statutes and Constitutional Provisions

Voting Rights Act of 1965,
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INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

Nix and *Shelby County* implicate a constitutional overreach too long suffered in jurisdictions where the federal government found, nearly half a century ago, discrimination against African-American voters. The goal of preventing voter disenfranchisement is unquestionably just (and constitutional), but it is no longer served by Section 5 of the Voting Rights Act. This provision now only perpetuates the very race-based political decisions the Act was intended to stop.

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given timely notice of intent to file and written communications from Petitioners' and Respondents' counsel (in both cases) consenting to the filing of this brief has been submitted to the Clerk. Pursuant to Rule 37.6, *amicus* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

"The historic accomplishments of the Voting Rights Act are undeniable." *Nw. Austin Mun. Util. Dist. No. One v. Holder ("NAMUDNO")*, 557 U.S. 193, 201 (2009). Its modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, with the Fourteenth and Fifteenth Amendments, and with the orderly implementation of fair elections. These tensions—constitutional, statutory, and practical—undermine the VRA's legacy of vindicating the voting rights of all citizens.

Jurisdictions covered by Section 5 are subject to utterly predictable litigation, the outcome of which is often dependent on judges' views of how to satisfy both the VRA's race-conscious mandates and the Fifteenth Amendment's command to treat people of all races equally under law. When added to legislators' partisan interests, this navigation between the VRA's Scylla and the Constitution's Charybdis inevitably crashes the electoral vessel onto judicial shoals.

Moreover, Section 5's preclearance system is an anachronism. As this Court found three terms ago,

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.

Id. at 203-04 (citing Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* 3-6 (AEI, 2006)).

Indeed, the list of Section 5 jurisdictions is bizarre: six states of the Old Confederacy (and certain counties in three others), plus Alaska, Arizona, and counties or townships in other states ranging from New Hampshire to South Dakota. Curiously, (only) three New York counties are covered, all boroughs in New York City. What is going on in the Bronx, Brooklyn, and Manhattan that is not in Queens or Staten Island? Four members of this Court famously hail from Gotham, each from a different borough; perhaps they know something the rest of us don't.

And all of this mess stems from the presumption that election regulations in certain places are illegal until proven otherwise. But three generations of federal intrusion on state prerogatives have been more than enough to kill Jim Crow.

The Voting Rights Act has exceeded expectations in making this nation "a more perfect union." Barack Obama, *A More Perfect Union*, Address at the National Constitution Center (Mar. 18, 2008) (transcript available at http://www.americanrhetoric.com/speeches/barackobamaperfectunion.htm). While celebrating its achievements, we must recognize that this success has obviated its constitutional legitimacy. Moreover, the VRA's incongruities present the prototypical situation of legal problems that are capable of repetition, yet evading review. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) (internal citations omitted). This Court needs to address the fundamental constitutional defects arising under the modern VRA.

ARGUMENT

I. THIS COURT MUST RECONSIDER THE CONTINUING VIABILITY OF THE VOTING RIGHTS ACT BECAUSE THIS HISTORIC LEGISLATION NO LONGER SERVES ITS ORIGINAL PURPOSE

A. The VRA, Once Justified by Jim Crow, Is Now "an Eye Glazing Mess"[2]

1. Successful at First

The Voting Rights Act has become "one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions." Richard Pildes, *Introduction* to David Epstein, *The Future of the Voting Rights Act* xiv (2006).

Defining that appropriate balance, however, was not the VRA's original aim. Its original purpose was simply to enfranchise southern blacks who were still being denied their voting rights a century after the Civil War. "The statute has become such an eye glazing mess that it's easy to forget that in 1965 it was beautifully designed and absolutely essential." Abigail Thernstrom, *The Messy, Murky Voting Rights Act: A Primer*, Volokh Conspiracy (Aug. 17, 2009), http://volokh.com/2009/08/17/the-messy-murky-voting-rights-act-a-primer.

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[2] This section is based on the work of Abigail Thernstrom, legal historian and vice-chairman of the U.S. Commission on Civil Rights, particularly her book *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* (2009) and her series of blogposts about the book at the Volokh Conspiracy blog.

When Congress enacted the VRA, Jim Crow was not going quietly into the historical night. Black ballots were the levers of change that white supremacists most feared, so enforcing the Fifteenth Amendment required an overwhelming exercise of federal power—radical legislation that involved an unprecedented intrusion of federal authority into state and local elections. *See Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (noting that Section 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs'" (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

The VRA effectively put southern states under federal electoral receivership. It suspended literacy tests, provided for the use of federal registrars, and demanded that suspect jurisdictions obtain preclearance of proposed electoral changes. A reverse-engineered statistical trigger identified these "covered" jurisdictions; the burden to prove that changes in voting procedure were free of racial animus—to prove a negative—lay on these Section 5 jurisdictions.

Justice Black worried that the provision compelled states to "beg federal authorities to approve their policies," so distorting our constitutional structure as to nearly eradicate the distinction between federal and state power. *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring in part and dissenting in part). It was a valid point, but the VRA succeeded where all other attempts to secure voting rights failed: black voter registration skyrocketed.

The enforcement authority that would remedy a century of Fifteenth Amendment violations thus amounted to what might be called "federal wartime powers." As on other occasions when wartime powers were invoked, however, the consequence was a serious distortion of constitutional order. Abigail Thernstrom, *Race-Conscious Districting: Needed and Costly*, Volokh Conspiracy (Aug. 18, 2009), http://volokh.com/2009/08/18/race-conscious-districting-needed-and-costly. Such a temporary distortion was justified in 1965, but it is not today.

2. Moving in the Wrong Direction

Section 5 was an emergency provision with an expected life of five years that instead has been repeatedly renewed. Every renewal became an occasion for expanding the VRA; never did Congress consider whether the law's unprecedented reach should instead be reduced in recognition of its success. Even as black political participation increased, federal power over local affairs grew.

In the 1970s, the government placed more groups and places into Section 5's clutches. An arbitrary, careless change in the statistical trigger, for example, made three New York boroughs subject to preclearance even though black New Yorkers had been freely voting since the Fifteenth Amendment's enactment in 1870, and had held municipal offices for decades. Hispanics, Asian Americans, American Indians, and Alaskan Natives became eligible for federal protection, even though their experience at the polls was not remotely comparable to that of southern blacks.

In 1982, Congress rewrote what had been an innocuous preamble, Section 2, morphing it into a powerful tool to attack election practices anywhere in the nation that had the "result" of denying the right to vote on account of race. But Section 2 as rewritten guaranteed electoral equality in some absolute sense—undefined and indefinable. The obvious proportionality inquiry rests on profound misunderstandings about the "natural" distribution of various groups across the sociopolitical landscape. Racist exclusion should instead have been the concern.

The VRA thus moved in an unanticipated direction. Its original vision was one all decent Americans share: equal access to the political process, with blacks free to form coalitions and choose candidates in the same manner as everyone else. But in certain places, equality could not be reached simply by giving blacks the vote. Ballot access was insufficient after centuries of slavery, another century of segregation, ongoing racism, and persistent resistance to black political power. More aggressive measures were needed.

Consequently, blacks came to be treated as politically different. The VRA was amended to mandate the drawing of legislative districts effectively reserved for black candidates. The power of federal authorities to force jurisdictions to adopt "racially fair" maps conflicted starkly with the Constitution's federalism guarantees, while the entitlement of designated racial groups to legislative seats was discordant with traditional notions of democratic competition.

But serious costs accompany race-driven election regulation, costs that have increased as racism has waned. Nearly 20 years ago, this Court described race-driven electoral maps as "an effort to 'segregate . . . voters' on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (O'Connor, J.) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). Such maps threaten "to stigmatize individuals by reason of their membership in a racial group." *Id.* at 631.

3. Congress Exacerbates the Anachronism

The VRA is disconnected from the reality of modern American life. Blacks hold public office at all levels and have reached the pinnacles of every field of private endeavor. The extreme problems that once made VRA necessary no longer exist. Still, in 2006, Congress overwhelmingly renewed the VRA, including Section 5, for another 25 years. A campaign by so-called civil rights groups had persuaded Congress that race relations remain frozen in the past, that America is still plagued by persistent disfranchisement, and that minority voters in covered jurisdictions (through a formula last updated in 1975) should remain unable to participate in political life without electoral set-asides—and that those jurisdictions should not run elections without federal oversight.

"Discrimination [in voting] today is more subtle than the visible methods used in 1965. However, the effects and results are the same," the House Judiciary Committee reported. H.R. Rep. No. 109-478, at 6 (2006). "Vestiges of discrimination continue to exist . [preventing] minority voters from fully participating in the electoral process," the amended statute itself read. Pub. L. No. 109-246 § 2(b)(1)(2) (2006).

No evidence supported such extreme claims. The skepticism of those who can't forget Jim Crow is understandable, but the South they remember is gone (and the discrimination that existed there never did in Alaska, Arizona, Manhattan, etc.). As the Court declared in *NAMUDNO,* "things have changed in the South" and "conditions . . . relied upon in upholding the statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved." 557 U.S. at 202.

Massive disfranchisement is ancient history, as unlikely to return as segregated water fountains. America is no longer a land where whites hold the levers of power and minority representation depends on extraordinary federal intervention, consistent with the Constitution only as an emergency measure. Today, southern states have some of the highest black voter-registration rates in the nation; over 900 blacks hold public office in Mississippi alone. Abigail Thernstrom, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* 11 (2009).

By the 2008 election, a stunning 69.7 percent of the black population was registered to vote and turnout rates were similarly impressive. Thom File & Sarah Crissey, *U.S. Census Bureau Population Reports: Voting and Registration in the Election of November 2008* 4 (2010), *available at* http://www.census.gov/prod/2010pubs/p20-562.pdf. By 2008, there were 41 members of the Congressional Black Caucus; almost 600 African-Americans held seats in state legislatures, and another 8,800 were mayors, sheriffs, school board members, and the like. Forty-seven percent of these officials lived in Section 5 states, even though those states contained only 30 percent of the nation's black population. Thernstrom, *Voting Rights—and Wrongs* 203. The bottom line is indisputable: *Section 5 states elect black candidates at higher rates than the rest of the country.*

But without the threat of federal interference, would southern state legislatures feel free to engage in mischief? It seems wildly improbable, even in the Deep South. Indeed, one of the latest VRA remedial orders involved a black Democratic Party county chairman in Mississippi conspiring to discriminate against white voters. *See, e.g.*, *Appeals Court Upholds Noxubee Voting Rights Ruling*, Picayune Item, Mar. 3, 2009, http://picayuneitem.com/statenews/x2079285859/Appeals-court-upholds-Noxubee-voting-rights-ruling.

In the same vein, a 2008 Clarksdale, Mississippi, newspaper editorial noted that "[t]here's probably less chance today of election discrimination against minorities occurring in Mississippi—given the high number of African-Americans in elected office, including as county election commissioners—than in many parts of the country not covered by the Voting Rights Act." Quoted in Abigail Thernstrom, *A Period Piece*, Volokh Conspiracy (Aug. 20, 2009), http://volokh.com/2009/08/20/a-period-piece. Yet Section 5 still "presumes that minorities are powerless to protect their own election interests in places where they actually have the most clout." *Id.*

Racial progress has rapidly outpaced the law, and the voting rights challenges of greatest concern today—hanging chads, electronic-voting glitches, etc.—bear no relation to those that plagued us in 1965. The South has changed, America has changed, and it's time for this Court to change constitutional understandings regarding the VRA as well.

Recognizing that Section 5 is "no longer constitutionally justified" is not "a sign of defeat." *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part). As Justice Thomas wrote, a declaration that Section 5 is unconstitutional "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA." *Id.* at 229. The Court should declare victory and excise Section 5.

B. Section 5 Conflicts with the Constitution[3]

At its inception, the VRA stood on firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic rights. A clear principle justified its original enactment: skin color should be irrelevant when states determine voting eligibility. Unfortunately, clarity has been lost. Nearly 50 years later, the law has become what Judge Bruce Selya described as a "Serbonian bog." *Uno v. Holyoke*, 72 F.3d 973, 977 (1995). The legal landscape looks solid but is really a quagmire into which "plaintiffs and defendants, pundits and policymakers, judges and justices" have sunk. *Id.*

In *NAMUDNO*, this Court fired unmistakable warnings at Congress. Although it recognized the historic achievements of the VRA, the Court stated that "past success alone" is no longer "adequate justification to retain the preclearance requirements." 557 U.S. at 202. The Court had originally upheld Section 5 as a temporary exercise of federal power, concluding that "exceptional conditions could justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 334-335. But the statutes that Congress subsequently passed go far beyond enforcing voting rights and, perversely, encourage segregation through racial gerrymandering.

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[3] This section is based on the work of Roger Clegg, president of the Center for Equal Opportunity and former DOJ official, particularly *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 Cato Sup. Ct. Rev. 35 (2009).

1. Substantial Federalism Costs

Rather than lifting the VRA's constraints on federalism, Congress in 2006 heightened the tension between the states and federal government by overruling *Bossier Parish II* and *Ashcroft* and amending preclearance requirements such that electoral changes must be rejected when they are believed to exhibit "any discriminatory purpose" or "diminish[ ] the ability of minority citizens...to elect their preferred candidates of choice." 42 U.S.C. § 1973c.

Yet the Constitution preserves the powers of the states to regulate elections. *Georgia v. Ashcroft,* 539 U.S. 461, 461-62. Absent a compelling justification or "exceptional conditions" (such as pervasive, invidious racial discrimination), election law falls within states' reserved powers and is an essential element of their sovereignty. See *NAMUDNO*, 557 U.S. at 216 (Thomas, J., concurring in part and dissenting in part) ("In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems." (citations omitted)); *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) ("[Preclearance is] a substantial departure . . . from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable.").

In *NAMUDNO,* this Court cited numerous cases acknowledging Section 5's "intrusion into sensitive areas of state and local policymaking" and expressing "serious misgivings about the constitutionality of Section 5." 557 U.S. at 202 (quoting *Miller*, 515 U.S. at 926). Neither Congress nor this Court can avoid these glaring constitutional doubts any longer.

Section 5 violates the Tenth Amendment and basic tenets of federalism in two principal ways. The first is that the preclearance regime undermines the "fundamental principle of equal sovereignty" by "differentiating between the states" with a coverage formula that is now unsubstantiated, invalid, and, therefore, completely arbitrary. *Id.* at 203 ("The evil that section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."). Moreover, "the greater the burdens imposed by section 5, the more accurate the coverage scheme must be." *Shelby County v. Holder,* 679 F.3d 848, 885 (D.C. Cir. 2012) (Williams, J., dissenting). Yet Congress did not review the coverage formula when it reauthorized the VRA in 2006.

The second Tenth Amendment violation lies in the preclearance regime's mandate for anticipatory review. Mandatory preclearance acts as a prior restraint on election law, a policy area generally reserved to the states. In addition, anticipatory review ensnares every state and local electoral rule proposed by a covered jurisdiction. To obtain preclearance a covered jurisdiction must prove both the absence of "any discriminatory purpose" and that the proposed voting change will not detract from a minority group's "ability to elect" its preferred candidate. Under this regime, whether the proposal affects a voter's actual exercise of the right to vote is no longer the ultimate question. Now deviating from that central inquiry, the exclusive focus becomes whether a proposed rule affects a minority groups' ability to elect their "preferred candidate" (whatever that means). As a consequence, covered jurisdictions lose the freedom to show that plans formulated based on other factors warrant consideration. Besides restricting state autonomy, the "ability to elect" constraint coerces states to adopt "a particular brand of race conscious decision-making" that treats minorities as a monolithic bloc. *Id.* at 887.

Similarly, the requirement that covered jurisdictions "prove the absence of a discriminatory purpose" conjures up memories of DOJ's campaign of "maximizing majority-minority districts at any cost." *Id.* at 888. As Judge Williams commented below, the discriminatory purpose standard, "at worst restored the DOJ's 'implicit command that states engage in presumptively unconstitutional race-based districting'" *Id.* (quoting *Miller*, 515 U.S. at 927), and "at best, 'exacerbated the substantial federalism costs that the preclearance procedure already exacts'." *Id.* (quoting *Reno v. Bossier Parish School Bd.*, 528 U.S. at 336).

2. Equal Protection Problems

The Court again faces here the tension between Section 5 and the Constitution's non-discrimination mandate. As Justice Kennedy noted in *Ashcroft*, Section 5 imposes a serious dilemma when consideration of race would constitutionally condemn a proposed regulation just as preclearance demands it. 539 U.S. at 491 (Kennedy, J., concurring) ("There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive."). Judge Williams below echoed Justice Kennedy's concerns: Section 5 "not only mandates race-conscious decision-making, but a particular brand of it" that departs from "the Reconstruction Amendments' commitment to nondiscrimination." *Shelby County*, 679 F.3d at 887-888 (Williams, J., dissenting).

The VRA quite literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies others. For example, a minority group may be entitled to a racially gerrymandered district while other groups are not so entitled and indeed may lack protection against districting that hurts them. *This is nothing if not treating people differently based on race.* Under the Constitution, no racial group should be assured "safe" districts or districts of "influence" unless all other groups are given the same guarantee—an impossibility even if it were a good idea.

Despite having achieved so much success early on, the continual effort to invent new justifications for Section 5—as well as Congress's prescription of one-dimensional remedies for electoral equality—are sowing the seeds for future conflict. The racial balkanization Section 5 fosters is so pernicious that this Court has repeatedly warned about its unconstitutionality. *See, e.g.*, *NAMUDNO*, 557 U.S. 193; *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Branch v. Smith*, 538 U.S. 254 (2003); *Abrams*, 521 U.S. 74. The segregated districts that racial gerrymandering creates have led to uncompetitive elections, increased polarization (racial and ideological), and the insulation of Republican candidates and incumbents from minority voters—as well as the insulation of minority candidates and incumbents from white voters (contributing to these politicians' difficulties in running for statewide office). As Chief Justice Roberts wrote, it is "a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006).

Ironically, the VRA has become an obstacle to racial integration. Race-based districts have kept most black legislators from the political mainstream—precisely the opposite of what the law's framers intended. As of 2006, for example, all Congressional Black Caucus members were more liberal than the average white Democrat. Abigail Thernstrom, *Looking Forward*, Volokh Conspiracy (Aug. 21, 2009), http://volokh.com/2009/08/21/looking-forward. Majority-minority districts reward politicians who make the sort of racial appeals that are the staple of invidious identity politics. People across the political spectrum end up with more extreme views than they would otherwise hold when they talk only to those who are similarly-minded. *See generally* Cass Sunstein, *Republic.com* (2001).

Not all black politicians have been trapped in safe minority districts, of course. Barack Obama himself lost a congressional race but went on to win a statewide election. A decade earlier, Mike Coleman became the first black mayor of Columbus, Ohio, with the strategy: "Woo the white voters first . . . then come home to the base later." Gwen Ifill, *The Breakthrough: Politics and Race in the Age of Obama* 227 (2009). Unfortunately, such candidates remain the exception. The VRA was meant to level the playing field but has been used to maximize black districts. The ugly implication is that black politicians need such help to win—but then their message is honed to appeal to limited constituencies. The marginalization that the VRA targets instead becomes entrenched.

3. Confusing Purpose and Effect

To be sure, certain jurisdictions had played cat-and-mouse games with voting-rights enforcement—provoking Section 5's preclearance response. Fair enough, but it is problematic that later VRA amendments outlawed both actions with a racially disparate "purpose" and those with a racially disparate "effect"—so again that which the Constitution permits is illegal under a law meant to enforce the Constitution.

Whenever the government bans actions that merely have racially disparate *impacts*, two bad outcomes are encouraged that would not be if the government only policed actual racial discrimination.

First, actions that are perfectly legitimate are abandoned. Focusing obsessively on guaranteeing majority-minority districts detracts from experimentation with alternative methods of advancing minority political power and may prevent the election of pragmatic candidates who can create "biracial coalitions which [could be] key to passing racially progressive policies." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting) (quoting David Epstein & Sharyn O'Hallaran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 Am. J. Pol. Sci. 367, 390-92 (1999)). For instance, Judge Williams explained below that in *Ashcroft*, Georgia "gave covered jurisdictions an opportunity to make trade-offs between concentrating minority voters in increasingly safe districts and spreading some of those voters out into additional districts; the latter choice, the Court pointed out, might increase the 'substantive representation' they enjoy and lessen the risks of 'isolating minority voters from the rest of the state' and of 'narrowing their political influence to only a fraction of political districts'." *Id.* (quoting *Ashcroft*, 539 U.S. at 481). A similar dynamic may be at work in the reforms at issue in *Nix*.

Second, if the action is valuable enough, surreptitious racial quotas will be adopted so that the action no longer produces a racially disparate impact. In staffing, for example, an employer who requires employees to have high school diplomas and who does not want to be sued for the resulting racially disparate impact has two choices: abandon the requirement (and hire employees he believes to be less productive) or implement racial hiring quotas (engaging in the very discrimination that the statute supposedly bans). This tension between the anti-racism mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact was at the forefront of another civil rights case that this Court decided three terms ago. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53 (2009) (analyzing *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009)). Justice Scalia noted there that this tension is so strong that disparate impact statutes may violate the Constitution's equal protection guarantee. 129 S. Ct. at 2682 (Scalia, J., concurring).

We see the same phenomenon in the VRA context. Some legitimate voting practices—*e.g.*, ensuring that voters are U.S. citizens—will be challenged if they have a racially disparate impact. In racial gerrymandering cases, jurisdictions will be pressed to use racially segregated districting to ensure proportionate election results and thus engage in the very discrimination that the underlying law forbids!

To emphasize: *The principal use of Section 5 today is to coerce state and local jurisdictions into devising plans with an eye on race, to ensure that minorities will elect representatives of the right color.*

* * *

In *NAMUDNO*, the Court declared that "current burdens . . . must be justified by current needs," 557 U.S. at 203. Meanwhile, Section 4(b)'s coverage formula should be "sufficiently related to the problem that it targets" to justify its infringement on the equal sovereignty of states. *Id.* Congress's findings underlying the 2006 re-authorization were woefully inadequate to substantiate that "exceptional conditions" or "current needs" existed to justify the extraordinary burdens and enforcement powers they claimed. Since that time, not only has Congress refused to address the inadequacy of their findings in light of *NAMUDNO*, but the Department of Justice continues to interfere with benign electoral reforms.

Because the burdens imposed by Section 5—the substantial federalism costs and the equal protection violations discussed *supra*—are not justified by "current needs," they fail to satisfy this Court's requirements for "appropriate" constitutional enforcement legislation as required by the Fourteenth Amendment, the Fifteenth Amendment, and *Katzenbach*. For the same reason, the coverage formula of section 4 (b) cannot be deemed "congruent and proportional."

II. SECTIONS 2 AND 5 ARE AT A "BLOODY CROSSROADS"

A. The Conflict between Sections 2 and 5 Creates Bad Law

The VRA's outdated provisions no longer advance the Fifteenth Amendment's simple bar on race-based disenfranchisement. *See NAMUDNO*, 557 U.S. at 210. Worse yet, racial equality is hindered by the complex judicial web surrounding VRA implementation. Courts face significant challenges in trying to avoid racial discrimination while administering the inherently race-conscious VRA.

Nix and *Shelby County* bring the tension between Sections 2 and 5 to the fore: Courts confront a "bloody crossroads" at the intersection of these provisions. While we know from *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), that each section requires a distinct inquiry, courts often face Section 2 claims while also having to draw electoral maps that have to comply with Section 5. While neither the DOJ nor the D.C. district court is supposed to deny Section 5 preclearance on Section 2 grounds, *Georgia v. Ashcroft*, 539 U.S. at 478, courts are effectively forced to wear both hats. Their apparent inability to do so is not surprising given the lack of applicable standards.

Many courts have labored to satisfy the VRA in the context of a cacophony of precedent—some that invokes only Section 5, some only Section 2, and some that references both sections. What's more, certain elements of the two inquiries overlap, even as this and other courts have consistently maintained that—at least in some measure—they are distinct. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1; *Georgia v. Ashcroft*, 539 U.S. 461; *Metts v. Murphy*, 347 F.3d 346 (1st Cir.

2003); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, (D.S.C., 2002).

For example, in evaluating an election regulation under Section 5, a court conducts a "retrogression" analysis to ensure the proposed rule doesn't reduce the ability of minorities to elect their preferred candidates. 42 U.S.C. § 1973c (2006); *Beer v. United States*, 425 U.S. 130 (1976). But there is no justiciable definition of what constitutes the "ability to elect."

Ignoring for the moment that ambiguity, if a court concludes that retrogression would result under a proposal, "court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. This stricter standard applies, however, only to remedies required by the nature and scope of the violation." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (internal citations omitted). Okay, but in what respects these standards are "stricter," what constitutes "remedies," and which remedies are "required" (and under what circumstances) is far from clear.

If that weren't cryptic enough, Congress's 2006 prohibition on electoral regulations promulgated with "any discriminatory purpose," regardless of effect, further muddied the waters. Without legislative guidance as to what constitutes a "discriminatory purpose," lower courts are left only to "hope that . . . the Supreme Court will provide appropriate and immediate guidance." Interim House Order (Doc. 528) at 29 (Smith, J., dissenting), *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011).

But even if this Court's Section 5 guidance were easily applicable in a given case, that does not end the dispute. After a proposed rule has been precleared or judicially approved, Section 2 further complicates matters. Its language sounds similar to Section 5's—it invalidates laws that create inequality among races in electing their preferred representatives, 42 U.S.C. § 1973(b) (2006)—but don't be fooled, say the courts. This Court has "consistently understood" Section 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Georgia v. Ashcroft,* 539 U.S. at 477-78 (citing *Reno* v. *Bossier Parish,* 520 U.S. at 477). The distinction *Bossier Parish* draws is merely that Section 5 "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Id.* at 478. Is that a meaningful difference?

Indeed, even if it is relatively clear that courts intend the analysis under the two sections to be different; how those analyses should differ remains ambiguous. "In contrast to Section 5's retrogression standard, the 'essence' of a Section 2 vote dilution claim is that 'a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Georgia v. Ashcroft,* 539 U.S. at 478 (citing *Thornburg v. Gingles,* 478 U.S. 30, 47 (1986)). This Section 2 process seems hardly different, however, from the very "retrogression" standard it distinguishes—a judicial assurance that a proposal "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006).

The result is untenable: Some states and counties are subject to Section 5's prolonged preclearance process while there has not yet been any judicial, legislative, or otherwise meaningful articulation of any *substantive* difference between that selectively applied Section 5 analysis and the Section 2 review all states must satisfy. The contradictory precedent that has emerged creates a near-impossible task for courts administering the VRA. Section 5's dubious constitutionality weighs heavily in favor of declaring victory and moving on, with Section 2 as the proper remedy for addressing the problems Congress has identified.

B. Section 2 Is the Proper Remedy for the Problems Congress Identified

Given Section 5's unconstitutional burdens, that provision's conflict with Section 2 should be resolved in favor of the latter. In allowing a private right of action, Section 2 provides the appropriate means for enforcing the Fifteenth Amendment and ensuring that any state practice which "results in a denial or abridgment of voting rights," 42 USC § 1973a, can be effectively remedied. That private right of action is a more targeted remedy, empowering citizens to litigate specific discriminatory acts—in contrast to Section 5's broad sweep, which ensnares every voting change, no matter how miniscule or banal.

When the Court upheld the VRA in 1966 it found that Section 5's generalized remedial mechanism was necessary because individualized litigation under Section 2 could not effectively fight such "widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328. Although Section 5's generalized remedial role was once appropriate and necessary in turning the tide against such "systematic resistance to the Fifteenth Amendment" and defeating "obstructionist tactics" *id.*, modern instances of discrimination are discrete rather than systemic. Facetious tests and sinister devices that eluded private rights of action are now permanently banned—while even Section 2 violations are exceedingly rare and not disproportionate to Section 5 jurisdictions.

Courts have also contemplated whether Section 2 provides an adequate remedy, raising concerns about the costs and expediency. The DOJ can essentially assume plaintiffs' costs for Section 2 suits, however, by either initiating the action itself or "intervening in support of the plaintiff as it often does." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting). Moreover, prevailing parties in a Section 2 suit are reimbursed attorney and expert fees. *Id.* As for the issue of expediency, when discriminatory practices are imminent and threaten injury before parties have had the opportunity to litigate, the courts may issue a preliminary injunction "to prevent irreparable harm caused by adjudicative delay." *Id.* (citing *Perry v. Perez*, 132 S. Ct. 934, 942 (2012)). Nothing in the legislative record of the 2006 VRA amendments suggests that Section 2 private rights of action would be an inadequate remedy.

In sum, Section 5's extraordinary measures are no longer constitutionally justifiable because entrenched discrimination is gone. The Court's conclusion in *Katzenbach* that section 5 is a necessary supplement to Section 2 is no longer warranted.

CONCLUSION

The Voting Rights Act has served its purpose but is now outmoded and unworkable. Section 5 in particular causes tremendous federalism and equal protection problems, all while enforcing arbitrary standards that conflict with the Fourteenth and Fifteenth Amendments and with Section 2. Accordingly, *amicus* respectfully urges this Court to grant review in either *Nix* and *Shelby County* (or both) regarding the continuing viability of this historic piece of legislation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-96

In the
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.................................... 1

ARGUMENT 4

I. EVEN A SIMPLE REAUTHORIZATION OF SECTION 5 IN ITS EXISTING FORM WOULD HAVE BEEN UNCONSTITUTIONAL 4

II. CONGRESS AGGRAVATED THE INHERENT CONSTITUTIONAL DEFECTS OF SECTION 5 BY OVERRULING THIS COURT'S DECISIONS AND ALTERING THE SUBSTANTIVE STANDARD FOR PRECLEARANCE 5

   A. This Court's Decisions in *Georgia v. Ashcroft* and *Bossier Parish II* Were Critical To Alleviating the Constitutional Flaws of Section 5.. 6

   B. Congress Worsened the Inherent Problems of Section 5 by Overruling *Georgia* and *Bossier Parish II*........................ 10

III. DOJ'S AGGRESSIVE ENFORCEMENT STRATEGY HAS FURTHER EXACERBATED SECTION 5'S CONSTITUTIONAL DEFECTS.................................. 14

   A. DOJ Has Refused To Preclear Legislation That is Unquestionably Permissible in Non-Covered Jurisdictions............................ 15

   B. DOJ Has a Long Record of Overreach in Section 5 Cases 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Beer v. United States,
425 U.S. 130 (1976) 6, 7

City of Boerne v. Flores,
521 U.S. 507 (1997) 4, 13

Crawford v. Marion County Election Bd.,
553 U.S. 181 (2008) 3, 15, 16

Georgia v. Ashcroft,
539 U.S. 461 (2003) ....*passim*

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) 17

Hays v. Louisiana,
839 F. Supp. 1188 (W.D. La. 1993) 20

Hays v. Louisiana,
936 F. Supp. 360 (W.D. La. 1996).......................21

LaRoque v. Holder,
679 F.3d 905 (D.C. Cir. 2012) 18

Miller v. Johnson,
515 U.S. 900 (1995) 6, 12, 19, 20

Northwest Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) ....*passim*

Perry v. Perez,
132 S.Ct. 934 (2012) 2

Reno v. Bossier Parish School Board,
528 U.S. 320 (2000) 2, 6, 7, 12

Ricci v. DeStefano,
557 U.S. 557 (2009) 5

Shaw v. Hunt,
17 U.S. 899 (1996) 21

Shelby County v. Holder,
679 F.3d 848 (D.C. Cir. 2012) ....*passim*

Statutes

42 U.S.C. § 1973c 1, 5, 11, 12

Other Authorities

Charlie Savage, *Holder, at NAACP Event, Criticizes Voter ID Laws* (July 10, 2012), *available at* http://thecaucus.blogs.nytimes.com/2012/07/10/holder-at-n-a-a-c-p-event-criticizes-voter-id-laws/ 17

Letter from William Moschella, Assistant Attorney General, to Hon. James Sensenbrenner (Apr. 12, 2006), *available at* http://www.scribd.com/doc/48673021/2006-0412-Ltr-to-House-of-Rep-re-Voting-Rights-Act-Procedures.................................. 20, 21

National Conference of State Legislatures, *Absentee and Early Voting* (updated July 22, 2011), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx... 18

Petition for Writ of Certiorari, *Nix v. Holder*, No. 12-81 (filed July 20, 2012) 19

Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174 (2007)................................ 12, 13

United States' Proposed Findings of Fact and Conclusions of Law, *Florida v. Holder*, No. 1:11-cv-01428 (D.D.C. May 3, 2012).............. 18

United States' Proposed Findings of Fact and Conclusions of Law, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. June 25, 2012)........... 18

INTEREST OF *AMICI CURIAE* [1]

Amici Hans von Spakovsky, J. Christian Adams, Roger Clegg, Charles J. Cooper, Robert N. Driscoll, William Bradford Reynolds, and Bradley Schlozman have all served in senior positions in the Civil Rights Division of the Department of Justice. *Amici* have extensive experience with the Voting Rights Act and the Department's enforcement policies, and have a substantial interest in ensuring that that any race-based remedial measures, such as Section 5 of the Act, comply with the Constitution.

SUMMARY OF ARGUMENT

This Court has rarely mentioned Section 5 of the Voting Rights Act ("VRA") in recent years without mentioning in the same breath the serious constitutional issues raised by that provision. Section 5 prohibits "covered jurisdictions" from implementing any changes to their election procedures until those changes are submitted to, and approved by, either the Attorney General or a three-judge district court. *See* 42 U.S.C. § 1973c. In doing so, Section 5 differentiates between the states despite "our historic tradition that all the states enjoy 'equal sovereignty'"; uses a coverage formula based on 40-year-old data that no longer reflects where discrimination is most likely to occur; and forces states to rely excessively on racial considerations in designing their election policies. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04 (2009); *see also Perry v. Perez*, 132 S.Ct. 934, 942 (2012) (noting the "'serious constitutional questions' raised by § 5's intrusion on state sovereignty").

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Petitioner and Respondent have each filed a blanket consent for *amicus* briefs. Counsel for Defendent-Intervenors received timely notice of *amici*'s intent to file and have consented to this filing.

In light of this Court's repeated articulation of the constitutional flaws of Section 5, Congress and DOJ could have taken any number of different steps to ease those concerns and place the statute on more sound constitutional footing. Congress, for example, could have updated the coverage formula to ensure a better fit between current burdens and current needs, or relaxed the substantive standard for granting preclearance. DOJ, for its part, could have adopted a restrained enforcement strategy that minimized costly litigation and quickly precleared voting changes in covered jurisdictions that were similar to valid statutes in non-covered jurisdictions.

Instead, both Congress and DOJ have taken a number of actions that have only exacerbated the already-serious constitutional flaws of Section 5. In the 2006 reauthorization of the VRA, Congress abrogated two of this Court's most important decisions interpreting Section 5, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). Both of those decisions relied on the canon of constitutional avoidance and were critical to preventing an unconstitutionally overbroad application of Section 5. Yet the 2006 reauthorization discards *Georgia* and *Bossier Parish II*, and significantly expands the substantive grounds on which DOJ or the district court can refuse to preclear a change in voting procedures.

DOJ, too, has abandoned any pretense of restraint and has used Section 5 to block a number of voting changes in covered jurisdictions that closely resemble laws already in force in non-covered jurisdictions. For example, this Court has held that an Indiana statute requiring voters to present photo identification is facially constitutional, *see Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), yet DOJ has sought to prevent Texas and South Carolina from adopting similar legislation. Worse yet, many of DOJ's objections to preclearance rely on amorphous allegations of discriminatory "purpose" that cannot be resolved without extensive and costly discovery and, often, a full trial on the merits. Covered jurisdictions are subject to these burdens solely because of a formula that relies on nearly 40-year-old data and has taken no account whatsoever of the fact that "[t]hings have changed" over the intervening four decades. *Northwest Austin*, 557 U.S. at 202.

* * *

Rather than heed this Court's repeated calls for restraint, Congress' and DOJ's recent actions have only worsened the grave constitutional flaws of Section 5. It is thus critical that this Court finally answer the question left open in *Northwest Austin* of "[w]hether conditions continue to justify" the extraordinary burdens imposed by Section 5. 557 U.S. at 211. The petition for certiorari should be granted.

ARGUMENT

I. EVEN A SIMPLE REAUTHORIZATION OF SECTION 5 IN ITS EXISTING FORM WOULD HAVE BEEN UNCONSTITUTIONAL

The 2006 reauthorization of Section 5 would not have passed constitutional muster even if Congress had made no substantive changes to the statute. As Shelby County explains, the formula used to determine which jurisdictions are covered by Section 5 relies on badly outdated data and fails to identify the jurisdictions most likely to engage in discriminatory voting practices. Pet. 29-34; *see also Shelby County v. Holder*, 679 F.3d 848, 889-900 (D.C. Cir. 2012) (Williams, J., dissenting) (concluding that the "equivocal evidence" of discrimination in covered jurisdictions cannot "sustain" Section 5). Indeed, the disparity in voter registration rates between African-American and white citizens in covered jurisdiction has "nearly vanished," and in many covered jurisdictions minority registration and turnout rates *exceed* those of white voters. *Northwest Austin*, 557 U.S. at 227 (Thomas, J., concurring in part and dissenting in part).

Moreover, even if there were some plausible nexus between the coverage formula and likely constitutional violations, the severe remedy of forcing covered jurisdictions to seek advance federal approval of their duly enacted laws is "so out of proportion . . . that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997); *see* Pet. 25-29; *Northwest*

Austin, 557 U.S. at 228 (Thomas, J., concurring in part and dissenting in part) (concluding that "the existence of discrete and isolated incidents of interference with the right to vote" is not "sufficient justification for the imposition of § 5's extraordinary requirements").[2]

II. CONGRESS AGGRAVATED THE INHERENT CONSTITUTIONAL DEFECTS OF SECTION 5 BY OVERRULING THIS COURT'S DECISIONS AND ALTERING THE SUBSTANTIVE STANDARD FOR PRECLEARANCE

In order to obtain preclearance under Section 5, a covered jurisdiction must demonstrate that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The "limited substantive goal" of Section 5 is to ensure that "'no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise.'" *Miller v.*

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[2] Section 5's use of an "effects" test also raises serious constitutional concerns, as it forces covered jurisdictions to engage in race-conscious decisionmaking. For example, covered jurisdictions will face a strong incentive to engage in racial gerrymandering in order to ensure racially proportionate election results. *See* Part II.B, *infra*; *see also Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (noting that the disparate-impact provisions in Title VII raise serious equal protection concerns because they "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes").

Johnson, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

When Congress reauthorized Section 5 in 2006, it did not write on a blank slate. This Court's decisions in *Georgia v. Ashcroft* and *Bossier Parish II* had interpreted both the "purpose" and "effects" prongs of the statutory test in a manner that ameliorated the inherent constitutional burdens of the statute. Remarkably, Congress abrogated both of those decisions in the 2006 reauthorization. As a result, even though covered jurisdictions have made remarkable progress since the VRA was enacted in 1965—and now perform as well as (or better than) non-covered jurisdictions on most measures of voting equality, *see Northwest Austin*, 557 U.S. at 202-04; Pet. 29-34—it has become considerably harder for covered jurisdictions to meet the substantive standard for preclearance.

A. This Court's Decisions in *Georgia v. Ashcroft* and *Bossier Parish II* Were Critical To Alleviating the Constitutional Flaws of Section 5

1. *Bossier Parish II* involved a challenge to the new electoral districts for a Louisiana school board. It was undisputed that, compared to the preexisting "benchmark" plan, the new plan "did not worsen the position of minority voters," and thus did not have a retrogressive effect. 528 U.S. at 324. The Attorney General nonetheless denied preclearance, arguing that new plan had a discriminatory purpose because the Parish did not maximize the number of majority-minority districts. *Id.* at 325.

This Court squarely rejected DOJ's interpretation of the "purpose" test, holding that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Id.* at 341. That is, the relevant inquiry is not whether there was *any* discriminatory purpose, but whether there was a *specific* purpose to retrogress minority voting strength compared to the benchmark plan. As the Court explained, Section 5 "prevents nothing but backsliding, and preclearance under Section 5 affirms nothing but the absence of backsliding." *Id.* at 336. A holding that Section 5 reached any kind of discriminatory purpose would have also been inconsistent with this Court's decisions interpreting the "effects" prong of the statute as requiring "*retrogressive* effects." *Beer*, 425 U.S. at 141 (emphasis added); *see also id.* (noting that "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account or race").

The decision in *Bossier Parish II* expressly turned on the canon of constitutional avoidance. This Court emphasized that extending Section 5 to "discriminatory but nonretrogressive vote-dilutive purposes" would "blur the distinction between Section 2 and Section 5," and "change the Section 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." 528 U.S. at 336. That reading of the statute would "exacerbate the 'substantial' federalism costs the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about Section 5's constitutionality." *Id.*

2. *Georgia v. Ashcroft*, which addressed Georgia's redistricting plans following the 2000 census, was an equally important decision regarding the "effects" prong of the preclearance standard. The challenged plans, which were strongly supported by African-American legislators, "unpacked" the most heavily concentrated majority-minority districts in order to create several new "influence" districts. 539 U.S. at 470-71. That is, the legislature chose to reduce the number of districts with a black voting age population in excess of 60% and instead create additional districts with a black voting age population between 25% and 50%. The goal of this plan was to "bring[] people together" by eliminating districts that overwhelmingly consisted of voters of a single race. *Id.* at 470. The district court nonetheless refused to preclear Georgia's plans, holding that the plans had a retrogressive effect because they reduced the opportunity for the "black candidate of choice" to win election, and "diminish[ed] African American voting strength" in existing majority-minority districts. *Id.* at 474.

This Court reversed. The Court held that the question whether a challenged practice has a retrogressive effect "depends on an examination of *all the relevant circumstances*, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id.* at 479 (emphasis added). The comparative ability of a minority group to elect a candidate of its choice is "important" in the retrogression inquiry but "cannot be dispositive or exclusive." *Id.* at 480.

The Court further held that "Section 5 gives States the flexibility to choose one theory of effective representation over the other." *Id.* at 482. Some states might choose to create a small number of "safe" majority-minority districts. That approach "virtually guarantee[s]" the election of the group's preferred candidate, but "risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts." *Id.* at 480-81. Alternatively, a state might choose to create "influence districts" with lower percentages of minority voters. This increases the risk that the preferred candidate will lose, but promotes the creation of multi-racial coalitions. *Id.* at 481. The core holding of *Georgia* is that Section 5 does not mandate one approach over the other, but leaves each state substantial discretion about how best to accommodate its own unique interests. *See id.* at 483 (Section 5 "leaves room for States to use these types of influence and coalitional districts").

The Court emphasized once again that "[t]he purpose of the [VRA] is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Id.* at 490. Thus, "the [VRA], as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Id.* at 490-91.

Justice Kennedy concurred. While agreeing that "our decisions controlling the § 5 analysis require the Court's ruling here," he noted that "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5." *Id.* at 491 (Kennedy, J., concurring). Justice Kennedy emphasized that "the discord and inconsistency" between § 2 and § 5 "should be confronted," and that "[t]here is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Id.*

B. Congress Worsened the Inherent Problems of Section 5 by Overruling *Georgia* and *Bossier Parish II*

Because of the badly outdated coverage formula and disproportionate remedy, even a simple reauthorization of Section 5 would have raised grave constitutional concerns. *See supra* Part I. But the 2006 reauthorization goes far beyond that, by significantly broadening the substantive grounds on which voting changes can be denied preclearance. Congress expressly overruled this Court's decisions in *Georgia* and *Bossier Parish II*, even though both of those decisions relied on the canon of constitutional avoidance and were critical to alleviating Section 5's inherent constitutional defects.

1. As explained above, *Georgia* gave states significant discretion to choose whether to have a smaller number of "safe" majority-minority districts or a larger number of "influence" districts. The 2006 amendments to the VRA foreclose that choice.

Congress rejected *Georgia*'s totality-of-the-circumstances analysis and instead provided that the sole inquiry is whether the challenged law "has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b); *see also id.* § 1973c(d) (providing that the purpose of this amendment "is to protect the ability of [minority] citizens to elect their preferred candidates of choice").

The "exclusive focus" of Section 5 is now "whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting). As Judge Williams explained, this amendment to Section 5's substantive standard "not only mandates race-conscious decisionmaking, but a particular brand of it." *Id.* The effect will be ossification of existing majority-minority districts, which will prevent policymakers from experimenting with different types of districts that may promote good governance and cooperation between racial groups.[3] Congress' overruling of *Georgia* thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between Section 5 and the Reconstruction Amendments' commitment to nondiscrimination." *Id.*

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[3] *See Georgia*, 539 U.S. at 481 (influence and coalition districts may "increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group").

2. In the 2006 reauthorization, Congress also abrogated this Court's decision in *Bossier Parish II* by adding to Section 5 a new provision stating that the term "purpose" "shall include *any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added).

This change is no mere technicality. *See* Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 217 n.165 (2007) (arguing that the "potential impact" of overruling *Bossier Parish II* "should not be understated"). If Section 5 broadly bars "any" discriminatory purpose, then DOJ can use it to block voting changes on grounds that have nothing to do with retrogression. Indeed, in *Bossier Parish II*, DOJ divined a discriminatory purpose from the district's *failure to maximize* minority seats, even though it was undisputed that there was no actual retrogression compared to the benchmark plan. 528 U.S. at 324-25; *see also Miller*, 515 U.S. at 927 (DOJ's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act . . . into tension with the Fourteenth Amendment").

By overruling *Bossier Parish II*, Congress has now reauthorized the same type of free-ranging "purpose" inquiry under which DOJ pursued its patently unconstitutional failure-to-maximize policies throughout the 1990s. *See Shelby County*, 679 F.3d at 887-88 (Williams, J., dissenting) (discriminatory purpose claims under Section 5 were "precisely the device that [DOJ] had employed in its pursuit of maximizing majority-minority districts at any cost"). As Professor Persily presciently explained in 2007, "[t]here is a risk that the purpose inquiry will turn into another opportunity for partisan infection of the preclearance process—for example, with a Democratic-leaning DOJ determining that all Republican gerrymanders in jurisdictions with heavy minority populations have discriminatory purposes or finding that failure to maximize the number of majority-minority districts constitutes discriminatory purpose." Persily, 117 Yale L.J. at 217 n.165. At the very least, "[t]he purpose inquiry provides a lot of discretion to the DOJ," and "[j]urisdictions may feel that they must accede to DOJ pressures applied in the short, stressful period preceding an election." *Id.*

3. The Court of Appeals refused to address Congress' alteration of the preclearance standard on the ground that Shelby County had not brought a *separate* challenge to the substantive amendments to Section 5. *See Shelby County*, 679 F.3d at 883-84. But Shelby County did bring a facial challenge to "Congress' decision in 2006 to reauthorize until 2031 the preclearance obligation of Section 5 of the VRA under the pre-existing coverage formula." Pet. 2. The substantive standard for granting preclearance is critical to any assessment of whether Section 5, on its face, is "congruen[t] and proportional[]" to the harm Congress sought to remedy. *Boerne*, 521 U.S. at 520. As Judge Williams explained, "[t]o answer that question one must necessarily first assess the severity of the consequences of coverage." *Shelby*

County, 679 F.3d at 888 (Williams, J., dissenting).[4] Congress' abrogation of *Georgia* and *Bossier Parish II* is properly before the Court, and only underscores the unconstitutionality of Section 5.

III. DOJ'S AGGRESSIVE ENFORCEMENT STRATEGY HAS FURTHER EXACERBATED SECTION 5'S CONSTITUTIONAL DEFECTS

Not content with both the reauthorization of Section 5 and a significant expansion of the substantive grounds on which preclearance can be denied, DOJ has also doubled down on aggressive enforcement strategy that has dramatically increased the costs and burdens borne by covered jurisdictions.

In particular, DOJ has refused to preclear a number of state laws in covered jurisdictions that are routinely implemented in non-covered jurisdictions. As a result, covered jurisdictions must engage in costly and wasteful litigation in order for their statutes to take effect, while similar laws in non-covered jurisdictions are presumptively valid and may take effect immediately. *See Shelby County*, 679 F.3d at 885 (Williams, J., dissenting) (Section 5 requires "state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes").

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[4] The majority was also wrong on the facts, as Shelby County did challenge Congress' modifications of the substantive preclearance standard. *See* Plaintiff's Consolidated Reply Memorandum in Support of Motion for Summary Judgment at 50-51, Dkt. 65, No. 1:10-cv-651 (D.D.C. Dec. 13, 2010); Reply Brief for Appellant at 24-25, No. 11-5256 (D.C. Cir. Dec. 15, 2011).

The sole reason for this grossly disparate treatment is a formula based on 40-year-old data that fails to acknowledge in any way that "[t]hings have changed" in covered jurisdictions since the VRA was enacted in 1965. *Northwest Austin*, 557 U.S. at 202.

A. DOJ Has Refused To Preclear Legislation That is Unquestionably Permissible in Non-Covered Jurisdictions

1. The second-class status of covered jurisdictions is most readily apparent in the context of laws requiring voters to present photo identification at the polls.

This Court has emphasized that "[t]here is no question about the legitimacy or importance of [a] State's interest in counting only the votes of eligible voters." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op.). Moreover, "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* While "the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.; see also id.* at 197 (noting that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process").

The Court thus rejected a facial challenge to Indiana's voter identification law. For most voters, the law was unlikely to "even represent a significant increase over the usual burdens of voting." *Id.* at 198. And, although "a somewhat heavier burden may be placed on a limited number of persons," the

Court concluded that the "severity" of this burden would be lessened by a provision allowing voters to cast provisional ballots if they did not have photo identification at the polls. *Id.* at 199. The challengers bore a "heavy burden of persuasion," and this Court found that the "precise interests advanced by the State" were "sufficient to defeat [the] facial challenge. *Id.* at 200, 203; *see also id.* at 204 (Scalia, J., concurring) (concluding that the "burden at issue is minimal and justified").

Non-covered jurisdictions are thus free to enact voter identification laws, and Indiana, Kansas, Pennsylvania, and Tennessee have done just that. Those statutes are deemed facially valid, and the burden of proof is on the plaintiffs in any Section 2 or Equal Protection challenge.

In light of this Court's decision in *Marion County*, one might have expected that DOJ would readily preclear voter identification statutes in covered jurisdictions as well. Instead, however, DOJ has sought to prevent Texas and South Carolina from implementing statutes that closely resemble the Indiana law this Court found to be facially constitutional.[5] Both cases are now pending before three-judge district courts, and have entailed massive document discovery, numerous intervenors, dueling expert witnesses, and trials with live testimony. Even though the Texas and South Carolina statutes were both enacted in May 2011, it is unlikely that either will be in force for the fall 2012 elections.

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[5] The Texas and South Carolina statutes are also similar to a Georgia voter identification law that DOJ precleared in 2005 under the previous administration.

This disparate treatment is particularly baffling given that Texas and South Carolina have *higher* minority registration and voting rates, and more African-American elected officials, than Indiana. *See Shelby County*, 679 F.3d at 902 (Williams, J., dissenting). Yet DOJ has refused to allow Texas' and South Carolina's duly enacted statutes to take effect, and the Attorney General has grossly mischaracterized these statutes as "poll taxes."[6] It strains credulity to suggest that statutes offering *free* identification to voters—and that are similar to a statute this Court found to be facially constitutional—are akin to the most egregious form of voting discrimination from the Jim Crow era. *See Gonzalez v. Arizona*, 677 F.3d 383, 408-410 (9th Cir. 2012) (*en banc*) (rejecting argument that a proof-of-citizenship requirement was analogous to a poll tax because that requirement "is related to the state's legitimate interest in assessing the eligibility and qualifications of voters ... and the burden is minimal under [*Marion County*]").

2. These are not isolated examples. Eighteen states do not currently offer *any* in-person early voting.[7] Yet DOJ has refused to preclear a Florida law that merely *changes the times* at which early voting will be offered while preserving the same total number of early voting hours. In refusing to preclear that change, DOJ has advanced exactly the sort of amorphous, purpose-based claim that this Court found constitutionally problematic in *Bossier Parish II*, but that Congress reinvigorated in the 2006 reauthorization.[8] Florida will not be allowed to implement these trivial changes in its election procedures unless and until it can prove the negative that its legislators were *not* acting with such a purpose.

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[6] *See* Charlie Savage, *Holder, at NAACP Event, Criticizes Voter ID Laws* (July 10, 2012), *available at* http://thecaucus.blogs.nytimes.com/2012/07/10/holder-at-n-a-a-c-p-event-criticizes-voter-id-laws/.

[7] *See* National Conference of State Legislatures, *Absentee and Early Voting* (updated July 22, 2011), *available at*

Similarly, in November 2008, voters in Kinston, North Carolina approved a referendum shifting to a system of non-partisan local elections. Countless jurisdictions in the United States use some form of non-partisan elections to choose local officials or judges. Yet DOJ refused to preclear the Kinston plan on the rather paternalistic theory that minority candidates would receive fewer "crossover" votes if they could not identify themselves as Democrats. *See LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012). After nearly three years of litigation, and on the eve of a second trip to the D.C. Circuit, DOJ

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http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx.

[8] *See* United States' Proposed Findings of Fact and Conclusions of Law at 17-25, *Florida v. Holder*, No. 1:11-cv-01428 (D.D.C. May 3, 2012); *see also* United States' Proposed Findings of Fact and Conclusions of Law at 24, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. June 25, 2012) (asserting that Texas' "stated purposes" for adopting a photo identification requirements "cloak a discriminatory purpose"); *id.* at 63-71.

withdrew its objection and attempted to moot the case. *Id.* A certiorari petition in the Kinston case is currently pending before this Court, *see Nix v. Holder*, No. 12-81 (filed July 20, 2012), and *amici* encourage the Court to grant that petition as well as the instant petition.[9]

B. DOJ Has a Long Record of Overreach in Section 5 Cases

This overreach is nothing new. Throughout the 1990s, DOJ routinely invoked a discriminatory "purpose" as the basis for withholding preclearance from redistricting plans that did not *maximize* minority voting strength. For example, in *Miller v. Johnson*, DOJ twice denied preclearance of Georgia's redistricting plans on the ground that the state "'failed to explain adequately' its failure to create a third majority-minority district." 515 U.S. at 907. Georgia eventually obtained administrative preclearance from DOJ only by adopting a severely gerrymandered plan that used the ACLU's so-called "max-black" plan as the benchmark. *Id.* at 907-08.

DOJ's approach to preclearance effectively forced Georgia to violate the Equal Protection Clause. Race was "the predominant, overriding factor" explaining why the new plan attached to existing districts "various appendages containing dense majority-black populations." *Id.* at 920. As this Court explained, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear that [DOJ] was driven by its policy of maximizing majority-black districts." *Id.* at 924. The Court found DOJ's position to be "insupportable," and emphasized that "[w]e do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 922-24. "In utilizing § 5 to require States to create majority-minority districts wherever possible, [DOJ] expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.* at 925. DOJ eventually agreed to pay nearly $600,000 in attorneys' fees to the plaintiffs for the protracted litigation in the *Miller* case.[10]

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[9] *Amicus* J. Christian Adams expresses no position on the Kinston case.

Similarly, in a case arising out of Louisiana's 1990 redistricting, DOJ "let it be known that preclearance would not be forthcoming for any plan that did not include at least two 'safe' black districts out of seven." *Hays v. Louisiana*, 839 F. Supp. 1188, 1196 n.21 (W.D. La. 1993). The court held that "neither Section 2 nor Section 5" justifies this approach, and that DOJ's position was "nothing more than . . . 'gloss' on the [VRA]—a gloss unapproved by Congress and unsanctioned by the courts." *Id.*; *see also id.* (DOJ "arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies"); *Hays v. Louisiana*, 936 F. Supp. 360, 369, 372 (W.D.

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[10] *See* Letter from William Moschella, Assistant Attorney General, to Hon. James Sensenbrenner (Apr. 12, 2006) at 3, *available at* http://www.scribd.com/doc/48673021/2006-0412-Ltr-to-House-of-Rep-re-Voting-Rights-Act-Procedures ("Moschella Letter") (detailing cases in which the Civil Rights Division was admonished by a court or forced to pay attorneys' fees to the opposing party).

La. 1996) (DOJ "impermissibly encouraged—nay, mandated—racial gerrymandering," and "the Legislature succumbed to [DOJ's] illegitimate preclearance demands"). DOJ paid more than $1.1 million to settle claims for attorneys' fees arising out of the *Hays* case. *See* Moschella Letter at 4.[11]

CONCLUSION

DOJ's current approach to Section 5 closely resembles its enforcement strategy during the 1990s, which was roundly rejected by the courts as indefensible and, indeed, unconstitutional. Because of DOJ's renewed recalcitrance, covered jurisdictions must incur millions of dollars of costs, countless hours of wasted time, and the inherent sovereign indignity of being forced to go "hat in hand" to federal officials just to implement their duly enacted laws—laws that are often nearly identical to facially valid legislation in non-covered jurisdictions.

The 2006 reauthorization of Section 5, which continues to rely on the badly outdated coverage formula, would have raised grave constitutional concerns even if Congress had preserved the preexisting substantive standard for preclearance and DOJ had taken a restrained approach to enforcement. Congress' failure to update the coverage formula, combined with its overruling of *Georgia* and *Bossier Parish II* and DOJ's aggressive enforcement strategy, cannot satisfy any plausible standard of constitutionality.

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[11] *See also Shaw v. Hunt*, 517 U.S. 899, 912-13 (1996) (holding that North Carolina redistricting plan violated the Equal Protection Clause, and that DOJ's insistence upon the maximum number of race-based districts was "unsupportable").

The petition for certiorari should accordingly be granted.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

◆

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

Whether the "congruency and proportionality" test governs the standard of review for the constitutionality of remedial legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE PETITION 6

I. THE CONGRUENCY AND PROPORTIONALITY STANDARD ENSURES THAT CONGRESS DOES NOT EXCEED ITS REMEDIAL POWERS CONFERRED BY THE FOURTEENTH AND FIFTEENTH AMENDMENTS 7

II. BOTH *KATZENBACH* AND *BOERNE* ESTABLISHED THE CONGRUENCY AND PROPORTIONALITY STANDARD OF REVIEW 9

A. *Katzenbach* Ruled That What Is "Appropriate" And "Reasonable" Remedial Legislation Depends Upon The Nature Of The Constitutional Violation To Be Remedied And The Means Adopted To Do So 9

B. *Katzenbach* Established A Congruency And Proportionality Standard Of Review Without Expressly So Stating 11

TABLE OF CONTENTS – Continued

Page

C. *Boerne* Adopted *Katzenbach*'s Fifteenth Amendment Analysis As The Model For Its Congruency And Proportionality Standard Of Review 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

City of Boerne v. Flores, 521 U.S. 507 (1997).....*passim*

Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1879)..........9, 10

Large v. Fremont County, Wyo., 709 F. Supp. 2d 1176 (D. Wyo. 2010)..........2

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)..........9, 10

Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 573 F. Supp. 2d 221 (D.D.C. 2008)..........4

Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009)..........2, 4, 5

Shelby County, Ala. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011)..........3, 4

Shelby County, Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012)..........2, 4, 11

State of S.C. v. Katzenbach, 383 U.S. 301 (1966)..........*passim*

United States v. Alamosa County, Colo., 306 F. Supp. 2d 1016 (D. Colo. 2004)..........2

United States v. Blaine County, Mont., 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005)..........2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV ....*passim*

U.S. Const. amend. XV...*passim*

STATUTES

Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006)..3

Section 4(b) of the Voting Rights Act (42 U.S.C. § 1973b(b))...3, 6

Section 5 of the Voting Rights Act (42 U.S.C. § 1973c)...*passim*

RULES

Supreme Court Rule 37.2...1

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

◆

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism and separation of powers is at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

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[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Especially relevant to this case, MSLF has challenged the power of Congress to enact the 1982 Amendment to the constitutionality of Section 2 of the Voting Rights Act ("VRA"), arguing Congress had exceeded its powers, in three different cases: *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); and *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). Recently, MSLF also filed an amicus curiae brief with this Court supporting a challenge to the constitutionality of the 2006 Reauthorization of Section 5 of the Voting Rights Act in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). MSLF also participated as an amicus curiae in the case below, *Shelby County, Ala. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012). MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in considering whether to grant the Petition.

◆

STATEMENT OF THE CASE

Shelby County filed suit in the district court for the District of Columbia arguing that Congress exceeded its Fourteenth and Fifteenth Amendment remedial powers by reauthorizing Sections 4(b) and 5 of the Voting Rights Act (codified as 42 U.S.C. § 1973b(b) and 42 U.S.C. § 1973c, respectively) in the Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006).[2] *Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) "The Attorney General . . . argue[d] . . . that 'when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard,'" not congruency and proportionality, as announced in *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). *Id.* at 448-49.

The district court rejected that argument: "*Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach* (*State of S.C. v. Katzenbach*, 383 U.S. 301 (1966)), and hence provides the appropriate standard of review to assess *Shelby County*'s facial constitutional challenge to Section 5 and Section

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[2] All references to "Section 5" are references to Section 5 of the Voting Rights Act.

4(b)." *Id.*[3] But the district court also erroneously held that Section 5 of the Voting Rights Act met the congruency and proportionality standard. *Id.* at 502-03. Shelby County appealed that holding to the D.C. Circuit.

The Attorney General renewed his argument on appeal: "The Attorney General insists that Congress may use 'any rational means' to enforce the Fifteenth Amendment (citing *Katzenbach*, 383 U.S. at 324)." *Shelby County*, 679 F.3d at 859.[4] The D.C. Circuit did not answer this question and settle the conflict of opinions from the district court. Though noting that the Supreme Court, in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), sent a "powerful signal that congruence and proportionality is the appropriate standard of review," *id.*, it did not decide the issue: "[I]n any event, if section 5 survives the arguably more rigorous 'congruent and proportionality' standard, it would also survive *Katzenbach's* rationality review." *Id.* So the D.C. Circuit analyzed the case under congruency and proportionality, without deciding that it was required to do so, and held that Section 5 was congruent and proportionate legislation and, therefore, constitutional under both the "congruency and proportionality" standard and the "rational means" standard. *Id.* at 873. Petitioner then filed its Petition.

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[3] The government made the same argument successfully to a three-judge panel of the district court in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 573 F. Supp. 2d 221, 235-36 (D.D.C. 2008), *rev'd on other grounds by Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). That court ruled that there are "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." That is, "notwithstanding the *City of Boerne* cases [under the Fourteenth Amendment], *Katzenbach*'s *rationality standard* remains fully applicable to constitutional challenges to legislation [under the Fifteenth Amendment] aimed at preventing racial discrimination in voting." *Nw. Austin*, 573 F. Supp. 2d at 235-36 (emphasis added).

[4] The Attorney General modified his argument at the D.C. Circuit in his principal brief. He conceded that "the terms 'enforce' and 'appropriate legislation' have the same meaning in the Fourteenth and Fifteenth Amendments." Brief of Appellee at 27, *Shelby County, Ala. v. Holder*, No. 11-626, Dkt. 1345212 (D.C. Cir. 2012). Then he argued that *Katzenbach*'s "rational basis review" applied to all legislation under the Fifteenth Amendment. *Id.* at 27. Finally, he tried to extend deferential review to the Fourteenth Amendment, insofar as it targeted race discrimination, by suggesting that *Boerne*'s congruence and proportionality test applied to Fourteenth Amendment legislation only when it targeted acts "outside the core prohibitions on race discrimination[.]" *Id.* at 27-28.

This background demonstrates the Attorney General's relentless determination to establish a deferential standard of review for remedial legislation under both the Fourteenth and Fifteenth Amendments that targets racial discrimination. The matter was not decided by the D.C. Circuit and it is very likely that the Attorney General will persist in arguing that *Katzenbach* and *Boerne* are inconsistent and that they establish very different standards of review for race discrimination remedies. Therefore, it is imperative that this Court provide a definitive decision on the proper standard of review.[5]

◆

REASON FOR GRANTING THE PETITION

This Court should grant the Petition not only for the reasons stated in the Petition, but also to firmly establish that there is only one standard of review for constitutional challenges to remedial enforcement legislation enacted pursuant to the Fourteenth and Fifteenth Amendments – congruency and proportionality. The Attorney General will likely continue to argue to the contrary. The proper standard of review for challenges to the constitutionality of remedial enforcement legislation pursuant to the Fourteenth and Fifteenth Amendments is an important national question that this Court has not expressly decided.

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[5] MSLF agrees with Petitioners that the outcome of the challenge to the coverage formula under Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), does not necessarily depend upon whether the "congruency and proportionality" standard of review is applied to Section 4(b). *See* Petition at 29-35.

I. THE CONGRUENCY AND PROPORTIONALITY STANDARD ENSURES THAT CONGRESS DOES NOT EXCEED ITS REMEDIAL POWERS CONFERRED BY THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

The Fourteenth and Fifteenth Amendments are remedial and merely prohibit certain State conduct. Thus, "Congress's power under § 5 extends only to 'enforcing the provisions of the Fourteenth Amendment[, which] [t]his Court has described . . . as 'remedial.'" *Boerne*, 521 U.S. at 519 (quoting *Katzenbach*, 383 U.S. at 326). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.* That is, "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id.* at 529.

Constitutional difficulty arises when Congress, in a purported attempt to prevent unconstitutional conduct, legislates regulating conduct that is facially *constitutional*, without requiring proof of discriminatory intent – so-called "prophylactic legislation" like Section 5. In such a case, the question arises as to whether Congress has enforced the constitutional prohibition set forth in the Amendment, or whether it has unconstitutionally substantively defined the Amendment. To address this, *Boerne* pronounced the congruency and proportionality standard of review:

> There must be a *congruence and proportionality* between the *injury to be prevented* or remedied and the *means adapted to that end*. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519-20 (all emphasis added). In other words:

> While *preventive* rules are *sometimes* appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The *appropriateness of remedial measures must be considered in light of the [degree of] evil presented.* Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (all emphasis added).

This standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments instead of enforcing them.

II. BOTH *KATZENBACH* AND *BOERNE* ESTABLISHED THE CONGRUENCY AND PROPORTIONALITY STANDARD OF REVIEW.

A. *Katzenbach* Ruled That What Is "Appropriate" And "Reasonable" Remedial Legislation Depends Upon The Nature Of The Constitutional Violation To Be Remedied And The Means Adopted To Do So.

In *Katzenbach*, this Court stated that "[a]s against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324 (emphasis added). *Katzenbach* then cited *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a case construing whether Congress had the substantive power, under the Necessary and Proper Clause of Article I, to establish a national bank:

> "Let the end be legitimate, let it be *within the scope of the constitution*, and all *means which are appropriate*, which are *adapted to that end*, which are *not prohibited*, but *consistent with the letter and spirit of the constitution*, are constitutional."

Id. (quoting *McCulloch*, 17 U.S. at 421) (all emphasis added).

Katzenbach also cited to *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 340, 344 (1879), which involved enforcement of the Thirteenth and Fourteenth Amendments, and which prohibited judges from intentionally and discriminatorily disqualifying jurors on account of their race and providing penalties for doing so.[6] *Katzenbach*, 383 U.S. at 327. In *Katzenbach*, this Court observed that "the Court [in *Ex Parte Virginia*] . . . echoed [*McCulloch*'s] language in describing *each* of the Civil War Amendments." *Id.* at 327 (emphasis added). *Katzenbach* then observed that, with respect to all Civil War Amendments:

> "Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, . . . if not prohibited, is brought within the domain of Congressional power."

Id. (quoting *Ex Parte Virginia*, 100 U.S. at 345-46). Thus, *Ex Parte Virginia*, like *McCulloch*, required that enforcement of any of the Civil War Amendments must be "appropriate," "adapted to carry out the objects" of the constitutional prohibition it enforces, and not "prohibited" by other constitutional considerations.

The consistent lesson of *Katzenbach*, *McCulloch*, and *Ex Parte Virginia*, is that what is "rational," "appropriate," legislation, "not otherwise prohibited," depends upon the fit between the constitutional harm targeted and the means adopted to remedy it.

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[6] This was a direct prohibition and penalty, not a *prophylactic* statute.

B. *Katzenbach* Established A Congruency And Proportionality Standard Of Review Without Expressly So Stating.

The Attorney General seized upon the phrase "Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination," *Katzenbach*, 383 U.S. at 324, to justify a "deferential standard" of review of Fifteenth Amendment enforcement legislation. *Shelby County*, 679 F.3d at 859 ("the attorney general insists that congress may use 'any rational means' to enforce the Fifteenth Amendment"). But the Attorney General ignored *Katzenbach*'s next sentence: "We turn now to a *more detailed description of the standards* which govern our review of the Act." *Katzenbach*, 383 U.S. at 324 (emphasis added).

This Court then detailed the egregious record of an unremitting, widespread pattern and practice of ingenious defiance of the Constitution, impervious to ordinary remedies, that it believed justified the extraordinary resort to Section 5 remedies. *Katzenbach* ruled that Section 5 was, *under those circumstances*, a "rational" response. *Id.* at 335 ("States covered by the Act resorted to the *extraordinary* stratagem of contriving new rules of various kinds for *the sole purpose* of perpetuating *voting discrimination* in the face of adverse federal court decrees.") (emphases added).

The "extraordinary stratagems" with which *Katzenbach* was confronted, and that were documented by Congress, consisted of widespread, persistent, intentionally discriminatory voting practices that prevented African-Americans from registering and voting, and which were not remediable by other, less drastic means. For example, more than half a dozen States "enacted tests ... specifically designed to prevent [African-Americans] from voting." *Katzenbach*, 383 U.S. at 310. "At the same time, alternate tests were prescribed ... to assure that white illiterates were not deprived of the franchise, [which] included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matters." *Id.* at 311. Worse still, these tests were discriminatorily administered; white voters were "given easy versions, ... received extensive help from voting officials, and [were] registered despite serious errors in their answers," while African-Americans were "required to pass difficult versions ... without any outside assistance and without the slightest error." *Id.* at 312.

Congress had originally addressed this pattern of intentional voting discrimination by passing laws to "facilitat[e] case-by-case litigation" and the Supreme Court responded by "striking down [unconstitutional] discriminatory voting tests and devices in case after case." *Id.* at 313. But widespread voting discrimination persisted. Thus, the Voting Rights Act of 1965, particularly Section 5, which targeted facially constitutional practices, was enacted to defeat these efforts to intentionally nullify the Fifteenth Amendment that had "infected the electoral process in parts of our country for nearly a century." *Id.* at 308.

Therefore, *Katzenbach* concluded that, "*under the compulsion of these unique circumstances*, Congress responded in a permissibly decisive manner [in enacting Section 5]." *Id.* (emphasis added). *Katzenbach* held that the evidence before Congress – persistent, pervasive, and intransigent State action intentionally discriminating against African-Americans to prevent them from registering and voting, impervious to less drastic remedies – was sufficient to justify the extraordinary prophylactic exercise of remedial powers contained in Section 5:

> Two points emerge vividly from the voluminous legislative history. . . . First: Congress felt itself confronted by an *insidious and pervasive evil* which had been perpetuated in certain parts of our country through the *unremitting and ingenious defiance of the Constitution*. Second: Congress had concluded that the *unsuccessful remedies which it had prescribed in the past* would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 309 (all emphases added). Far from employing the relaxed, deferential standard of review advocated by the Attorney General, *Katzenbach* recognized that Section 5 of the Voting Rights Act is "an *uncommon* *exercise of congressional power*" and that only "*exceptional* conditions can justify legislative measures *not otherwise appropriate*." *Katzenbach*, 383 U.S. at 334-35 (emphasis added).

Thus, *Katzenbach* held that the extraordinary and uncommon exercise of congressional power engaged in by Congress in enacting Section 5's prophylactic provisions was "appropriate" and "rational" only because it was adopted to remedy a widespread pattern of insidious, pervasive, unremitting, and ingenious defiance of the Constitution to deny African-Americans the right to register and to vote, which had defied previous lesser remedies.

In fact, consistent with the Supreme Court's subsequent decision in *Boerne*, the remedy approved by *Katzenbach* was congruent and proportionate to the nature and scope of the unremitting defiance of the Constitution presented to Congress and that it sought to remedy as set out in *Boerne*. *Boerne*, 521 U.S. at 519-20, 524-26. Therefore, *Katzenbach*, without expressly so stating, applied the congruency and proportionality standard that this Court would later articulate more specifically in *Boerne*.

C. *Boerne* Adopted *Katzenbach*'s Fifteenth Amendment Analysis As The Model For Its Congruency And Proportionality Standard Of Review.

In *Boerne*, this Court, quoting *Katzenbach*, ruled that "'the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects.'" *Id.* at 525 (quoting *Katzenbach*, 383 U.S. at 308). Indeed, *Boerne* noted that *Katzenbach* approved the severe and intrusive remedies of Section 5 only because they were necessary to "'banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 308). Referring to *Katzenbach*, this Court emphasized that "[t]he new *unprecedented remedies* were deemed necessary given the ineffectiveness of the existing voting rights law. . . ." *Id.* at 526 (emphasis added).

Far from announcing a new standard of review for exercising remedial, prophylactic enforcement powers under the Fourteenth Amendment, *Boerne* relied heavily on *Katzenbach* to demonstrate the constitutional predicate necessary for a congruent and proportionate prophylactic remedy under *all* the Civil War Amendments. In fact, *Boerne* cited *Katzenbach* no less than eleven times to support its congruence and proportionality standard of review. *Id.* at 518, 519, 524, 525, 526, 530, 533. In *Boerne*, this Court, echoing *Katzenbach*, ruled that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Boerne*, 521 U.S. at 519. In other words, only congruent and proportionate remedial legislation is "rational" and "appropriate."

Therefore, it was only because Congress was confronted with egregious, widespread, pervasive, unconstitutional scheming to prevent African-Americans from registering or voting in spite of lesser remedies that *Katzenbach* ruled that Section 5's exceptional, prophylactic remedy was "appropriate" legislation that adopted a "rational means" of addressing those extraordinary discriminatory practices. Thus, Section 5 was, when adopted in 1965, congruent and proportionate to the extreme constitutional violations targeted by Congress.

◆

CONCLUSION

For the reasons set out in the Petition, and for the reason elaborated here, this Court should grant the Petition.

Dated this 23rd day of August, 2012.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

In The Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, et al.,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF OF THE NATIONAL BLACK CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

- I. THE VRA'S PRECLEARANCE REGIME EXCEEDS CONGRESS'S AUTHORITY UNDER THE FIFTEENTH AMENDMENT 6
  - A. Section 5 Is No Longer an Appropriate Means of Enforcing the Fifteenth Amendment 7
    - 1. Only "Widespread Resistance to the Fifteenth Amendment," and Its Lingering Aftereffects, May Justify this "Uncommon Exercise of Power" 7
    - 2. The "Exceptional Conditions" Present in *Katzenbach* and Lingering Aftereffects Present in *City of Rome* No Longer Prevail 12
  - B. The Section 4(b) Coverage Formula Is No Longer "Rational in ... Practice and Theory" 17

TABLE OF CONTENTS – Continued

Page

II. THE COURT NEED NOT RESOLVE THE STANDARD OF REVIEW APPLICABLE TO SECTION 2 OF THE FIFTEENTH AMENDMENT 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Beer v. United States, 425 U.S. 130 (1976) 8

Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) 26

City of Boerne v. Flores, 521 U.S. 507 (1997) ... 6, 23, 26, 27

City of Rome v. United States, 446 U.S. 156 (1980) .... *passim*

Georgia v. Ashcroft, 539 U.S. 461 (2003) 6

Gonzales v. Raich, 545 U.S. 1 (2005) 23

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 5, 23, 26, 27

Miller v. Johnson, 515 U.S. 900 (1995) 8, 24

Nat'l Fed. Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) 23

Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F.Supp.2d 221 (D.D.C. 2008) 12

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) .... *passim*

Perry v. Perez, 132 S.Ct. 934 (2012) 17

Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000) 16, 25, 26

Shaw v. Reno, 509 U.S. 630 (1993) 25, 26

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .... *passim*

Page

Tennessee v. Lane, 541 U.S. 509 (2004) 4, 5, 16, 18, 22

United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110 (1978) 3

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XV .... *passim*

Pub. L. No. 89-110, 79 Stat. 437 (1965) 7

Pub. L. No. 109-246, 120 Stat. 577 (2006) 16

42 U.S.C. § 1973 ("Section 2") 2, 16, 17, 23

42 U.S.C. § 1973 ("Section 3") 17, 24

42 U.S.C. § 1973b ("Section 4") .... *passim*

42 U.S.C. § 1973c ("Section 5") .... *passim*

OTHER AUTHORITIES

H.R. Rep. No. 109-478 (2006) 4, 12, 14, 16

S. Rep. No. 109-295 (2006) 13, 14, 15

Evan Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 Stan. L. Rev. 1127 (2001) 27

Ellen Katz, Documenting Discrimination in Voting, Judicial Findings under Section 2 of the VRA Since 1982, 36 U. Mich. J. L. Reform 643 (2006) 16, 22

Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174 (2007) 5, 19

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008 14

INTEREST OF THE *AMICUS CURIAE*[1]

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African American-owned businesses, and advocates on behalf of the 2.1 million black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

The Chamber rejects the assumption underlying Congress's reauthorization of Section 5 of the Voting Rights Act that the exceptional circumstances which justified close federal oversight of the electoral practices of many states and localities in 1965 and 1975 persist today. They do not. The Chamber and its members and affiliates work hand-in-hand with government at all levels to foster an environment in which black-owned businesses can take root and thrive. The government officials who are partners in this effort are people of good faith, and do not deserve to be labeled and treated as presumptive discriminators. Federal control of elections, through the "preclearance" process, undermines these officials' authority and flexibility, to the ultimate detriment of their constituents – many of them minorities. Worse, Section 5 has been abused in some instances *to reinforce* stereotypes regarding minority voters' preferences and affiliations, preventing voters who do not embody these stereotypes from electing their candidates of choice.

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[1] Pursuant to Rule 37.2(a), all parties have received at least 10 days' notice of *amicus's* intent to file and have consented to the filing of this brief. In accordance with Rule 37.6, counsel to *amicus* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Chamber supports vigorous enforcement of those federal laws that prohibit actual voting discrimination, including the Fifteenth Amendment and Section 2 of the Voting Rights Act. By contrast, Section 5 is no longer necessary to combat widespread and persistent discrimination in voting and now, perversely, serves as an impediment to racial neutrality in voting and to the empowerment of state and local officials who represent minority constituencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Katzenbach upheld Section 5 of the Voting Rights Act of 1965 ("VRA") on the basis that "exceptional conditions can justify legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Though the Fifteenth Amendment had barred voting discrimination over 90 years before, "registration of voting-age whites ran roughly

50 percentage points or more ahead of Negro registration" in a group of states that flouted federal law through discriminatory administration of voting requirements. *Id.* at 313. As quickly as Congress acted to prohibit particular means of discrimination by facilitating case-by-case litigation, these jurisdictions contrived new ones, exhibiting an "unremitting and ingenious defiance of the Constitution." *Id.* at 309. In the face of this massive resistance, Congress exercised its Fifteenth Amendment power in an "inventive manner" by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims" through Section 5's temporary preclearance regime, which it confined to those specific regions where "immediate action seemed necessary." *Id.* at 327-28.

The exceptional conditions that prevailed in 1965 and justified "one of the most extraordinary remedial provisions in an Act noted for its broad remedies," *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting), no longer exist. In today's South, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Nw. Austin*"). Indeed, "the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Id.* at 203. The VRA's success over 45 years has been robust and durable; no longer does Section 5 remain "necessary to preserve the 'limited and fragile' achievements of the Act." *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

The logic of *Katzenbach* and *City of Rome* does not support Congress's latest 25-year reauthorization of the VRA's preclearance regime. Those cases upheld Section 5 as a temporary remedy for contemporaneous, widespread discrimination and its lingering aftereffects. *Katzenbach*, 383 U.S. at 334-35; *City of Rome*, 446 U.S. at 176. But as the record most recently compiled by Congress concludes, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." H.R. Rep. No. 109-478, at 12 (2006). The Court need not "check Congress's homework to make sure that it has identified sufficient constitutional violations," *Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting), but may instead rely on Congress's findings showing that "systematic resistance to the Fifteenth Amendment," *Katzenbach*, 383 U.S. at 328, is long past. For that reason, Section 5 is *ultra vires* and unconstitutional.

Section 4(b)'s coverage formula, based on 40-year-old data that fails to account for decades of progress, is also unconstitutional under *Katzenbach*. In 1965, Congress used "evidence of actual voting discrimination" to craft a coverage formula that the Court upheld as "rational in both practice and theory." *Id*. at 330. But in 2006, Congress rubberstamped continued application of an outdated formula in the face of "considerable evidence that it fails to account for current political conditions." *Nw. Austin*, 557 U.S. at 203. As to theory, the most one can say in that formula's defense is that leaving it in place did not "disrupt settled expectations." Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 208 (2007). And as to practice, the "correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout ... appears to be negative," as is the correlation between coverage and blacks' holding public office. Pet. App. 83a, 85a (Williams, J., dissenting). In other relevant respects, "the covered jurisdictions appear indistinguishable from their covered peers." *Id.* at 93a. That they are nonetheless singled out for opprobrium and federal supervision is simply irrational and, given the absence of "relevant constitutional violations," cannot be supported by the Fifteenth Amendment. *See Lane*, 541 U.S. at 564 (Scalia, J., dissenting).

To reach these conclusions, the Court need not definitively resolve the extent of Congress's Fifteenth Amendment enforcement power, *see Nw. Austin*, 557 U.S. at 204, but only apply *Katzenbach* and *City of Rome* according to their terms. Their application of the "necessary and proper" standard of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), though flexible, requires at least that Congress's ends be legitimate, its means be "plainly adapted" to those ends, and its actions comport with the letter and the spirit of the Constitution. Congress's decision to "enforce" Section 1 of the Fifteenth Amendment by invading states' power to regulate elections, in the face of evidence that any need for such a prophylactic remedy has long passed, falls far short, particularly when the means it has chosen violate the Constitution's letter by rendering race "the predominant factor in redistricting." *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003). Of course, the result is no different under the more rigorous "congruence and proportionality" standard of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

This case presents a question of great and recurring importance. Delaying review of the issues it raises will only exacerbate the iniquities of the preclearance regime. The Court should grant the petition for a writ of certiorari and overturn the decision of the court below.

ARGUMENT

I. THE VRA'S PRECLEARANCE REGIME EXCEEDS CONGRESS'S AUTHORITY UNDER THE FIFTEENTH AMENDMENT

The Fifteenth Amendment does not grant Congress plenary power to regulate states' electoral practices. As Congress itself recognized in the 1965 Act, suspending facially nondiscriminatory voting regulations and subjecting them to review for discriminatory purpose or effect was so novel and aggressive an exercise of its enforcement power that it applied the VRA's preclearance requirement only to those jurisdictions employing tests or devices to violate the Fifteenth Amendment's affirmative prohibition and did so only on an emergency basis, limited to five years. Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965). This Court upheld that enactment as justified by "widespread resistance" to the constitutional prohibition against racial discrimination in voting: "Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Katzenbach*, 383 U.S. at 337, 335. Because those unique circumstances are long in the past, and because voting discrimination is no longer concentrated in the areas singled out by its obsolete coverage formula, Section 5 no longer serves to enforce the right of citizens to vote free of race, color, or previous condition of servitude.

A. Section 5 Is No Longer an Appropriate Means of Enforcing the Fifteenth Amendment

1. Only "Widespread Resistance to the Fifteenth Amendment," and Its Lingering Aftereffects, May Justify this "Uncommon Exercise of Power"

The Court has always held that prophylactic exercises of Congress's Fifteenth Amendment enforcement power, and Section 5 in particular, "must be justified by current needs." *Nw. Austin*, 557 U.S. at 203. In particular, this means "widespread and persistent discrimination in voting," *Katzenbach*, 383 U.S. at 331, and its lingering effects, *City of Rome*, 446 U.S. at 176, 181-82.

"Section 5 was directed at preventing a particular set of invidious practices that had the effect of undoing or defeating the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (internal quotation marks and citation omitted). Through discriminatory administration of voting qualifications, and an endless procession of tests and devices, jurisdictions predominantly within the South managed to deprive black citizens of their right to vote for nearly a century following the Fifteenth Amendment's enactment.

Beginning in the 1950s, Congress "repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination." *Katzenbach*, 383 U.S. at 313. But that approach proved unequal to the Southern states' "unremitting and ingenious defiance of the Constitution." *Id.* at 309. Jurisdictions could "stay[ ] one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976). Each new law "remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that [it], too, was discriminatory." *Id.*

Section 5 was directed precisely at this evil:

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these

> lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

Katzenbach, 383 U.S. at 328.

And the *Katzenbach* Court upheld Section 5 on precisely that basis, reasoning that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. The provision, it recognized, was an "inventive," and potentially problematic, assertion of Congress's Fifteenth Amendment enforcement power, in three respects. First, it automatically suspends state and local procedures, prior to any judicial review. But this was, the Court recognized, "a legitimate response to the problem" of "systematic resistance to the Fifteenth Amendment" that was unchecked by case-by-case litigation. *Id.* at 328. Second, Section 5's remedies were not uniform throughout the nation, in keeping with the principle of equal sovereignty, but confined "to a small number of States and political subdivisions" identified by formula. *Id.* This, too, was permissible in principle: Congress could appropriately "cho[o]se to limit its attention to the geographic areas where immediate action seemed necessary." *Id.*

Finally, the Court considered, and approved, Section 5's substantive effect, of suspending the operation of voting regulations pending federal review for discriminatory purpose or effect. This "uncommon exercise of power," it explained, was justified only by the "exceptional circumstances" of the day:

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

Id. at 334-35.

City of Rome affirmed *Katzenbach* and upheld the 1975 reauthorization of Section 5. The Court rejected the argument that a ban on electoral changes that are discriminatory in effect necessarily exceeds Congress's Fifteenth Amendment enforcement power. Under that power, Congress may "attack[] the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect." *Id.* at 177. In this instance, Congress "could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177. Section 5 was therefore an appropriate means of enforcing the Fifteenth Amendment by "preventing States from undoing or defeating the rights recently won by Negroes." *Id.* at 178 (internal quotation marks omitted).

The Court also upheld Congress's seven-year reauthorization of Section 5, on the basis that it remained "necessary to preserve" what were then "the limited and fragile achievements of the Act." *Id.* at 182 (internal quotation marks omitted). Although recognizing that progress had been made, the Court deferred to Congress's finding, supported by electoral data, that the effects of a century of widespread discrimination persisted even a decade after the VRA's enactment:

> Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though "undeniable," had been "modest and spotty," extension of the Act was warranted.

Id. at 180-81. On that basis, "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination [was] both unsurprising and unassailable." *Id.* at 182.

2. The "Exceptional Conditions" Present in *Katzenbach* and Lingering Aftereffects Present in *City of Rome* No Longer Prevail

The same cannot be said of Congress's 2006 reauthorization of Section 5 in the face of evidence demonstrating that "[t]he extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring).

Indeed, Congress was forced to concede that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA" – i.e., the very types of tests, devices, and "ingenious defiance" that Section 5 was enacted to block – "have been eliminated." H.R. Rep. No. 109-478, at 12. "Blatantly discriminatory evasions of federal decrees are rare," *Nw. Austin*, 557 U.S. at 202, and the instances of allegedly discriminatory conduct identified by Congress are few in number and widely scattered. *See Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d 221, 252-54, 256-62 (D.D.C. 2008) (summarizing legislative record); Pet. App. 29a-30a (providing five examples, four involving towns or counties, over 11 years);

S. Rep. No. 109-295, at 13 (2006) (identifying a total of six published cases since 1982 where a court has found unconstitutional voting discrimination against minorities). They do not amount to anything near the kind of "widespread and persistent discrimination in voting" that *Katzenbach* held to justify Section 5. 383 U.S. at 328 (citing "a century of systematic resistance to the Fifteenth Amendment").

Reflecting this lasting progress, "the rate of DOJ objections to preclearance requests has decreased from over 4% in the first five years after the Voting Rights Act, to between 0.05% and 0.23% from 1983 to 2002," Persily, *supra*, at 199, to .05% from 1998 to 2002, Pet. App. 34a. These data on actual enforcement actions rebut any possible argument "that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting." *Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring).

The record is also clear that the kind of lingering aftereffects of a century of voting discrimination that the *City of Rome* Court held to support reauthorization of Section 5 are too in the past. "[T]he number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H.R. Rep. No. 109-478, at 12. In particular:

> [I]n seven of the covered States, African-Americans are registered at a rate higher than the national average. Moreover, in California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election ... was higher than that for whites. In Louisiana and South Carolina, African-American registration was 4 percentage points lower than that for whites – a rate identical to the national average.

S. Rep. No. 109-295, at 11. Even in the farthest outlier, Virginia, black voter registration in 2004 was only 7 percentage points lower than the national average, *id.*, and had nowhere near the "significant disparity" between black and white voting rates that persisted through the decade following enactment of the VRA.[2] *Id.*; *see City of Rome*, 446 U.S. at 180; *cf. Katzenbach*, 383 U.S. at 313 (in several Southern states, black registration was 50 percentage points behind white registration).

---

[2] Moreover, by 2008, black registration and voting rates in Virginia exceeded than those for whites. U.S. Census Bureau, Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008, at tbl. 4b, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.

Similar gains are evident in the number of black elected officials:

> As of 2000, more than 9,000 African-Americans have been elected to office, an increase from the 1,469 officials who held office in 1970. As of 2004, 43 African-Americans currently serve in the United States Congress, with 42 individuals serving in the United States House of Representatives, and one serving in the United States Senate. At the State level, more than 482 African-Americans serve in State legislatures, with thousands more African-Americans serving in county, township, and other locally elected positions.

S. Rep. No. 109-296, p. 18. No longer do the number of black elected officials in covered jurisdictions "f[a]ll far short of being representative" of the black populations of covered jurisdictions. *City of Rome*, 446 U.S. at 181.

In sum, Congress's own findings, supported by Census data, demonstrate that, far from "limited and fragile," *City of Rome*, 446 U.S. at 182, the achievements of the VRA have been robust and durable, particularly over the past three decades. There is no possibility that the jurisdictions subject to Section 5, unbridled from the preclearance requirement, could act to "perpetuate[ ] the effects of past discrimination," *id.* at 176, when those effects have long since dissipated.

Recognizing that the exceptional circumstances previously found to support Section 5 no longer prevail, Congress based its reauthorization on evidence of so-called "second-generation barriers" quite unlike the type of purposeful discrimination that motivated Section 5's enactment. *See* Pub. L. No. 109-246, § 2(b)(4), 120 Stat. 577, 577-78 (2006). Much of this evidence concerns "racially polarized voting" (i.e., "block voting"), not any kind of state action to deny the right to vote. *See* H.R. Rep. No. 109-478, pp. 34-35. It is irrelevant. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) (requiring "an identified history of relevant constitutional violations"). The remainder consists of Section 2 vote dilution litigation. Pet. App. 26a-29a, 36a-38a. This evidence, of course, does not even suggest the kind of purposeful discrimination that the Court held to support Section 5; it does not indicate any violation of the Fifteenth Amendment, *see Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334 n.3 (2000) ("*Bossier II*"); and, as described further below, it does not support Congress's application of Section 5 to particular jurisdictions. *See* Ellen Katz, Documenting Discrimination in Voting, Judicial Findings under Section 2 of the VRA Since 1982, 36 U. Mich. J. L. Reform 643, 677-78 (2006) (identifying all of 12 lawsuits finding intentional discrimination in covered jurisdictions, and 21 in non-covered jurisdictions, between 1982 and 2006).

Finally, absent the sort of widespread discrimination and "obstructionist tactics" that prevailed in 1965, traditional litigation, such as under Section 2, is certainly not "inadequate" to protect the right to vote. *See Katzenbach*, 383 U.S. at 328. In addition to the Section 3 "bail-in" mechanism, which authorizes judicial preclearance of voting regulations in jurisdictions found to have engaged in discrimination, "courts may always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by delay" in Section 2 litigation. Pet. App. 77a-78a (Williams, J., dissenting) (citing *Perry v. Perez*, 132 S.Ct. 934, 942 (2012)). No evidence even suggests that jurisdictions (subject to Section 5 or not) have acted to evade Section 2 judgments or otherwise stymie judicial enforcement of the right to vote. *See generally* Katz, *supra* (comprehensively surveying Section 2 litigation between 1982 and 2006).

* * *

Without question, "exceptional conditions can justify legislative measures not otherwise appropriate" under Congress's remedial authority. *Katzenbach*, 383 U.S. at 334. But for Congress to persist long past the date those conditions are remedied, as it has with its reauthorization of Section 5, is to seize for itself a new and improper power that the Constitution reserves to the states.

B. The Section 4(b) Coverage Formula Is No Longer "Rational in ... Practice and Theory"

Section 4(b)'s coverage formula comes nowhere near satisfying *Katzenbach's* bare-minimum requirement that preclearance coverage be "rational in both practice and theory." Based on 40-year-old data that "fails to account for current political conditions," *Nw.*

Austin, 557 U.S. at 203, it blatantly violates "the requirement that Congress may impose prophylactic § [2] legislation only upon those particular States in which there has been an identified history of relevant constitutional violations." *Lane*, 541 U.S. at 564 (citing cases).

Katzenbach recognized that Section 4(b) was unusual, and potentially problematic, because it confines its remedies (and those of Section 5) to a discrete set of states and political subdivisions. 383 U.S. at 328. It therefore required that Congress distinguish between covered and non-covered jurisdictions in a rational manner, so as "to justify the application to [covered] areas of Congress' express powers under the Fifteenth Amendment." *Id.* at 329. The Section 4(b) formula was rational in practice, because it applied two characteristics routinely shared by jurisdictions that had engaged in actual voting discrimination – "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.* at 330. And it was rational in theory, because those characteristics are logically probative of discrimination: "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id.* Overall, the coverage formula's rationality was "confirm[ed]" by the fact that it exempted no state or jurisdiction that had engaged in recent discrimination involving tests or devices – in other words, coverage could be justified on both an absolute and relative basis. *Id.* at 331.

By contrast, attempting to identify present-day vote discrimination by reference to 40-year-old data is not rational in either respect. It is certainly not rational in theory. "[T]he misuse of tests and devices ... was the evil for which the new remedies were specifically designed," *id.*, but voting practices in place at the time President Richard Nixon was reelected are not probative of any current discrimination. Ending "widespread and persistent discrimination in voting" was Congress's broader objective, *id.*, but obstinate refusal to consider more recent experience guarantees that, even if met, that objective will have no legal consequence whatsoever. "In identifying past evils, Congress obviously may avail itself of information from any probative source," *id.* at 330, but it may not bury its head in the sand. And the Court has never suggested that political expedience is sufficient to sustain an otherwise irrational exercise of enforcement power. *See* Persily, *supra*, at 208-09 (altering the coverage formula "would likely have led to the complete unraveling of the bill"); *id.* at 210 (expanding coverage to "large and politically powerful states ... would have sunk the bill"); *id.* at 211 ("Whatever its drawbacks, the current coverage formula had the virtue of already having been upheld by the Supreme Court," decades prior.).

Even more stunning is Section 4(b)'s complete failure in practice to identify current vote discrimination. Voter registration and turnout data, which were central to *Katzenbach*, actually undermine any argument for the formula's current rationality:

> There appears to be no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exists, it appears to be negative – condemnation under § 4(b) is a marker of higher black registration and turnout. Most of the worst offenders – states where in 2004 whites turned out or were registered in significantly higher proportion than African-Americans – are not covered. These include, for example, the three worst – Massachusetts, Washington, and Colorado. And in Alabama and Mississippi, often thought of as two of the worst offenders, African-Americans turned out in greater proportion than whites.

Pet. App. 83a (Williams, J., dissenting) (citing Census Bureau voting data).

Data on black elected officials also demonstrates the formula's completely arbitrary pattern of coverage:

> Covered jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones. Of the ten states with the highest proportion of black elected officials relative to population, eight

> are covered states, with the top five all being fully covered states (Virginia, Louisiana, South Carolina, Mississippi, and Alabama). Nor can the poor scores achieved by some uncovered states be chalked up to small black populations. Illinois, Missouri, Delaware and Michigan, where African-Americans comprise at least 10% of the [citizen voting-age population], all [score worse than] every one of the states fully covered by § 4(b).

Pet. App. 85a (Williams, J., dissenting) (citing Census Bureau and election data). Based on data from recent decades, "no one could credibly argue that the [black officeholder] numbers are proof of the coverage scheme's continued rationality." *Id.*

Taken as a whole, the same types of data on which the Court relied in *Katzenbach* and *City of Rome* do not show that vote discrimination is "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203. In fact, they show the opposite. Congress's choice, notwithstanding that fact, to continue to subject those jurisdictions to the preclearance requirement is therefore arbitrary, irrational, and in excess of its Fifteenth Amendment enforcement power.

Again, recognizing that Section 4(b) could not be upheld under the reasoning of *Katzenbach* and *City of Rome*, Congress attempted to bolster the record by pointing to "second-generation barriers" to voting, principally Section 2 litigation, which are not necessarily probative of Fifteenth Amendment violations.

But Section 2 cases since the last reauthorization of the VRA in 1982 do not support Section 4(b)'s continued application:

> The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions.... Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered.

Pet. App. 93a (Williams, J., dissenting). Moreover, of those very few cases that resulted in a finding of intentional discrimination – the only result conceivably relevant to the *Katzenbach* analysis – far more arose in non-covered jurisdictions (21 cases) than in covered jurisdictions (12 cases). Katz, *supra*, at 677.

* * *

Lacking evidence of any meaningful correlation between Section 4(b)'s coverage formula and actual Fifteenth Amendment violations, and unable or unwilling to devise a formula suited to current conditions, Congress attempted to backfill the legislative record with largely irrelevant evidence of Section 2 cases, and even those data undermine the case for the formula's rationality. But reliable evidence, accepted by Congress and long held relevant by this Court, confirms that the coverage formula "fails to account for current political conditions," *Nw. Austin*, 557 U.S. at 203, and fails to confine Section 5's remedy to "those particular states" that have engaged in vote discrimination, *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). It therefore exceeds Congress's authority.

II. THE COURT NEED NOT RESOLVE THE STANDARD OF REVIEW APPLICABLE TO SECTION 2 OF THE FIFTEENTH AMENDMENT

The foregoing analysis demonstrates that the Court need not resolve the difficult question of the proper standard of review for exercises of Congress's Fifteenth Amendment enforcement power. *See Nw. Austin*, 557 U.S. at 204 ("That question has been extensively briefed in this case, but we need not resolve it."). Whether under the more permissive *McCulloch* standard, which the Court claimed to apply in *Katzenbach* and *City of Rome*, or the potentially more rigorous "congruence and proportionality" standard of *Boerne*, the result is the same: the Fifteenth Amendment cannot support the VRA's arbitrary and unnecessary preclearance regime.

Though permissive, the *McCulloch* standard does not accord Congress plenary power. Instead, it requires that Congress, at the least, legislate with rationality and within the limitations of the Constitution. *McCulloch*, 17 U.S. (4 Wheat.) at 421; *accord Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring); *Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2647 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (concluding that insurance-coverage mandate was not plainly adapted, and therefore not "necessary," to effectuate insurance-market reforms). As should be apparent, the preclearance regime fails on both counts.

First, it is anything but "plainly adapted" to the unarguably legitimate end of eradicating both widespread intentional discrimination in voting and the perpetuation of the effects of such discrimination. *See City of Rome*, 446 U.S. at 178. As described above, such discrimination is now rare and scattered, calling into serious question the appropriateness of any preclearance process other than one limited to particular jurisdictions' violations of the Reconstruction Amendments – in other words, the VRA's Section 3(b). And the effects of previous discrimination have long since dissipated, as demonstrated by blacks' robust voting participation rates and substantial gains in elected offices. But even more damning is the preclearance regime's perfectly arbitrary coverage, which bears no relation to any meaningful indicia of vote discrimination, much less actual acts of discrimination. Based on decades-old data, the coverage formula is plainly adapted only to Congress's political expedience, and not to any facts on the ground that might justify Section 5's extraordinary burden.

Second, the preclearance regime stands in violation of both the letter and the spirit of the Constitution. Section 5, even prior to its 2006 amendment, was recognized to be in "tension with the Fourteenth Amendment" to the extent that it was used as a "command that States engage in presumptively unconstitutional race-based districting." *Miller*, 515 U.S. at

927. Congress's 2006 amendments, even while leaving untouched the Section 4(b) coverage formula, ignored this Court's warnings and amended Section 5 to mandate race-conscious districting. Under the new Section 5, covered jurisdictions must prove that any change will not "diminish[ ] the ability" of minorities "to elect their preferred candidates of choice," 42 U.S.C. §§ 1973c(b),(d), and is not premised on a "discriminatory purpose" of declining to adopt other changes that would have strengthened minority voting power, § 1973c(c).

As a result of these amendments, "[p]reclearance now has an exclusive focus – whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their preferred candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration – and thus less of the political isolation that concentration spawns." Pet. App. 75a (Williams, J., dissenting). Moreover, "[b]y inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have ... restored 'the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting.'" *Id.* at 76a (quoting *Bossier II*, 528 U.S. at 336). Section 5 now requires, in effect, that minority voters be lumped together with other persons with whom they "may have little in common ... but the color of their skin." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). This in itself perpetuates and enforces "impermissible stereotypes" and "bears an uncomfortable resemblance to political apartheid." *Id.* And mandating that covered jurisdictions discriminate among their own citizens on the basis of race surely "exacerbate[s] the substantial federalism costs that the preclearance procedure already exacts." *Bossier II*, 528 U.S. at 336.[3]

Finally, even the most cursory analysis shows that the preclearance regime, which cannot withstand *McCulloch's* standard, surely fails "congruence and proportionality" review. Under *Boerne*, a court must "identify with some precision the scope of the constitutional right at issue," *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001); "examine whether Congress identified a history and pattern" of constitutional violations, *id.* at 368; and then find "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. Here, a "history and pattern" of constitutional violations is lacking, and the Court has rejected looking decades into the past to take notice of conditions that fortunately no longer prevail, in support of current and substantial burdens on federalism. *Nw. Austin*, 557 U.S. at 203. Measured against current evidence of intentional discrimination in voting, the preclearance regime is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 509.[4] Nor is its haphazard coverage congruent to any recent pattern of actual voting discrimination.

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[3] Although these issues were not argued below as *independent* grounds for invalidation of Sections 4(b) and 5, they are unquestionably implicated by the question presented, both under the *McCulloch* standard (actions must "consist with the letter and spirit of the constitution") and the *Boerne* standard (actions must be congruent and proportional), and are therefore properly raised by the petition for a writ of certiorari. *See* Pet. App. at 77a (Williams, J., dissenting) (To evaluate Section 4(b)'s constitutionality, "one must necessarily first assess the severity of the consequences of coverage under § 4(b) (i.e., subject to § 5 as it exists today.)").

Of course, it is only logical that an enactment which is not "plainly adapted" to enforcement of a constitutional right, or outside the "letter and spirit of the constitution," also lacks "congruence and proportionality" with respect to violations of that right. *See generally* Evan Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 Stan. L. Rev. 1127, 1153-58 (2001). A statute that fails *McCulloch* therefore fails *Boerne*. To decide this case, the Court need not choose between the two.

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[4] And this infirmity is only exacerbated by the most recent amendments to Section 5.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

In the

Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General, et al.,

Respondents.

◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act exceeded its authority under the Fifteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION 3

ARGUMENT 5

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE SECTION 5 IMPOSES SIGNIFICANT BURDENS ON FEDERALISM AND STATE SOVEREIGNTY THAT MUST BE JUSTIFIED BY CONTEMPORARY DISCRIMINATION 5

A. Conditions in the South No Longer Justify Blanket Section 5 Coverage 6

B. Section 5's Coverage Formula Places Great Strain on States and Municipalities and Raises Significant Tenth Amendment Concerns 9

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE "EFFECTS TEST" OF SECTION 5 RAISES SERIOUS EQUAL PROTECTION CONCERNS THAT SHOULD BE ADDRESSED BY THIS COURT 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 14-15

Bartlett v. Strickland, 556 U.S. 1 (2009) 1-2

Bush v. Vera, 517 U.S. 952 (1996) 1

Carrington v. Rash, 380 U.S. 89 (1965) 11

Chisom v. Roemer, 501 U.S. 380 (1991) 1-2

City of Boerne v. Flores, 521 U.S. 507 (1997) 4, 16

City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980) 15

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 14-15, 17

City of Rome v. United States, 446 U.S. 156 (1980) 2

Hirabayashi v. United States, 320 U.S. 81 (1943) 14

Houston Lawyers' Ass'n v. Attorney Gen. of Tex., 501 U.S. 419 (1991) 2

Johnson v. De Grandy, 512 U.S. 997 (1994) 8

LaRoque v. Holder, 679 F.3d 905 (D.C. Cir. 2012) 1, 5, 14, 18

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TABLE OF AUTHORITIES—Continued

Page

Lopez v. Monterey County, 519 U.S. 9 (1996) 10-11

Lopez v. Monterey County, 525 U.S. 266 (1999) 10

Nix v. Holder, No. 12-81 (U.S. filed July 20, 2012) 1, 5, 14, 18

Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009) 1-5, 12-13, 16

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 15

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 14

Rodgers v. Lodge, 458 U.S. 613 (1982) 15

Shaw v. Hunt, 517 U.S. 899 (1996) 1, 17

Shaw v. Reno, 509 U.S. 630 (1993) 15

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 13

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 4, 7

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 15

Washington v. Davis, 426 U.S. 229 (1976) 15

United States Constitution

U.S. Const. amend. X 9, 12

U.S. Const. amend. XIV 4-5, 15-16

Page

amend. XIV, § 1 14

U.S. Const. amend. XV 4, 7, 13, 15-17

California Constitution

Cal. Const. art. II, § 4 11

United States Statutes

42 U.S.C. § 1973b(b) 11

§ 1973c(a) 16

United States Regulation

35 C.F.R. Part 51 (Appendix) 11

Rules of Court

Sup. Ct. R. 10(c) 4

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

35 Fed. Reg. 12354 (July 24, 1980) 11

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Page

H.R. Rep. No. 89-439,
reprinted in 1965 U.S.C.C.A.N. 2437 6

Hearings on H.R. 4249, Before Subcomm.
No. 5 of the House Comm. on the Judiciary,
91st Cong., 1st Sess. 92-93 (1969) 7

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of the Political Process (2d ed. 2002) 6

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Renewal of Section 5 of the Voting Rights Act,
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Rights Act at Work 1982-2005 (Feb. 2006),
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admin/voting_rights/documents/files/0023.pdf
(last visited Aug. 21, 2012) 9

TABLE OF AUTHORITIES—Continued

Page

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Thernstrom, Abigail, *Voting Rights and Wrongs: The Quest for Racially Fair Elections* (2009) 3

U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page, *Section 5 Covered Jurisdictions*, *available at* http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Aug. 21, 2012) 10

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Petitioner Shelby County.[1] For the reasons set forth in this brief, PLF, CEO, and Project 21 also support the Petitioner and the grant of certiorari in the companion case, *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom., Nix v. Holder* (U.S. July 20, 2012) (No. 12-81).

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in this Court in numerous cases relevant to this case. PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193; *Bartlett v. Strickland*, 556 U.S. 1; and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during the 2006 reauthorization of the Voting Rights Act.

Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, and *Bartlett v. Strickland*, 556 U.S. 1. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 5's intrusiveness into traditional state functions. Amici will show that the 2006 enactment extending the preclearance requirements of Section 5 of the Voting Rights Act should be reviewed by this Court.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

It is undeniable that America has come a long way since 1964 when "the majority of blacks remained unable to cast a ballot in almost every southern state." Abigail Thernstrom, *Voting Rights and Wrongs: The Quest for Racially Fair Elections* 4 (2009). It is equally undeniable that the strides America has made in eradicating the rampant discrimination in southern voting is, in part, attributable to the historic Voting Rights Act of 1965. *Nw. Austin*, 557 U.S. at 201. Today, for many Americans, it is difficult to imagine that forty-seven years ago, state and local governments deliberately disenfranchised blacks in the Deep South, and that the federal government enacted "the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction"—the Voting Rights Act of 1965 (Act)—to end it. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 745 (2006).

The Act, as originally enacted, allowed the Attorney General to deploy federal examiners to the South to take over state and local voter-registration functions. Adopted as an extreme temporary measure, Section 5 of the Act required every political subdivision targeted by the Act to obtain permission from the federal government before any change to election procedures, no matter how minor, could take place. Today, Section 5 continues to place only certain state and local governments under a form of federal receivership, often without rhyme or reason. However, the "insidious and pervasive evil" of racism in the Deep South, which once justified Section 5's uniquely burdensome remedy, has greatly diminished. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (describing the "insidious and pervasive evil" in parts of the South); *Nw. Austin*, 557 U.S. at 202 (noting that conditions have "unquestionably improved").

"Past success alone, however, is not adequate justification to retain [Section 5]." *Nw. Austin*, 557 U.S. at 202. In *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997), this Court explained that for Congress's remedial authority under the Fourteenth and Fifteenth Amendments there must be a congruence and proportionality between the injury to be prevented and the means adopted to that end. Section 5's "current burdens" must be adapted to its "current needs." *Nw. Austin*, 557 U.S. at 203. But Section 5, which was designed as a *temporary* measure to combat the extensive intentional voting discrimination pervasive throughout the Deep South, can no longer be seen as a congruent or proportional means to alleviate that now largely eradicated discrimination.

This Court should grant certiorari because the lower court "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Section 5 dramatically changes the way states and local jurisdictions relate to the federal government. It imposes real and substantial costs on "state sovereignty" thereby raising significant "federalism concerns." *Nw. Austin*, 557 U.S. at 203. Its coverage formula lacks rhyme or reason placing municipalities and states at odds with local laws and state constitutions. Further, Section 5's focus on the "effects" of a particular voting change, raises potential conflicts with the Fourteenth Amendment's guarantee of equal protection. Section 5, which is not set to expire until 2031, should be reviewed by this Court.

ARGUMENT

I

THE COURT SHOULD GRANT CERTIORARI BECAUSE SECTION 5 IMPOSES SIGNIFICANT BURDENS ON FEDERALISM AND STATE SOVEREIGNTY THAT MUST BE JUSTIFIED BY CONTEMPORARY DISCRIMINATION

There is no doubt that the Voting Rights Act, and Section 5 in particular, represented a dramatic upheaval to the relationship between the federal government and the states. *Nw. Austin*, 557 U.S. at 202-03. Amici urge this Court to grant certiorari here and in the companion case, *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed*, *sub nom.*, *Nix v. Holder* (U.S. July 20, 2012) (No. 12-81), because the circumstances that led this Court to validate the Act may no longer be present. The immense costs to federalism imposed by Section 5 should undergo rigorous review by this Court. Failure to review Section 5 would make these dramatic changes *de facto* permanent.

A. Conditions in the South No Longer Justify Blanket Section 5 Coverage

Today, political and social conditions are far different from those of forty years ago when certain state legislatures and county officials did whatever was necessary to ensure the continued disenfranchisement of black voters. Government action approaching such blatantly racist conduct could not even exist today given this country's growing shift to a color-blind society that just recently saw the election of our nation's first black President, the increasing intolerance for racism among most Americans, and the ever present scrutiny of news media. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 74 (2007) (describing decline of white racism).

Section 5 is a federally intrusive law that injects the federal government directly into the policy-making process at the state and local levels. In extending Section 5, Congress simply assumed that covered jurisdictions remain mired in a discriminatory past. The measures provided by Section 5 were necessary in 1965, "because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order." Samuel Issacharoff, *et al.*, *The Law of Democracy: Legal Structure of the Political Process* 546-47 (2d ed. 2002); *see* H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440-41 (describing repeated delays in the judicial process).

Originally, Section 5's coverage was limited mainly to jurisdictions of the Deep South. The experience federal officials gained from enforcing the early voting rights statutes prior to 1965 allowed the framers of the Act to precisely identify which states and counties continuously and deliberately committed Fifteenth Amendment violations. In the context of this "unremitting and ingenious defiance of the Constitution," it was possible to infer that any change in voting procedures that occurred in certain southern jurisdictions was for a discriminatory purpose. *See Katzenbach*, 383 U.S. at 309 (describing the "insidious and pervasive evil" in parts of the South). Those jurisdictions were all of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Hearings on H.R. 4249, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 92-93 (1969). Armed with this knowledge, the framers of the Act carefully crafted a triggering formula to make Section 5 apply to those states and jurisdictions. Thernstrom, *Section 5*, *supra*, at 46, 49.

As a result, Section 5 of the Act "remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws." Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 718 (2006).

Today, however, the unconscionable and deliberate vote suppression tactics that were implemented by governments in the Deep South in 1965, and which were the sole justification for the temporary intrusiveness of Section 5, have been eradicated. The Jim Crow inspired barriers to voting, such as intentionally discriminatory literacy tests and poll taxes, are no longer in use, and the numbers of minority officeholders are at historically high levels, as are levels of minority electoral participation. Persily, *supra*, 49 How. L.J. at 719. Almost thirty years ago, there were few black elected officials; the Democratic Party was the only political party in much of the South; voting was extremely polarized along racial lines; and the major voting issues of the day concerned multimember and at-large election structures that hindered black political representation. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148 (2007). Today there is robust two-party competition in the South; a significant number of black officials serve at all levels in states with large minority populations, with black elected state legislators making up 31 to 45% of all Democrat state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina; multiethnic jurisdictions abound, rather than the old biracial districts of the South thirty years ago; and there has been a decline in polarized racial voting. *Id.* at 149.

Section 5's intrusiveness deprives "local jurisdictions a customary range of political decisions—including districting, terms of office, and electoral systems—that were ordinarily subject to what Justice Souter would term the pulling and hauling of everyday politics." Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1711 (2004) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). In extending Section 5 without altering its coverage of states in the Deep South, Congress failed to address difficult policy issues created by the changed social landscape, and locked Section 5 in place until the year 2031 in the hopes those issues will go away. Pildes, *supra*, 117 Yale L.J.

Pocket Part at 148. Congress made no concessions to the post 1982 *City of Boerne* doctrines, nor to the social, political, and institutional changes since 1982. *Id.* at 153. It is true that Congress held hearings prior to the 2006 reauthorization, but strangely those hearings had no effect on the content of the law. *Id.* at 151.

B. Section 5's Coverage Formula Places Great Strain on States and Municipalities and Raises Significant Tenth Amendment Concerns

The 2006 reauthorization of Section 5 fails to reflect *any* of the changes that have occurred in the South or the other scattered jurisdictions that are subject to Section 5's coverage formula. Pildes, *supra*, 117 Yale L.J. Pocket Part at 149-50. As a result, Section 5's coverage has become even more overinclusive and underinclusive since its last reauthorization in 1982. Persily, *supra*, 49 How. L.J. at 723. Those jurisdictions that were selected for coverage based upon voting statistics from 1975 or earlier are no longer the worst or most notorious offenders of minority voting rights. *Id.* at 723-24 (citing The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (Feb. 2006)).[2] Thus, subjecting these jurisdictions to the continued coverage of Section 5 cannot logically be supported. *See id.* at 724 (discussing how renewal of Section 5's old coverage would leave the Act "incongruent" and "disproportionate"). For instance, Section 5 covers counties in New Hampshire and Michigan which have experienced few claims of discrimination, but not the counties which experienced recent well-known voting problems in Ohio and Florida. *Id.* at 723; *see also* U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page, *Section 5 Covered Jurisdictions.*[3]

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[2] *Available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf (last visited Aug. 21, 2012).

This outdated coverage scheme has real consequences to the jurisdictions that are forced to live under Section 5's heavy hand. In *Lopez v. Monterey County*, 519 U.S. 9, 12-14 (1996), changes to statewide California law led Monterey County, a covered county, to reorganize its court system. The resultant voting changes were thus a product of statewide law meant to make the judicial system more efficient and practical. Even though California is not a covered jurisdiction, Monterey County's actions—done in accordance with state law—led to a lawsuit alleging that Monterey County failed to seek preclearance. *Id.* at 15. When the case returned to this Court a second time, the Court held that noncovered states must preclear any statewide voting change where it will have an effect in a covered county. *Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). Thus, California cannot enact any statewide voting change without first getting prior consent from the federal government, even though California is *not covered* and has no history of discrimination that justifies Section 5 coverage.

The result of the *Monterey County* cases is all the more absurd when one considers the primary reason underlying Monterey County's inclusion as a covered jurisdiction. Monterey County became subject to

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[3] *Available at* http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Aug. 21, 2012).

Section 5 coverage in 1970 after the Census Bureau determined that fewer than 50% of the voting age residents in the county had voted in the November, 1968, presidential election. *See* 42 U.S.C. § 1973b(b); 35 C.F.R. Part 51 (Appendix); 35 Fed. Reg. 12354 (July 24, 1980); 36 Fed. Reg. 5809 (Mar. 27, 1971). In 1968, Monterey County had within its borders a large and active military base, Fort Ord Army Base, most of whose residents would not be expected to vote within Monterey County. *See Carrington v. Rash*, 380 U.S. 89, 91 n.3 (1965). Monterey County also housed the Naval Post-Graduate School. Moreover, Soledad State Prison was and is located in Monterey County. Under California law, the thousands of inmates could not vote. Cal. Const. art. II, § 4. The combined populations of the military outposts and the prison accounted for almost one-sixth of the County's total population. Appellee State's Brief on the Merits in *Lopez v. Monterey County*, 519 U.S. 9 (1996) (No. 95-1201), at 1-2. With a large proportion of this population not voting, the turnout for the 1968 elections fell below 50%, thus triggering the coverage provisions of the Voting Rights Act. Rampant discrimination is noticeably absent from the reasons Monterey County is included as a covered jurisdiction.

California, a sovereign state, should be able to determine the qualifications of its own officers and the structure of its own government, yet Section 5 prevents that. California should be able to impose state restrictions on subordinate political entities in furtherance of its decisions regarding the best qualifications and structure, but again, Section 5 prevents that. The federal government has never found that California's state election laws discriminate against minorities, even when those laws are directed toward particular counties. No county, a mere political subdivision of the state, should be able to declare itself exempt from these nondiscriminatory provisions. Given the fundamental principles of federalism, micromanagement by the federal government in the absence of discriminatory conduct by the state raises significant Tenth Amendment state sovereignty questions.

Prior to 2006 reauthorization, legal scholars warned that if Congress left Section 5 unchanged, it would become increasingly difficult to account for the differences between jurisdictions covered and not covered in terms of addressing new specific areas of systematic minority voting-rights problems. Pildes, *supra*, 49 How. L.J. at 754; *see* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 183 n.32 (2007) (describing testimony of Professors Richard Hasen, Samuel Issacharoff, Nathaniel Persily, and Richard Pildes in the Senate hearings prior to reauthorization). Congress's failure to change Section 5's coverage area thus raises serious questions about Section 5's constitutionality. The reauthorization of Section 5's invasive scheme on the same jurisdictions for another 25 years is an act of political abdication, not responsibility. Pildes, *supra*, 117 Yale L.J. Pocket Part at 148. As this Court noted, "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Nw. Austin*, 557 U.S. at 203.

The Section 5 burden placed on states and jurisdictions severely strains the bounds of federalism by requiring sovereign states to amend their own laws and constitutions to accommodate the federal government's view of the preferred method of conducting elections. While the intrusiveness of Section 5 is suspect as an initial matter, it is significantly more so when the states and jurisdictions subjected to its burdens cannot be reconciled by contemporary voting or discrimination statistics. Review is required to ensure that the constitutional guarantee of dual sovereignty is only infringed where necessary to enforce the Fifteenth Amendment.

II

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE "EFFECTS TEST" OF SECTION 5 RAISES SERIOUS EQUAL PROTECTION CONCERNS THAT SHOULD BE ADDRESSED BY THIS COURT

In the court below, Judge Williams recognized "the troubling tension" between Section 5's "encouragement of racial gerrymandering and the ideals embodied in the [Constitution]." *Shelby County, Alabama v. Holder*, 679 F.3d 848, 902-03 (D.C. Cir. 2012) (Williams, J., dissenting). This "tension" is well-known to this Court. "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5." *Nw. Austin*, 557 U.S. at 203 (citation omitted). Section 5 is currently used as sword by the "*minority group's majority*"—ignoring the "minority group's *own minority*"—to gerrymander voting districts according to racial stereotypes. *Shelby County*, 679 F.3d at 903 (Williams, J., dissenting). There is little doubt that the "principal use of . . . Section[] 5 . . . is to coerce state and local jurisdictions into drawing districts with an eye on race." Roger Clegg, *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-09 Cato Sup. Ct. Rev. 35, 40 (2009) (emphasis omitted).

Section 5's primary use to create race-based districts[4] brings it into direct conflict with the Equal Protection Clause. The Equal Protection Clause mandates that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Decisions of this Court have made clear that distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J. A. Croson* Co., 488 U.S. 469, 495 (1989). Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race," such a preferential purpose must be rejected as facially invalid. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (plurality opinion). Accordingly, all racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223 (citation omitted), and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

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[4] The abuse of the effects test—using it not to combat true disparate treatment, but to advance a more partisan agenda—is starkly presented in the companion case. *See* Petition for Writ of Certiorari, *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom., Nix v. Holder* (U.S. July 20, 2012) (No. 12-81), at 6-16. These facts help make *Nix* a good candidate for review by this Court.

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. Before resorting to a race-conscious measure, the government must "identify [the] discrimination [to be remedied], public or private, with some specificity," and must have a "strong basis in evidence" upon which to "conclu[de] that remedial action [is] necessary." *Croson*, 488 U.S. at 504, 500 (citation omitted).

This Court has long held that the Fourteenth Amendment bans only disparate treatment—*i.e.* intentional discrimination—on the basis of race, not disparate impact. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (citation omitted) ("official action will not be held unconstitutional solely because it results in a racially disproportionate impact."); *Washington v. Davis*, 426 U.S. 229, 238-46 (1976) (finding no violation solely based on racially disparate impact). Similarly, this Court has also held that the Fifteenth Amendment only reaches intentional discrimination. *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality op.) (citation omitted) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'").

While both the Fourteenth and Fifteenth Amendments only reach intentional discrimination on the basis of race, Section 5 specifically targets racially disparate impacts. Under Section 5, a voting change will be precleared only where it "does not have the purpose and will not have the *effect* of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a) (emphasis added). Indeed, this Court recognized that Section 5 "goes beyond the prohibition of the Fifteenth Amendment." *Nw. Austin*, 557 U.S. at 202. Because disparate impact alone cannot justify a government's race-based action, it is this effects test that has caused Section 5 to run up against the Fourteenth Amendment's guarantee of equal protection. Section 5 requires the federal government to engage in race-based decision making where a disparate impact is found, and without more, there is no compelling governmental interest to constitutionalize the governmental act.

Congress may use its enforcement authority under the Fourteenth Amendment to rectify a disparate impact only where there is a "congruence and proportionality" to the Fourteenth Amendment's guarantee of equal protection. *See City of Boerne*, 521 U.S. at 520. That is, there must be some showing that the ban on disparate impact is intimately tied to the goal of ending disparate treatment. There should be little doubt that this requirement also applies to the Fifteenth Amendment. "[T]he two were ratified within nineteen months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens' voting rights." Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol'y 561, 570 (2007).

The 2006 reauthorization of the Voting Rights Act, however, fails to tie the disparate impact enforcement mechanism—the effects test—to the Fifteenth Amendment's requirement that legislation be designed to remedy *intentional* discrimination. *Id.* at 568-69 (discussing the nine "Findings" of the House bill and the lack of any relationship to eliminating intentional discrimination). "In sum, the record reads like an after the fact justification rather than a serious effort to provide constitutional justification for the reauthorization." *Id.*

Prior to engaging in race-conscious action, equal protection law requires the government to identify intentional discrimination with specificity and precision; *Croson*, 488 U.S. at 504, and demands a strong basis in evidence that race-based remedial action is necessary. *Hunt*, 517 U.S. at 909. Absent a prior determination of specific necessity, supported by convincing evidence, the government will be unable to narrowly tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified. *Croson*, 488 U.S. at 510. Section 5, by requiring race-based action untethered to remedying intentional discrimination, fails to abide this Court's equal protection requirements. "It is a sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). Review by this Court is needed to ensure individuals' right to equal protection of the law does not go abridged for another 20 years.

◆

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, the Center for Equal Opportunity, and Project 21 respectfully request that this Court grant the writ of certiorari here and in the companion case *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *petition for cert. filed, sub nom., Nix v. Holder* (U.S. July 20, 2012) (No. 12-81).

DATED: August, 2012.

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JOINT
APPENDIX

Supreme Court, U.S.
FILED

DEC 26 2012

R…ORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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TABLE OF APPENDICES

Page

APPENDIX A — RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT 1a

U.S. DISTRICT COURT, DISTRICT OF COLUMBIA 11a

APPENDIX B — DECLARATION OF DR. PEYTON MCCRARY WITH ATTACHMENTS, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NOVEMBER 15, 2010 .....35a

APPENDIX C — DECLARATION OF ROBERT S. BERMAN WITH ATTACHMENTS, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NOVEMBER 15, 2010.....77a

APPENDIX D — DECLARATION OF DR. SARAH BRINEGAR, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, JANUARY 14, 2011 .....125a

Page

APPENDIX E — SUPPLEMENTAL DECLARATION OF ROBERT S. BERMAN, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, JANUARY 14, 2011 .... 130a

APPENDIX F — SECOND SUPPLEMENTAL DECLARATION OF ROBERT S. BERMAN, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FEBRUARY 16, 2011 .... 140a

APPENDIX G — SUPPLEMENTAL DECLARATION OF DR. PEYTON MCCRARY, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FEBRUARY 16, 2011 .... 144a

The following opinions and orders have been omitted in printing this Joint Appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED MAY 18, 2012 ... Pet. App. 1a

Page

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DECIDED SEPTEMBER 21, 2011 . . . Pet. App. 111a

APPENDIX C — MINUTE ORDER OF U.S. DISTRICT COURT, DISTRICT OF COLUMBIA, DATED FEBRUARY 4, 2011 . . . . Pet. App. 292a

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 16, 2010 . . . . Pet. App. 294a

APPENDIX A — RELEVANT DOCKET ENTRIES

United States Court of Appeals
for District of Columbia Circuit

Court of Appeals Docket #: 11-5256
Docketed: 09/27/2011
Shelby County, Alabama v. Eric Holder, et al
Appeal From: United States District Court for the
District of Columbia

Shelby County, Alabama,

Plaintiff - Appellant

v.

Eric H. Holder, Jr., In his official capacity as Attorney General of the United States,

Defendant - Appellee

Earl Cunningham; Harry Jones; Albert Jones; Ernest Montgomery; Anthony Vines; William Walker; Bobby Pierson; Willie Goldsmith, Sr.; Mary Paxton-Lee; Kenneth Dukes; Alabama State Conference of the National Association for the Advancement of Colored People, Inc.; Bobby Lee Harris,

Intervenors for Defendant - Appellees

Date Filed	Docket Text
09/27/2011	US CIVIL CASE docketed. [11-5256]
09/27/2011	NOTICE OF APPEAL filed [1331956] by Shelby County, Alabama seeking review

	of a decision by the U.S. District Court in 1:10-cv-00651-JDB. Assigned USCA Case Number [11-5256]
09/30/2011	CLERK'S ORDER filed [1332664] directing party to file initial submissions: APPELLANT docketing statement due 10/31/2011. APPELLANT certificate as to parties, etc. due 10/31/2011. APPELLANT statement of issues due 10/31/2011. APPELLANT underlying decision due 10/31/2011. APPELLANT deferred appendix statement due 10/31/2011. APPELLANT notice of appearance due 10/31/2011. APPELLANT transcript status report due 10/31/2011. APPELLANT procedural motions due 10/31/2011. APPELLANT dispositive motions due 11/14/2011; directing party to file initial submissions: APPELLEE certificate as to parties, etc. due 10/31/2011. APPELLEE entry of appearance due 10/31/2011. APPELLEE procedural motions due 10/31/2011. APPELLEE dispositive motions due 11/14/2011 [11-5256]
10/04/2011	DOCKETING STATEMENT FILED [1333349] by Shelby County, Alabama [Service Date: 10/04/2011] [11-5256] (Rein, Bertram)

10/04/2011	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1333350] by Shelby County, Alabama [Service Date: 10/04/2011] [11-5256] (Rein, Bertram)
10/04/2011	TRANSCRIPT STATUS REPORT [1333351] by Shelby County, Alabama [Service Date: 10/04/2011]. Status of Transcripts: Final - All transcripts needed for the appeal have been completed and received. [11-5256] (Rein, Bertram)
10/04/2011	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1333352] by Shelby County, Alabama [Service Date: 10/04/2011] Intent: AppxNotDeferred [11-5256] (Rein, Bertram)
10/04/2011	UNDERLYING DECISION IN CASE submitted [1333353] by Shelby County, Alabama [Service Date: 10/04/2011] [11-5256] (Rein, Bertram)
10/04/2011	STATEMENT OF ISSUES FILED [1333354] by Shelby County, Alabama [Service Date: 10/04/2011] [11-5256] (Rein, Bertram)
10/04/2011	UNOPPOSED MOTION filed [1333355] by Shelby County, Alabama to expedite case. [Service Date: 10/04/2011] Pages: 16-20. [11-5256] (Rein, Bertram)

10/06/2011	CLERK'S ORDER filed [1333740] considering appellant's unopposed motion to expedite case [1333355-2], The following briefing schedule will apply in this case: APPELLANT Brief due 11/01/2011. Appendix due 11/01/2011. APPELLEE Brief due 12/1/2011, Joint Brief for INTERVENOR-APPELLEE Brief due 12/08/2011, APPELLANT Reply Brief due 12/15/2011 [11-5256]
10/07/2011	CLERK'S ORDER filed [1334101] scheduling oral argument before Judges TATEL, GRIFFITH, WILLIAMS Thursday, 01/19/2012 AM [11-5256]
10/17/2011	NOTICE filed [1336041] by Mountain States Legal Foundation of intention to participate as amicus curiae. [Disclosure Listing: Not Attached] [Service Date: 10/17/2011] [11-5256] (Lechner, Steven)
10/18/2011	STATEMENT FILED [1336179] by Mountain States Legal Foundation with Disclosure Listing [Service Date: 10/18/2011] [11-5256] (Lechner, Steven)
10/21/2011	MODIFIED EVENT--NOTICE FILED [1337173] by New York Law School Racial Justice Project of consent to file amicus curiae brief. [Disclosure Listing: Not Applicable to this Party] [Service Date:

	10/21/2011] [11-5256]--[Edited 10/21/2011 by SMC] (Archer, Deborah)
10/25/2011	CONSENT MOTION filed [1337630] by Shelby County, Alabama to exceed word limits in briefs [Service Date: 10/25/2011] Pages: 1-10. [11-5256] (Rein, Bertram)
10/31/2011	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1338950] by Eric H. Holder, Jr. [Service Date: 10/31/2011] [11-5256] (Thome, Linda)
11/01/2011	PER CURIAM ORDER filed [1339162] granting appellant's motion to exceed word limits [1337630-2] Before Judges: Tatel, Griffith and Williams. [11-5256]
11/01/2011	APPELLANT BRIEF [1339375] filed by Shelby County, Alabama [Service Date: 11/01/2011] Length of Brief: 17,288 words. [11-5256] (Rein, Bertram)
11/01/2011	JOINT APPENDIX [1339376] filed [Volumes: 1] [Service Date: 11/01/2011] [11-5256] (Rein, Bertram)
11/08/2011	MODIFIED PARTY FILER--AMICUS FOR APPELLANT BRIEF [1340702] filed by State of Arizona and State of Georgia [Service Date: 11/08/2011] Length

	of Brief: Brief contains 6,909 words. [11-5256]--[Edited 11/14/2011 by LMC] (Forney, Michele)
11/08/2011	MODIFIED PARTY FILER--AMICUS FOR APPELLANT BRIEF [1340724] filed by State of Alabama [Service Date: 11/08/2011] Length of Brief: 5286 words. [11-5256]--[Edited 11/10/2011 by HTS] (Neiman, John)
11/08/2011	MODIFIED PARTY FILER--NOTICE filed [1340725] by State of Alabama of intention to participate as amicus curiae. [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/08/2011] [11-5256]--[Edited 11/10/2011 by HTS] (Neiman, John)
11/08/2011	AMICUS FOR APPELLANT FINAL BRIEF [1340728] filed by Mountain States Legal Foundation [Service Date: 11/08/2011] Length of Brief: 4,097 Words. [11-5256] (Lechner, Steven)
11/28/2011	CONSENT NOTICE filed [1344103] by Constitutional Accountability Center of intention to participate as amicus curiae. [Disclosure Listing: Attached] [Service Date: 11/28/2011] [11-5256] (Wydra, Elizabeth)

12/01/2011	APPELLEE BRIEF [1345212] filed by Eric H. Holder, Jr. [Service Date: 12/01/2011] Length of Brief: 17,500 Words. [11-5256] (Thome, Linda)
12/07/2011	UNOPPOSED AMICUS FOR APPELLEE BRIEF [1346200] filed by New York Law School Racial Justice Project [Service Date: 12/07/2011] Length of Brief: 6,718 words. [11-5256] (Archer, Deborah)
12/08/2011	MODIFIED PARTY FILER--CORRECTED AMICUS FOR APPELLEE BRIEF [1346623] filed by Constitutional Accountability Center [Service Date: 12/08/2011] Length of Brief: 6,745. [11-5256]--[Edited 12/12/2011 by LMC] (Wydra, Elizabeth)
12/08/2011	UNOPPOSED NOTICE filed [1346690] by New York State of intention to participate as amicus curiae. [Disclosure Listing: Not Applicable to this Party] [Service Date: 12/07/2011] [11-5256] (Underwood, Barbara)
12/09/2011	MODIFIED DOCKET TEXT--AMICUS FOR APPELLEE BRIEF [1346731] filed by State of California, State of Mississippi and State of New York [Service Date: 12/09/2011] Length of Brief: 5,300 words. [11-5256]--[Edited 12/21/2011 by KRM] (Underwood, Barbara)

12/09/2011	CORRECTED APPELLEE BRIEF [1346895] filed by Alabama State Conference of the National Association for the Advancement of Colored People, Inc., Earl Cunningham, Kenneth Dukes, Willie Goldsmith, Sr., Bobby Lee Harris, Albert Jones, Harry Jones, Ernest Montgomery, Mary Paxton-Lee, Bobby Pierson, Anthony Vines and William Walker [Service Date: 12/09/2011] Length of Brief: 17,403. [11-5256] (Adegbile, Debo)
12/15/2011	APPELLANT REPLY BRIEF [1347956] filed by Shelby County, Alabama [Service Date: 12/15/2011] Length of Brief: 8,732 words. [11-5256] (Rein, Bertram)
01/06/2012	PER CURIAM ORDER filed [1351401] allocating oral argument time as follows: Appellant -- 30 Minutes, Appellee -- 30 Minutes; directing party to file Form 72 notice of arguing attorney - due 01/12/2012. [11-5256]
01/09/2012	FORM 72 submitted by arguing attorney, Bert W. Rein, on behalf of Appellant Shelby County, Alabama. [11-5256] (Rein, Bertram)
01/11/2012	FORM 72 submitted by arguing attorney, Sarah E. Harrington, on behalf of Appellee Eric H. Holder, Jr.. [11-5256] (Harrington, Sarah)

01/19/2012	ORAL ARGUMENT HELD before Judges Tatel, Griffith and Williams. [11-5256]
02/13/2012	TRANSCRIPT [1358151] of oral argument [11-5256]
03/20/2012	LETTER FILED [1364728] by Eric H. Holder, Jr. pursuant to FRAP 28j advising of additional authorities [Service Date: 03/20/2012] [11-5256] (Thome, Linda)
03/22/2012	LETTER FILED [1365174] by Shelby County, Alabama pursuant to FRAP 28j advising of additional authorities [Service Date: 03/22/2012] [11-5256] (Rein, Bertram)
05/18/2012	PER CURIAM JUDGMENT filed [1374368] that the judgment of the District Court appealed from in this cause is hereby affirmed for the reasons in the accompanying opinion . Before Judges: Tatel, Griffith and Williams. [11-5256]
05/18/2012	OPINION filed [1374370] (Pages: 63) for the Court by Judge Tatel, DISSENTING OPINION (Pages: 37) by Judge Williams [11-5256]
05/18/2012	CLERK'S ORDER filed [1374371] withholding issuance of the mandate. [11-5256]

07/11/2012	MANDATE ISSUED to Clerk, District Court [11-5256]
07/25/2012	LETTER filed [1386544] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 07/24/2012 as No. 12-96. [11-5256]
11/13/2012	LETTER filed [1404555] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: The petition for writ of certiorari was granted on 11/13/2012. [11-5256]

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:10-cv-00651-JDB
SHELBY COUNTY, ALABAMA v. HOLDER

Date Filed	#	Docket Text
04/27/2010	1	COMPLAINT against ERIC H. HOLDER, JR (Filing fee $ 350, receipt number 4616029261) filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Civil Cover Sheet)(dr) (Entered: 04/27/2010)
04/27/2010		SUMMONS (2) Issued as to U.S. Attorney, and U.S. Attorney General (dr) (Entered: 04/27/2010)
04/27/2010	2	NOTICE OF RELATED CASE by SHELBY COUNTY, ALABAMA. Case related to Case No. 10-561. (dr) (Entered: 04/27/2010)
06/08/2010	5	MOTION for Summary Judgment by SHELBY COUNTY, ALABAMA (Attachments: # 1 Text of Proposed Order Proposed Order, # 2 Declaration Declaration of Frank C. Ellis, Jr., # 3 Exhibit Exhibit A, # 4 Exhibit Exhibit B)(Consovoy, William) (Entered: 06/08/2010)

06/11/2010	6	MOTION to Intervene by EARL CUNNINGHAM, HARRY JONES, ALBERT JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER (Attachments: # 1 Memorandum in Support, # 2 Proposed Responsive Pleading, # 3 Text of Proposed Order)(znmw,) (Entered: 06/14/2010)
06/22/2010	7	Memorandum in opposition to re 5 MOTION for Summary Judgment filed by ERIC H. HOLDER, JR. (Attachments: # 1 Exhibit Declaration of Richard Dellheim, # 2 Exhibit December 1, 2006 Order, # 3 Exhibit March 16, 2007 Order, # 4 Text of Proposed Order)(Dellheim, Richard) (Entered: 06/22/2010)
06/22/2010	9	MOTION to Intervene as Defendants by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., KENNETH DUKES, WILLIE GOLDSMITH, SR, MARY PAXTON-LEE, BOBBY PIERSON (Attachments: # 1 Memorandum in Support, # 2 Proposed Responsive Pleading, # 3 Text of Proposed Order) (znmw,) Modified spelling on 7/2/2010 (znmw,). (Entered: 06/23/2010)

06/24/2010	11	RESPONSE re 9 MOTION to Intervene, 6 MOTION to Intervene filed by ERIC H. HOLDER, JR. (Attachments: # 1 Exhibit Unpublished Orders)(Dellheim, Richard) (Entered: 06/24/2010)
06/25/2010	12	Memorandum in opposition to re 9 MOTION to Intervene, 6 MOTION to Intervene filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Text of Proposed Order, # 2 Text of Proposed Order)(Consovoy, William) (Entered: 06/25/2010)
06/28/2010	13	ANSWER to 1 Complaint by ERIC H. HOLDER, JR.(Dellheim, Richard) (Entered: 06/28/2010)
07/01/2010	14	REPLY to opposition to motion re 5 MOTION for Summary Judgment filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Text of Proposed Order)(Consovoy, William) (Entered: 07/01/2010)
07/01/2010	18	MOTION to Intervene as a Defendant by BOBBY LEE HARRIS (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Text of Proposed Order)(dr) (Entered: 07/06/2010)

07/02/2010	15	*APPLICANTS FOR INTERVENTION'S PROPOSED* ANSWER to 1 Complaint by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., KENNETH DUKES, WILLIE GOLDSMITH, SR, MARY PAXTON-LEE, BOBBY PIERSON.(Spitzer, Arthur) Modified spelling on 7/2/2010 (znmw,). (Entered: 07/02/2010)
07/02/2010	16	REPLY to opposition to motion re 9 MOTION to Intervene filed by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., KENNETH DUKES, WILLIE GOLDSMITH, SR, MARY PAXTON-LEE, BOBBY PIERSON. (Spitzer, Arthur) Modified spelling on 7/2/2010 (znmw,). (Entered: 07/02/2010)
07/02/2010	17	REPLY to opposition to motion re 6 MOTION to Intervene filed by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER. (Clarke, Kristen) (Entered: 07/02/2010)

07/13/2010	20	Memorandum in opposition to re 18 MOTION to Intervene filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Text of Proposed Order)(Consovoy, William) (Entered: 07/13/2010)
07/13/2010	21	RESPONSE re 18 MOTION to Intervene filed by ERIC H. HOLDER, JR. (Attachments: # 1 Exhibit Unpublished orders)(Dellheim, Richard) (Entered: 07/13/2010)
07/21/2010	23	REPLY to opposition to motion re 18 MOTION to Intervene filed by BOBBY LEE HARRIS. (znmw,) (Entered: 07/21/2010)
07/28/2010	26	*Applicants for Intervention's [PROPOSED]* ANSWER to 1 Complaint by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER.(Clarke, Kristen) (Entered: 07/28/2010)
08/25/2010	29	ORDER granting 6 , 9 , 18 the pending motions to intervene. See text of Order for details. Signed by Judge John D. Bates on 8/25/2010. (lcjdbl) (Entered: 08/25/2010)

08/25/2010	30	RESPONSE re 1 Complaint filed by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER. (dr) (Entered: 08/26/2010)
08/25/2010	31	RESPONSE re 1 Complaint filed by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., KENNETH DUKES, WILLIE GOLDSMITH, SR, MARY PAXTON-LEE, BOBBY PIERSON. (dr) (Entered: 08/26/2010)
08/25/2010	32	ANSWER to 1 Complaint by BOBBY LEE HARRIS.(dr) (Entered: 08/26/2010)
09/01/2010		MINUTE ORDER: On the Court's own motion, and upon consideration of the entire record herein, it is hereby ORDERED that the Court will hold a status conference in this action on September 10, 2010, at 2:00 p.m. in Courtroom 8. Signed by Judge John D. Bates on 9/1/2010. (lcjdb1) (Entered: 09/01/2010)
09/03/2010	33	RESPONSE TO ORDER OF THE COURT re 29 Order on Motion to Intervene,,, Set/Reset Deadlines,

		Order, Set Hearings,, filed by ERIC H. HOLDER, JR. (McFarland, Ernest) (Entered: 09/03/2010)
09/03/2010	34	RESPONSE TO ORDER OF THE COURT re 29 Order on Motion to Intervene,,, Set/Reset Deadlines filed by ERIC H. HOLDER, JR. (McFarland, Ernest) (Entered: 09/03/2010)
09/08/2010	36	Memorandum in opposition to re 5 MOTION for Summary Judgment filed by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., EARL CUNNINGHAM, KENNETH DUKES, WILLIE GOLDSMITH, SR, BOBBY LEE HARRIS, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, MARY PAXTON-LEE, BOBBY PIERSON, ANTHONY VINES, WILLIAM WALKER. (Attachments: # 1 Declaration, # 2 Text of Proposed Order)(Clarke, Kristen) (Entered: 09/08/2010)
09/10/2010	40	REPLY to opposition to motion re 5 MOTION for Summary Judgment filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Text of Proposed Order)(Consovoy, William) (Entered: 09/10/2010)

09/10/2010		Minute Entry: Status Conference held on 9/10/2010 before Judge John D. Bates. (Court Reporter Bryan Wayne) (tb,) (Entered: 09/13/2010)
09/16/2010	41	MEMORANDUM OPINION & ORDER denying 7 defendant and 36 defendant-intervenors' request for discovery. See text of Memorandum Opinion & Order for details. Signed by Judge John D. Bates on 9/16/2010. (lcjdb1) (Entered: 09/16/2010)
10/27/2010	45	TRANSCRIPT OF PROCEEDINGS before Judge John D. Bates held on 9/10/10; Page Numbers: 1 - 75. Date of Issuance:10/27/10. Court Reporter/Transcriber Bryan A. Wayne, Telephone number 202-354-3186, Court Reporter Email Address : bryanawayne@verizon.net.<P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.<P>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with

		the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at ww.dcd.uscourts.gov.<P></P> Redaction Request due 11/17/2010. Redacted Transcript Deadline set for 11/29/2010. Release of Transcript Restriction set for 1/25/2011. (Wayne, Bryan) (Entered: 10/27/2010)
10/29/2010	46	ORDER setting deadlines and motions hearing. See text of Order for details. Signed by Judge John D. Bates on 10/29/10. (lcjdb1) (Entered: 10/29/2010)
10/29/2010		Set/Reset Deadlines/Hearings: The government's consolidated memorandum in opposition to plaintiff's motion for summary judgment and in support of its cross-motion for summary judgment is due by 11/15/2010. Defendant-intervenors' memoranda in opposition to plaintiff's motion for summary judgment and in support of their cross-motions for summary judgment are also due by 11/15/2010. Plaintiff's consolidated reply memorandum in support of its motion for

		summary judgment and in opposition to defendant's and defendant-intervenors' cross-motions for summary judgment is due by 12/13/2010. The government's reply memorandum in support of its cross-motion for summary judgment is due by 1/14/2011. The defendant-intervenors' reply memoranda in support of their cross-motions for summary judgmment are also due by 1/14/2011. A motions hearing is set for 2/2/2011 at 09:30 AM in Courtroom 8 before Judge John D. Bates. (lcjdb1) (Entered: 10/29/2010)
11/15/2010	47	Cross MOTION for Summary Judgment by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., KENNETH DUKES, WILLIE GOLDSMITH, SR, MARY PAXTON-LEE, BOBBY PIERSON (Attachments: # 1 Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, # 2 Text of Proposed Order)(McDonald, Laughlin) (Entered: 11/15/2010)
11/15/2010	48	RESPONSE *to Plaintiff's Statement of Facts* filed by ALABAMA

		STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., EARL CUNNINGHAM, KENNETH DUKES, WILLIE GOLDSMITH, SR, BOBBY LEE HARRIS, ERIC H. HOLDER, JR, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, MARY PAXTON-LEE, BOBBY PIERSON, ANTHONY VINES, WILLIAM WALKER. (Posner, Mark) (Entered: 11/15/2010)
11/15/2010	53	Memorandum in opposition to re 5 MOTION for Summary Judgment filed by ERIC H. HOLDER, JR. (Attachments: # 1 Statement of Facts, # 2 Exhibit McCrary Declaration, # 3 Exhibit Berman Declaration, # 4 Text of Proposed Order)(Dellheim, Richard) (Entered: 11/15/2010)
11/15/2010	54	MOTION for Summary Judgment by ERIC H. HOLDER, JR (Attachments: # 1 Memorandum in Support, # 2 Statement of Facts, # 3 Exhibit McCrary Declaration, # 4 Exhibit Berman Declaration, # 5 Text of Proposed Order)(Dellheim, Richard) (Entered: 11/15/2010)

11/15/2010	55	MOTION for Summary Judgment by BOBBY LEE HARRIS (Attachments: # 1 Proposed Order, # 2 Memorandum in Support)(Posner, Mark) (Entered: 11/15/2010)
11/15/2010	56	Memorandum in opposition to re 5 MOTION for Summary Judgment filed by BOBBY LEE HARRIS. (Posner, Mark) (Entered: 11/15/2010)
11/15/2010	57	LARGE ADDITIONAL ATTACHMENT(S) *Joint Statement of Material Facts As to Which There is No Genuine Issue* by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., EARL CUNNINGHAM, KENNETH DUKES, WILLIE GOLDSMITH, SR, BOBBY LEE HARRIS, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, MARY PAXTON-LEE, BOBBY PIERSON, ANTHONY VINES, WILLIAM WALKER 47 Cross MOTION for Summary Judgment filed by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., MARY PAXTON-LEE, KENNETH DUKES,

		WILLIE GOLDSMITH, SR., BOBBY PIERSON, 55 MOTION for Summary Judgment filed by BOBBY LEE HARRIS. (Posner, Mark) (Entered: 11/15/2010)
11/15/2010	58	Cross MOTION for Summary Judgment by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER (Attachments: # 1 Memorandum in Support, # 2 Declaration Declaration of Ernest Montgomery, # 3 Text of Proposed Order)(Clarke, Kristen) Modified on 1/18/2011 to enchance docket text (jf,). (Entered: 11/15/2010)
11/15/2010	59	Memorandum in opposition to re 5 MOTION for Summary Judgment filed by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER. (Attachments: # 1 Declaration Declaration of Ernest Montgomery, # 2 Text of Proposed Order)(Clarke, Kristen) (Entered: 11/16/2010)
11/17/2010	61	NOTICE *of Lodging of Legislative History Documents* by ALABAMA STATE CONFERENCE OF THE

		NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., EARL CUNNINGHAM, KENNETH DUKES, WILLIE GOLDSMITH, SR, BOBBY LEE HARRIS, ERIC H. HOLDER, JR, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, MARY PAXTON-LEE, BOBBY PIERSON, ANTHONY VINES, WILLIAM WALKER re 54 MOTION for Summary Judgment, 47 Cross MOTION for Summary Judgment, 58 Cross MOTION for Summary Judgment *and Opposition to Plaintiff's Summary Judgment Motion*, 55 MOTION for Summary Judgment (Posner, Mark) (Entered: 11/17/2010)
11/22/2010	63	MOTION for Leave to File Amicus by CONSTITUTIONAL ACCOUNTABILITY CENTER (Attachments: # 1 Proposed Amicus Brief, # 2 Text of Proposed Order)(rdj) (Entered: 11/22/2010)
11/22/2010		MINUTE ORDER: Upon consideration of 63 the unopposed motion of the Constitutional Accountability Center for leave to file an amicus curiae brief in support of defendant and defendant-intervenors, and the entire record

		herein, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that the brief of the Constitutional Accountability Center as amicus curiae in support of defendants and defendant-intervenors is hereby accepted and deemed filed as of this date. SO ORDERED. Signed by Judge John D. Bates on 11/22/10. (lcjdb1) (Entered: 11/22/2010)
11/22/2010	64	AMICUS BRIEF by CONSTITUTIONAL ACCOUNTABILITY CENTER. (jf,) (Entered: 11/23/2010)
12/13/2010	65	REPLY to opposition to motion re 5 MOTION for Summary Judgment filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Statement of Facts, # 2 Text of Proposed Order)(Consovoy, William) (Entered: 12/13/2010)
12/13/2010	66	Memorandum in opposition to re 54 MOTION for Summary Judgment, 47 Cross MOTION for Summary Judgment, 58 Cross MOTION for Summary Judgment *and Opposition to Plaintiff's Summary Judgment Motion*, 55 MOTION for Summary Judgment filed by SHELBY COUNTY, ALABAMA. (Attachments: # 1 Statement of Facts,

		# 2 Text of Proposed Order)(Consovoy, William) (Entered: 12/13/2010)
01/14/2011	67	REPLY to opposition to motion re 54 MOTION for Summary Judgment filed by ERIC H. HOLDER, JR. (Attachments: # 1 Declaration Brinegar Declaration, # 2 Declaration Berman Supplemental Declaration)(Weinstein-Tull, Justin) (Entered: 01/14/2011)
01/14/2011	69	REPLY to opposition to motion re 55 MOTION for Summary Judgment filed by BOBBY LEE HARRIS. (Posner, Mark) (Entered: 01/14/2011)
01/19/2011	70	REPLY to opposition to motion re 47 Cross MOTION for Summary Judgment, 58 Cross MOTION for Summary Judgment *CONSOLIDATED REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF CUNNINGHAM DEFENDANT-INTERVENORS AND PIERSON DEFENDANT-INTERVENORS IN SUPPORT OF CROSS-MOTION FOR SUMMARYJUDGMENT* filed by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER. (Clarke, Kristen) (Entered: 01/19/2011)

01/24/2011	MINUTE ORDER: On the Court's own motion, and upon consideration of the entire record herein, it is hereby ORDERED as follows. At the motions hearing on February 2, 2011 at 9:30 AM, the Court will hear argument only from plaintiff, defendant, and the three defendant-intervenors in this case. The Court will not hear argument from any amici who have filed briefs with the Court. The Court will hear first from plaintiff, then from defendant, then from defendant-intervenors, and then plaintiff's rebuttal, if any. Plaintiff shall have a total of one (1) hour to present its initial argument, and fifteen (15) minutes for rebuttal. Defendant shall have a total of forty-five (45) minutes, and the three defendant-intervenors shall have a total of thirty (30) minutes, which they may apportion among themselves as they see fit. SO ORDERED. Signed by Judge John D. Bates on 1/24/11. (lcjdb1) (Entered: 01/24/2011)
02/02/2011	Minute Entry: Motion Hearing held on 2/2/2011 re 47 Cross MOTION for Summary Judgment filed by ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., MARY

	PAXTON-LEE, KENNETH DUKES, WILLIE GOLDSMITH, SR., BOBBY PIERSON, 58 Cross MOTION for Summary Judgment filed by ERNEST MONTGOMERY, HARRY JONES, ALBERT JONES, ANTHONY VINES, EARL CUNNINGHAM, WILLIAM WALKER, 54 MOTION for Summary Judgment filed by ERIC H. HOLDER, JR., 55 MOTION for Summary Judgment filed by BOBBY LEE HARRIS, 5 MOTION for Summary Judgment filed by SHELBY COUNTY, ALABAMA before Judge John D. Bates: Motions heard and taken under advisement. (Court Reporter Bryan Wayne.) (tb,) (Entered: 02/02/2011)
02/04/2011	MINUTE ORDER: On the Court's own motion, and upon consideration of the arguments of counsel at the February 2, 2011 hearing and the entire record herein, it is hereby ORDERED that the parties shall submit additional briefing by not later than February 16, 2011, which shall be limited to the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it "rational in both practice and theory," South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966), for Congress to

	preserve the existing coverage formula in Section 4(b) of the Act? In answering this question, the parties are strongly encouraged to point to specific instances in the legislative record that support their position. The parties are also encouraged to address each aspect of the question separately -- that is, to explain both why Section 4(b) is or is not rational "in practice" and why Section 4(b) is or is not rational "in theory." Plaintiff's memorandum addressing this question shall not exceed fifteen (15) pages in length, and defendant's memorandum addressing this question also shall not exceed fifteen (15) pages in length. Each defendant-intervenor may file its own memorandum addressing this question, which shall not exceed seven (7) pages in length; defendant-intervenors are, however, strongly encouraged to file a joint memorandum, not to exceed fifteen (15) pages in length, in order to avoid unnecessary duplication. SO ORDERED. Signed by Judge John D. Bates on 2/4/11.(lcjdb1) (Entered: 02/04/2011)
02/04/2011	Set/Reset Deadlines: The additional briefing required by the Court's 2/4/2011 Minute Order is due by 2/16/2011. (lcjdb1) (Entered: 02/04/2011)

02/16/2011	72	MEMORANDUM re Order,,,,,, by BOBBY LEE HARRIS. (Posner, Mark) (Entered: 02/16/2011)
02/16/2011	73	SUPPLEMENTAL MEMORANDUM to re 47 Cross MOTION for Summary Judgment, 58 Cross MOTION for Summary Judgment *CONSOLIDATED SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES OF CUNNINGHAM AND PIERSON DEFENDANT-INTERVENORS IN SUPPORT OF CROSS MOTIONS FOR SUMMARY JUDGMENT* filed by EARL CUNNINGHAM, ALBERT JONES, HARRY JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER. (Clarke, Kristen) (Entered: 02/16/2011)
02/16/2011	74	SUPPLEMENTAL MEMORANDUM re 65 REPLY to opposition to motion, and 66 Memorandum in opposition filed by SHELBY COUNTY, ALABAMA. (Consovoy, William) Modified on 2/17/2011 to create relationship and add link (dr). (Entered: 02/16/2011)
02/16/2011	75	SUPPLEMENTAL MEMORANDUM re Order by ERIC H. HOLDER, JR. (Dellheim, Richard) Modified on 2/17/2011 to edit text (dr). (Entered: 02/16/2011)

02/17/2011	76	TRANSCRIPT OF PROCEEDINGS before Judge John D. Bates held on 2/2/11; Page Numbers: 1 - 144. Date of Issuance:2/17/11. Court Reporter/ Transcriber Bryan A. Wayne, Telephone number 202-354-3186, Court Reporter Email Address : bryanawayne@verizon.net.<P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.<P>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at ww.dcd.uscourts.gov.<P></P> Redaction Request due 3/10/2011. Redacted Transcript Deadline set for 3/20/2011. Release of Transcript Restriction set for 5/18/2011. (Wayne, Bryan) (Entered: 02/17/2011)

06/15/2011	77	NOTICE *of Supplemental Information* by ERIC H. HOLDER, JR re 54 MOTION for Summary Judgment, 53 Memorandum in Opposition (Attachments: # 1 Exhibit)(McFarland, Ernest) (Entered: 06/15/2011)
06/16/2011	78	RESPONSE re 77 Notice (Other) filed by SHELBY COUNTY, ALABAMA. (Consovoy, William) (Entered: 06/16/2011)
07/15/2011	79	NOTICE *of Filing* by SHELBY COUNTY, ALABAMA (Attachments: # 1 Exhibit Letter)(Consovoy, William) (Entered: 07/15/2011)
09/09/2011	81	NOTICE *of Supplemental Information* by ERIC H. HOLDER, JR re 67 Reply to opposition to Motion, 54 MOTION for Summary Judgment, 53 Memorandum in Opposition, 77 Notice (Other) (Attachments: # 1 Exhibit Entered and Proposed Bailout Consent Decrees)(Dellheim, Richard) (Entered: 09/09/2011)
09/14/2011	82	NOTICE OF RELATED CASE by ERIC H. HOLDER, JR. Case related to Case No. 1:11-cv-01559-ABJ. (Dellheim, Richard) (Entered: 09/14/2011)

09/21/2011	83	MEMORANDUM OPINION. Signed by Judge John D. Bates on 9/21/11. (lcjdb1) (Entered: 09/21/2011)
09/21/2011	84	ORDER granting 54 the Attorney General's motion for summary judgment and 47 , 55 , 58 the motions for summary judgment filed by defendant-intervenors and denying 5 Shelby County's motion for summary judgment. See text of Order and accompanying Memorandum Opinion for details. Signed by Judge John D. Bates on 9/21/11. (lcjdb1) (Entered: 09/21/2011)
09/23/2011	85	NOTICE OF APPEAL as to 83 Memorandum & Opinion, 84 Order, by SHELBY COUNTY, ALABAMA. Filing fee $ 455, receipt number 0090-2675052. Fee Status: Fee Paid. Parties have been notified. (Consovoy, William) (Entered: 09/23/2011)
09/26/2011	86	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 85 Notice of Appeal. (dr) (Entered: 09/26/2011)
09/27/2011		USCA Case Number 11-5256 for 85 Notice of Appeal filed by SHELBY COUNTY, ALABAMA. (kb,) (Entered: 09/27/2011)

07/12/2012	90	MANDATE of USCA (certified copy) as to 85 Notice of Appeal to DC Circuit Court filed by SHELBY COUNTY, ALABAMA ; USCA Case Number 11-5256. Ordered and Adjudged that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date. (sth,) (Entered: 07/12/2012)

APPENDIX B — DECLARATION OF DR. PEYTON MCCRARY WITH ATTACHMENTS, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NOVEMBER 15, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

1:10-cv-00651-JDB

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity as
Attorney General of the United States,

Defendant

Declaration of Dr. Peyton McCrary

Pursuant to 28 U.S.C. § 1746, I, Peyton McCrary, make the following declaration:

1. My name is Peyton McCrary. I am an historian employed since August, 1990 by the Voting Section, Civil Rights Division, of the Department of Justice. My responsibilities include the planning, direction,

coordination, and performance of historical research and statistical analysis in connection with litigation. On occasion I am asked to provide written or courtroom testimony on behalf of the United States.

2. I received B.A. and M.A. degrees from the University of Virginia and obtained my Ph.D. from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the South during the 19th and 20th centuries. For 20 years I taught courses in my specialization at the University of Minnesota, Vanderbilt University, and the University of South Alabama. In 1998-99 I took leave from the Department of Justice to serve as the Eugene Lang Professor in the Department of Political Science, Swarthmore College. For the last four years I have co-taught a course on voting rights law as an adjunct professor at the George Washington University Law School.

3. I have published a prize-winning book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), six law review articles, six articles in refereed journals, and four chapters in refereed books. Over the last quarter century my published work has focused on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, and the impact of the Voting Rights Act in the South. Over the last three decades I have published numerous reviews of books in my areas of specialization and served as a scholarly referee for numerous journals and university presses. I continue to publish scholarly work on these

topics while employed by the Department of Justice. A detailed record of my professional qualifications is set forth in the attached curriculum vitae (Attachment A), which I prepared and know to be accurate.

4. My publications most relevant to the issues discussed in this declaration include: *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & L. 275 (2006) (co-authored with Christopher Seaman and Richard Valelly), *reprinted in Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 96-181 (2005); *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005*, 57 S.C. L. Rev. 785 (2006); *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. Pa. J. Const. L. 665 (2003); *Alabama*, in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 38 (Chandler Davidson and Bernard Grofman eds., 1994) (co-authored with Jerome A. Gray, Edward Still, and Huey Perry); *South Carolina, in Quiet Revolution in the South, supra*, at 397 (co-authored with Orville Vernon Burton, Terence R. Finnegan, and James W. Loewen); *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 Soc. Sci. Hist. 507 (1990); *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits*, 28 How. L.J. 463 (1985); and *History in the Courts: The Significance of City of Mobile v. Bolden, in Minority Vote Dilution* 47 (Chandler Davidson ed., 1984).

5. I have presented courtroom testimony as an expert witness in 15 voting rights cases, for the most part before joining the staff of the Civil Rights Division. In one instance, however, I testified on behalf of the United States as amicus curiae. In addition, I have presented sworn written testimony in seven cases, including three since my employment by the Department of Justice. I was retained as an expert in another 19 cases prior to my employment with the Civil Rights Division that settled before trial; 14 of these were Section 2 lawsuits. I was retained in two other Section 2 cases that settled after a trial court granted a preliminary injunction. In these cases my testimony has often dealt with legislative intent in adopting or maintaining at- large elections, numbered place or majority vote requirements, and methods of appointing local governing bodies, as well as with the history of racial discrimination in regard to voting. I have not testified in cases during the past four years.

6. The cases in which I testified that are most relevant to this declaration include: *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986); *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984); *Brown v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd* ,706 F.2d 1103 (11th Cir. 1983); and *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982). In each of these cases brought under Section 2 of the Voting Rights Act I testified as an expert witness for the plaintiffs. The trial court decided the two *Mobile* cases before the 1982 revision of Section 2 of the Voting Rights Act and thus under the intent standard applied in constitutional challenges after *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

7. I have been asked by attorneys for the Department of Justice: 1) to describe some basic characteristics of Shelby County, Alabama, and 2) to investigate factual evidence relevant to the allegations by Shelby County as to the coverage formula for Section 5 of the Voting Rights Act. In my investigation I have drawn on my familiarity with the record assembled by House and Senate committees during the hearings preceding passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, which I first examined when assisting attorneys for the United States in *Northwest Austin Municipal Utility District Number One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008), *vacated sub. nom. Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009).

Shelby County: Background

8. Shelby County is located south of Alabama's largest county, Jefferson County, and the State's largest municipality, the City of Birmingham, in the northern part of the state. A small portion of the state's largest municipality, Birmingham, is located within Shelby County and the county is included, in part, within the Birmingham Standard Metropolitan Statistical Area. There are also numerous towns and small cities within the county that have existed as separate municipalities for many years.

9. According to the 2000 Census, Shelby County had a total population of 143,293, including 126,951 whites (88.6%), 10,570 African Americans (7.4%), 2,910 Hispanics

(2.0%), and 1,465 Asians (1.0%). U.S. Census Bureau, PL 94-171 (2000), Shelby County, Alabama.

10. According to the 2006-2008 estimates provided by the Census American Community Survey ("ACS"), Shelby County's total population was 183,014, of which 153,649 were white (84.0%), 17,621 were African American (9.6%), 6,674 were Hispanic (3.6%), and 2,894 were Asian (1.6%). U.S. Census Bureau, American Community Survey (ACS) 2006-2008 (3-year estimates), Shelby County, Alabama.

11. Comparing the 2006-2008 estimates provided by the American Community Survey with 2000 Census results, the total population of Shelby County has increased significantly from 2000 to 2008, from 143,293 to 183,014, an increase of 39,721 (27.7%) from its 2000 population.

12. According to the 2000 Census, Shelby County had within its borders the following municipalities: 1) Alabaster (city); 2) Birmingham (city, part); 3) Calera (city, part); 4) Chelsea (town); 5) Childersburg (town, part), 6) Columbiana (city); 7) Harpersville (town); 8) Helena (city, part); 9) Hoover (city, part); 10) Indian Springs Village (town); 11) Leeds (city, part); 12) Montevallo (city); 13) Pelham (city); 14) Vestavia Hills (city, part); 15) Vincent (town, part); 16) Wilsonville (town); and 17) Wilton (town). U. S. Census Bureau, American Fact Finder, Alabama, GCT-Pl. Race and Hispanic or Latino: 2000. In 2001 the municipality of Westover was incorporated.

13. Shelby County and six of its municipalities, including the City of Calera, were among the defendants in the complex *Dillard* litigation, and each agreed to alter its at-large election system in favor of an election plan fair to minority voters. *See, e.g., Dillard v. Crenshaw County*, 748 F. Supp. 819 (M.D. Ala. 1990); *Dillard v. Town of Calera*, No. 2:87cv1167, 2007 WL 1607656 (M.D. Ala. May 9, 2007); *Dillard v. Town of Columbiana*, No. 2:87cv1189 (M.D. Ala.); *Dillard v. Town of Harpersville*, No. 2:87cv1228 (M.D. Ala.); *Dillard v. Town of Vincent*, No. 2:87cv1305 (M.D. Ala.); *Dillard v. Town of Wilsonville*, No. 2:87cv1315 (M.D. Ala.); *Dillard v. Town of Wilton*, No. 2:87cv1316 (M.D. Ala.).

Settlements in Section 2 Litigation, Covered vs. Non-covered Jurisdictions

14. I have examined the evidence in two studies considered by Congress when it reauthorized Section 5 of the Voting Rights Act in 2006: (1) Ellen Katz, et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (2005), *reprinted in To Examine Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16, 964-1124 (2005) [hereinafter *Documenting Discrimination in Voting*]; and (2) Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005* (2006), *reprinted in Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 104-289

(2006) [hereinafter *Protecting Minority Voters*].[1] The study by Professor Katz and law students working under her direction at the University of Michigan assembled data regarding all reported decisions in Section 2 litigation from 1982 to 2005. Among other evidence provided in its report, the staff of the National Commission gathered data regarding Section 2 litigation other than in reported decisions. The Commission's research utilized docket information contained on Lexis and the federal courts' Public Access to Court Electronic Records ("PACER") system; cases cited in the tables of *Quiet Revolution in the South*, *supra*; data supplied from the files of voting rights attorneys; and a search of the Department of Justice's Submission Tracking and Processing System ("STAPS") database, which records every Section 5 submission involving a change in the method of election since 1980. *See Protecting Minority Voters*, *supra*, at 240 n.280.

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[1] In its analysis the National Commission report utilized a version of the Michigan study directed by Professor Katz – known as the Voting Rights Initiative (VRI) – available on the VRI website as of Jan. 16, 2006. Thus the numbers in *Protecting Minority Voters*, *supra*, at 251 tbl. 5, drawn from the Michigan study, differ slightly from the numbers on the record before Congress. In my analysis I have relied on the numbers from the Michigan study on the record before Congress and the numbers calculated by the National Commission staff. *Id.* Because I use the number of reported decisions favorable to minority voters in covered jurisdictions reported to the House (64) instead of the 66 such favorable outcomes identified in *Protecting Minority Voters*, at 251 tbl. 5, my total for reported decisions and court-ordered settlements is 651, rather than the 653 used by the National Commission. The slight differences in the numbers reported in different versions of the Michigan study do not affect the conclusions to be drawn from the data. A finalized set of numbers, which I believe are the most accurate, appeared in the version of the study published at 39 U. Mich. J.L. Reform 643 (2006).

15. The Michigan study of reported decisions permits a detailed comparison of the enforcement of Section 2 in jurisdictions covered by Section 5 and enforcement in the rest of the country. Thus it provides useful evidence regarding the degree to which the Section 5 coverage formula captures jurisdictions in which racial discrimination in voting is most serious. On the other hand, as the Michigan study points out, many Section 2 cases have been settled by the parties to the advantage of minority voters in court-entered settlement agreements that are not reported by the courts. Professor Katz and her colleagues gathered lists of settled cases from various voting rights attorneys that suggested that the total volume of Section 2 litigation was at least four times as great as reflected in reported decisions. *See Documenting Discrimination in Voting*, *supra*, at 974.

16. The National Commission staff sought to collect data regarding the large volume of "all Section 2 claims – reported and unreported – resolved in a manner favorable to minority voters since 1982." *Protecting Minority Voters*, *supra*, at 205. Their search was, however, restricted to jurisdictions covered by Section 5 (excluding one covered state, Alaska). *See id.* The Commission staff recognized that this list of unreported settlements was incomplete but offered it as a "best effort" at a comprehensive accounting. *Id.*

17. A more comprehensive picture of the total volume of successful enforcement of Section 2 would include a similar list of settlements since 1982 for all jurisdictions *not* covered by Section 5. In order to obtain a more comprehensive assessment, I undertook a systematic search for Section 2 settlements in non-covered jurisdictions, utilizing the following methodology: I began with a list of all lawsuits catalogued in PACER as concerning "Civil Rights: Voting" (Code No. 441). I used LexisNexis CourtLink to search by docket number for all cases in non-covered jurisdictions. Four staff members working under my direction reviewed docket sheets to screen for possible Section 2 lawsuits and to print them for my review. After my initial review, two staff attorneys examined additional information from PACER about particular lawsuits suspected of being Section 2 settlements. In my final review, I did not include any case for which the docket sheet or case documents electronically linked to the dockets failed to provide some evidence that the case was resolved under Section 2 of the Voting Rights Act, whether by reference to the federal code section or by reference to "voting rights issues" or similar language. I also required some reference to settlement of the case, whether by consent decree, consent judgment, consent order, or a simple reference to "settlement."

18. In addition, I used certain publicly available documents to supplement information from the electronic docket sheets. Laughlin McDonald & Daniel Levitas, *Vote: The Case for Extending and Amending the Voting Rights Act* (2006*), reprinted in Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the*

Constitution of the S. Comm. on the Judiciary, 109th Cong. 378-1269 (2006), provides detailed information about the outcome of Section 2 cases brought by the American Civil Liberties Union. The Voting Section of the Civil Rights Division of the Department of Justice maintains a routinely updated list of voting rights cases brought by it from 1976 to the present. Similar lists were made part of the record before Congress when the Voting Rights Act was amended in 1970, 1975, and 1982.[2]

19. My goal was to identify all Section 2 settlements in non-covered jurisdictions. I recognize, however, that because of the limitations of PACER and CourtLink – which did not begin receiving documents from district courts until the late 1980s – my list of Section 2 settlements may be under-inclusive. The Michigan study documents that reported decisions in Section 2 cases were most numerous in the first decade following the creation of the Section 2 results test in 1982. *Documenting Discrimination in Voting*, *supra*, at 975. The studies of Section 5 covered jurisdictions in *Quiet Revolution in the South* indicate that Section 2 lawsuits in Southern states generated numerous orders and settlements during the 1980s requiring the adoption of single-member districts or cumulative or limited voting plans. Some docket sheets are available in the PACER database beginning in 1985, but not consistently until the early 1990s. Until the last

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[2] I drew on the personal knowledge of Department of Justice attorneys in determining that two New Mexico cases, *United States v. Chaves County* and *United States v. Roswell Indep. Sch. District*, were settled by changing the method of election in the defendant jurisdictions.

decade, moreover, few docket sheets included links to complaints or consent decrees, either in CourtLink or in PACER. The under-inclusiveness of CourtLink and PACER also necessarily affects the study of Section 2 settlements in covered jurisdictions conducted by the National Commission staff. ***Protecting Minority Voters, supra***, at 204-08, 239-40, and 251 tbl. 5.

20. I can think of no plausible reason why district courts in covered jurisdictions, mostly in the South, would have been *more likely* to send information about voting cases to PACER than district courts in the rest of the country. Counting each jurisdiction equally and rounding to the nearest year, the average jurisdiction covered by Section 5 began reporting to PACER in 1992. The average non-covered jurisdiction began reporting in 1991. The average partially covered jurisdiction began reporting in 1989. Thus, to the extent that dates at which reporting began reflect the availability of information in PACER, non-covered jurisdictions should be over-represented, if anything.

21. I found a total of 99 Section 2 settlements in non-covered jurisdictions. Twenty-four of these cases were in Arkansas alone; thirteen were in California; eleven were in the non- covered counties of Florida; thirteen in the non-covered counties of North Carolina; and the rest scattered around the country. Evidence concerning 61 of the 99 settlements I found in non- covered jurisdictions (62%) was on the record considered by Congress in adopting the 2006 Reauthorization Act. *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose:*

Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 2835-57 (2005), 2835-39; *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary,* 109th Cong. 321-22, 487-91, 500-02, 923-24, 953-54, 1150, 1171-73, 1200-03, 1246, 1252, 1484-85, 1491-92, 1763, 1773-74, 1779, 1782-89, 1794-95, 1875, 1889, 1986, 1999-2000, 4014-15, 4026-35, 4058-59, 4064, 4067-68, 4072-73, 4080-82, 4086, 4099, 4118-21, 4127, 4129, 4133-34, 4138, 4313-25, 4348, 4359-60, 4373, 4384, 4391-92, 4403-04, 4425, 4438, 4451-56, 4462, 4479, 4505-06, 4512-14, 4552, 4564-81, 4583, 4594, 4726, 4731-34, 4747, 5536-5544 (2006). *See* Attachment B to this declaration.

22. The 99 settlements in non-covered jurisdictions contrasts with the 587 cases resolved favorably to minority voters in covered jurisdictions found in the National Commission report.[3] Even if the under-inclusiveness of my research protocol led me to find only *half* of the Section 2 settlements in non-covered jurisdictions – a hypothetical 194 settlements – there would still be *393 more* settlements resolved favorably for minority voters in areas covered by the preclearance requirements of the Voting Rights Act than in the rest of the country. Based on my training and experience as a historian and 30 years of experience doing research for voting rights litigation, I am confident that the number of court-ordered settlements in non-covered jurisdictions is unlikely to be greater than twice the number I have identified here. Furthermore, jurisdictions

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[3] Calculated from the numbers in *Protecting Minority Voters, supra,* at 251 tbl. 5 (*see* footnote 1, *supra).*

covered by Section 5 account for less than a quarter of the nation's population, a number that highlights the disparity in court-ordered settlements. *Id.* at 83.

23. I have compared the number of Section 2 settlements in non-covered jurisdictions with the consent decrees resulting from the court decision in *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), where the trial court enjoined further use of at-large elections in nine Alabama counties, one of which was Shelby County. The court found, relying in part on my expert testimony, that the *Dillard* plaintiffs had shown a substantial likelihood of prevailing on the merits by producing evidence that the Alabama legislature "has engaged in a pattern and practice of using at-large systems as an instrument of race discrimination." *Crenshaw County*, 640 F. Supp. at 1361.

24. The *Dillard* plaintiffs subsequently amended their complaint to add municipalities and local school boards, so that the number of defendants eventually totaled 183. Of these defendants, 176 entered into interim consent decrees with the plaintiffs. The parties agreed to have the court deal with 165 of the defendants in separate lawsuits, with separate files and civil action numbers, with the remaining 18 jurisdictions treated as defendants in *Dillard v. Crenshaw County. See Dillard v. Baldwin County*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). In short, the number of Section 2 settlements in the *Dillard* litigation alone was 1.8 times as great as the 99 settlements I have identified in non-covered jurisdictions.

Conclusions

25. Considering cases resolved not only by reported decisions but also by court-ordered settlements gives a more comprehensive picture of the scope of litigation enforcing Section 2 of the Voting Rights Act than simply looking at reported decisions in Westlaw or Lexis. Once the number of court-ordered settlements is added to the reported decisions, it becomes clear that the vast majority of racially discriminatory election practices ended by enforcement of Section 2 during the past quarter century has taken place in jurisdictions covered by Section 5 of the Act. The pattern is in fact quite stark.

26. The study of reported decisions by Ellen Katz and law students at the University of Michigan included in the House record identified 64 Section 2 cases in covered jurisdictions in which plaintiffs were successful. *Documenting Discrimination in Voting, supra*, at 974-75.[4] The National Commission report found 587 cases

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[4] While the version of the Michigan study before the House identified 64 Section 2 cases in covered jurisdictions in which minority plaintiffs were successful, and 50 cases in non-covered jurisdictions in which plaintiffs prevailed, the finalized, published version of the study concludes that there were 68 cases with successful outcomes for minority plaintiffs in covered jurisdictions and 55 such cases in non-covered jurisdictions (44.7% of the total). *See* 39 U. Mich. J.L. Reform 643, 656 (2006). The list of Section 2 cases identified in the published Michigan study is available at http://sitemaker.umich.edu/votingrights/final_report. In both the initial and finalized versions of the Michigan study, more than half of all Section 2 cases in which minority plaintiffs prevailed were in covered jurisdictions.

which it characterized as resolved in a manner favorable to minority voters in covered jurisdictions where there were no reported decisions. *Protecting Minority Voters, supra*, tbl. 5.[5] These cases, some of which were statewide in impact, affected voting practices in 825 counties, parishes, or independent cities covered by Section 5. *Id.*

27. Looking at jurisdictions not covered by Section 5, the University of Michigan study before the House found only 50 reported cases with outcomes that the authors characterized as favorable for minority voters. *Documenting Discrimination in Voting, supra*, at 974-75. Even though more than three-fourths of the nation's population lives in non-covered jurisdictions, *id.*, only 50 (44%) of the 114 reported decisions before Congress that were favorable for minority voters came from these non-covered jurisdictions. Looking at unreported cases, I found only 99 Section 2 settlements in non-covered jurisdictions, as compared with the 587 in areas covered by Section 5 identified in the National Commission report. *Protecting Minority Voters, supra*, tbl. 5. Evidence regarding 61 of the 99 Section 2 settlements was on the record before Congress. Adding the settlements in covered and non-covered jurisdictions gives a total of 686 successful outcomes in cases without reported decisions, of which 86% fall within jurisdictions covered by Section 5, as demonstrated in the following Table:

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[5] The National Commission identified 66 reported cases that it characterized as being resolved favorably for plaintiffs, rather than the 64 in the Michigan data on the record before Congress. As noted in Footnote 1, supra, the Commission relied on an interim dataset from the Michigan study. *See Protecting Minority Voters, supra*, tbl. 5.

	Covered Jurisdictions	Non-Covered Jurisdictions	Total
Favorable Reported Decisions	64 (56%)	50 (44%)	114 (100%)
Court-Ordered Settlements	587 (86%)	99 (14%)	686 (100%)
Total	651 (81%)	149 (19%)	800 (100%)

28. Based on the record before Congress when it adopted the 2006 Reauthorization Act, 61 Section 2 cases settled favorably for minority voters in non-covered jurisdictions. *See* Paragraph 21, *supra*. According to the National Commission report provided to Congress in 2006, 587 Section 2 lawsuits resulted in favorable outcomes for minority voters in jurisdictions covered by Section 5. Thus the record before Congress shows that 91% of all Section 2 unreported cases settled favorably for minority voters were in covered jurisdictions.

29. Combining all successful outcomes in both reported and unreported cases - including those on the record before Congress in 2006 and those I have identified in the study reported here - shows that 81 percent of all successful outcomes in Section 2 cases occurred in covered jurisdictions. *See* Table in paragraph 28, above.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of November, 2010.

/s/

Peyton McCrary

ATTACHMENT A

CURRICULUM VITAE: PEYTON McCRARY

Historian, U.S. Department of Justice, 1990-
Civil Rights Division, Voting Section
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Principal Functions: Research in connection with voting rights litigation; identifying consultants and expert witnesses to be used in cases; working with attorneys and experts to prepare for direct testimony and cross-examination; supervising the preparation of contracts and processing the reimbursement of consultants and expert witnesses; drafting presentation of factual evidence in memoranda, briefs, and proposed findings of fact; legislative history research.

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PERSONAL: Born, Danville, Virginia, 1943.

EDUCATION: University of Virginia:
B.A. (Honors), 1965
M.A., History, 1966

Princeton University:
Ph.D., History, 1972

FIELDS: Minority Voting Rights; Law and the Political Process; U.S. History; History of the South; Southern Politics; Civil War and Reconstruction; American Political Parties and Voting Behavior; Theory and Methods of Historical Analysis

ACADEMIC APPOINTMENTS:

Adjunct Professor, George Washington University Law School, Washington, D.C., 2006 -

Eugene Lang Professor [Visiting], Department of Political Science, Swarthmore College, Swarthmore, Pennsylvania, 1998-1999.

Distinguished Scholar, Joint Center for Political and Economic Studies, Washington, D.C., 1987-1988.

Associate Professor of History, 1978-82, Professor of History, 1982-90, University of South Alabama, Mobile, Alabama.

Assistant Professor of History, 1976-1978, Vanderbilt University, Nashville, Tennessee

Instructor, Assistant Professor of History, 1969-1976, University of Minnesota, Minneapolis, Minnesota

BOOK:

Abraham Lincoln and Reconstruction: The Louisiana Experiment (Princeton, N.J., Princeton University Press, 1978), 423 pages. Winner, Kemper Williams Prize, Louisiana Historical Association, 1979.

BOOK CHAPTERS:

"The Law of Preclearance: Enforcing Section 5," co-authored with Christopher Seaman and Richard Valelly, in David Epstein, et.al. (eds.), *The Future of the Voting Rights Act* (New York, Russell Sage Foundation, 2006), 20-37.

"Alabama," co-authored with Jerome A. Gray, Edward Still, and Huey Perry, and "South Carolina," co- authored with Orville Vernon Burton, Terence R. Finnegan, and James W. Loewen, in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994), 38-66, 397-409. Winner, Richard Fenno Prize, American Political Science Association.

"History in the Courts: The Significance of *City of Mobile v. Bolden*," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., Howard University Press, 1984), 47-65.

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"How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005," *South Carolina Law Review*, 57 (Summer 2006), 785-825.

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"Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990," *University of Pennsylvania Journal of Constitutional Law*, 5 (May 2003), 665-708.

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"The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1946-1986," *Journal of Urban History*, 25 (Jan. 1999), 199-225.

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"Class and Party in the Secession Crisis: Voting Behavior in the Deep South, 1856-1861," co-authored with Clark Miller and Dale Baum, *Journal of Interdisciplinary History*, VIII (Winter 1978), 429-57.

REVIEW ESSAYS:

"Race and Misrepresentation: Review of Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*," H-Net, Feb. 2002. www.h- net.msu.edu/reviews/showrev.cgi?path=214111015008351.

"Review of David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interest in Congress*," H-Net, May 1998. www.h-net.msu.edu/reviews/showrev.cgi?path=23313895266679.

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"The Political Dynamics of Black Reconstruction," *Reviews in American History*, 12 (March 1984), 51-57.

ENCYCLOPEDIA ARTICLE:

"The Reconstruction Myth," in Charles Reagan Wilson and William Ferris (eds.), *Encyclopedia of Southern Culture* (Chapel Hill, University of North Carolina Press, 1989), 1120-21 [reprinted in Jonathan Birnbaum and Clarence Taylor (eds.), *Civil Rights Since 1787: A Reader on the Black Struggle* (New York, New York University Press, 2000), 150-53.]

BOOK REVIEWS: American Historical Review, Journal of Interdisciplinary History, Journal of Southern History, Social Science History, American Review of Politics.

COURTROOM TESTIMONY AS AN EXPERT WITNESS:

(United States as Amicus Curiae), *SCLC v. Evans*, M.D.Ala. (Montgomery), December 1991. [Challenge to the method of electing certain circuit judges in Alabama]

(Plaintiffs), *Vereen v. Ben Hill County*, M.D.Ga. (Macon), December 1989. [Challenge to the state law requiring appointment of county school boards by the local grand jury, as applied in more than a dozen counties]

(Plaintiffs), *Hall v. Holder*, M.D.Ga. (Macon), December 1989. [Challenge to the sole commissioner form of government in Bleckley County, Georgia.

(Plaintiffs), *Irby v. Fitzhugh*, E.D.Va. (Richmond), June 1988. [Challenge to the appointment of all school boards in the Commonwealth of Virginia]

(Plaintiffs), *Dillard v. Crenshaw County, et.al.*, M.D.Ala. (Montgomery), Preliminary Injunction Hearing, March 1986. [Challenge to the at-large election of public officials in more than 180 Alabama counties, municipalities, and school boards]

(Plaintiffs), *Whitfield v. Clinton*, E.D.Ark. (Helena), March 1988. [Challenge to the use of the statewide majority vote requirement in Phillips County, Arkansas]

(Plaintiffs), *Dent v. Culpepper*, M.D.Ga. (Macon), Preliminary Injunction Hearing, November 1987. [Challenge to the at-large election of the City Commission in Cordele, Georgia]

(Plaintiffs), *Jackson v. Edgefield County, School District*, D.S.C. (Columbia), April 1986. [Challenge to the at-large election of the Edgefield County School Board]

(Plaintiffs), *Harris v. Graddick*, M.D.Ala. (Montgomery), February 1985. [Challenge to the procedures by which election officials are selected and elections conducted in Alabama]

(Plaintiffs), *Woods v. Florence*, N.D.Ala. (Birmingham), August 1984. [Challenge to the method of appointing the Jefferson County Personnel Board]

(Plaintiffs), *Collins v. City of Norfolk*, E.D.Va. (Norfolk), May 1984. [Challenge to the at-large election of the Norfolk City Council]

(United States), *County Council of Sumter County, S.C. v. U.S.*, D.D.C., February 1983. [Defense of Section 5 Objection to the at-large election of the Sumter County Council]

(United States), *U.S. v. Dallas County Commission*, S.D.Ala. (Selma), October 1981. [Challenge to the at-large election of the Dallas County Commission]

(Plaintiffs), *Bolden v. City of Mobile*, S.D.Ala. (Mobile), May 1981. [Challenge to the at-large election of the Mobile City Commission]

(Plaintiffs), *Brown v. Board of School Commissioners of Mobile County*, S.D.Ala. (Mobile), April 1981. [Challenge to the at-large election of the Mobile County School Board]

SWORN WRITTEN TESTIMONY AS AN EXPERT WITNESS:

(United States as Defendant-Intervenor) July 31, 1996, *Cook v. Marshall County, Mississippi, and United States*, C.A. No. 3:95 CV 155-D-A, N.D. Miss. [Defense of Marshall County's redistricting plan]

(United States as Defendant-Intervenor) July 19, 1994, *Hays v. State of Louisiana*, C.A. No. 92-1522S, W.D. La. (Shreveport). [Defense of Louisiana's congressional redistricting plan]

(United States) March 25, 1991, *State of Georgia v. Thornburg* C.A. No. 90-2065, D.D.C. [Defense of Section 5 Objection to the method of electing certain superior court judges in Georgia]

(Plaintiffs) January 20, 1988, *Irby v. Fitzhugh*, C.A. No. 87-0633-R, E.D.Va. (Richmond). [Challenge to the appointment of all school boards in the Commonwealth of Virginia]

(United States) June 25, 1984, *U.S. v. Halifax County*, N.C., C.A. No. 83-88-CIV-8, E.D.N.C. (Wilson). [Challenge to the at-large election of the Halifax County Commission]

(Plaintiffs) April 22, 1983, *Wilson v. Powell*, C.A. No. 383-14, S.D.Ga. (Dublin). [Challenge to the appointment of the Johnson County School Board by the county grand jury]

(United States) September 28, 1982, *County Council of Sumter County, S.C. v. U.S.*, C.A. No. 82-0912, D.D.C. [Defense of Section 5 Objection to the at-large election of the Sumter County Council]

CONGRESSIONAL TESTIMONY:

"Written Testimony of Dr. Peyton McCrary," in ***Extension of the Voting Rights Act: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives***, 97th Cong., 1st Sess., Serial No. 24 (3 vols., Washington, D.C., G.P.O., 1982), III, 2749-76.

"Testimony Before the Subcommittee of National Parks and Public Lands, Committee on the Interior, U.S. House of Representatives, June 14, 1988.

UNPUBLISHED CONFERENCE PAPERS:

"From *Gomillion v. Lightfoot* to *City of Pleasant Grove v. United States*: Annexations, De-annexations, and the Voting Rights Act." Constitution Day Conference, San Francisco State University, September 2010.

"Two Kinds of Vote Dilution: From *Baker v. Carr* to *White v. Regester*." Organization of American Historians, April 2010.

"How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005," University of South Carolina School of Law, October 2005; [revised version, Southern Historical Association, November 2005].

"Bringing Equality to Power: Federal Courts and the Transformation of Southern Electoral Politics, 1960-2000." Organization of American Historians, April 2002.

"Why the Voting Rights Act Worked: A Judicial Model of Policy Implementation." Social Science History Association, October 1997; [revised version, Association of Public Policy Analysis and Management, November 1997].

"Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case." Southern Historical Association, November 1992.

"The Impact of the Voting Rights Act in Alabama," co-authored with Jerome Gray, Edward Still, and Huey Perry. American Political Science Association, 1989 [revised version presented at a Conference on the Impact of the Voting Rights Act, Rice University, Houston, Texas, May 1990].

"Taking History to Court: The Issue of Discriminatory Intent in Southern Voting Rights Cases." Joint Center for Political and Economic Studies, Washington, D.C., June 13, 1988.

"Keeping the Courts Honest: Expert Witnesses in Voting Rights and School Desegregation Cases," co- authored with J. Gerald Hebert. Southern Historical Association, November 1986.

"Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits." Conference on Voting Rights Law, Howard University School of Law, Washington, D.C., January 1985.

"The Subtle Gerrymander: Discriminatory Purposes of At-large Elections in the South, 1865-1982." Organization of American Historians, April 1983.

"The Party of Revolution: Republican Ideas About Politics and Social Change, 1861-1868." Southern Historical Association, November 1980.

"After the Revolution: American Reconstruction in Comparative Perspective." American Historical Association, December 1979.

"The Civil War Party System, 1854-1876: Toward a New Behavioral Synthesis?" Southern Historical Association, November 1976.

CHAIRPERSON, PANELIST, OR COMMENTATOR:

Alabama Association of Historians, 1983.
Alabama Department of Archives and History, 1988.
American Political Science Association, 1987, 2003.
Brookings Institution, 1990.
National Association of Secretaries of State, 1983.
Organization of American Historians, 1979, 1995.
Social Science History Association, 1981, 1987, 1996, 1997, 1999.
Southern Historical Association, 1973, 1985.
University of Alabama, 1983.
University of Utah, 2007.

ACADEMIC REFEREE:

Book-length manuscripts: Princeton University Press, University of North Carolina Press, University of Tennessee Press, University of Alabama Press, Louisiana State University Press, University of Georgia Press.

Article-length manuscripts: Journal of American History, American Historical Review, Sociological Spectrum, Gulf Coast Historical Review, Social Science History.

CONSULTANT:

Test Design: College Board Achievement Test, American History; Educational Testing Service, Princeton, N.J., 1979-1983

Archival: Re-organization of Section 5 Objection Files, Civil Rights Division/Voting Section, U.S. Department of Justice, Washington, D.C., January-July, 1989.

Litigation Research: Civil Rights Division/Voting Section, U.S. Department of Justice, Washington, D.C., August 1989 to August 1990.

FELLOWSHIPS AND GRANTS:

John D. and Catherine T. MacArthur Foundation, 1987-1988: Distinguished Scholar, Joint Center for Political and Economic Studies, Washington, D.C.

Appendix B

American Philosophical Society, 1983: Research Travel Grant.

Rockefeller Foundation, 1982-1983: Research Fellowship.

Carnegie Corporation of New York, 1982-1983: Research Fellowship.

National Endowment for the Humanities, 1980: Summer Research Stipend.

University of South Alabama, 1978-1987: Faculty Research Grants; Research Council Grant.

Vanderbilt University, 1976-1978: Manuscript Preparation Grant.

University of Minnesota, 1969-1976: Faculty Research Grants.

Princeton University, 1966-69: University Fellow; Herbert Osgood Fellow; NDEA Fellow.

University of Virginia, 1961-1966: Echols Scholar; Du Pont Scholar; Ford Foundation Fellow.

ATTACHMENT B

Attachment B: Section 2 Cases Settled by Consent Decrees in Non-Covered Jurisdictions

The following *99* cases are confirmed Section Two settlements in non-covered jurisdictions.

The *61* settlements in Section 2 cases listed in bold are identified in the record of congressional hearings. Citations are to the following hearing volumes: *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2835-57 (2005) [hereinafter *History, Scope, and Purpose*]; *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 104-289 (2006) [hereinafter *Evidence of Continuing Need*].

Settlements in cases that had minority language claims under Section 203 or 4(e) as well as Section 2 claims are listed in italics. Because these cases are identified in the record of congressional hearings, they are also listed in bold.

Where a civil action number is unknown, the date of filing is listed in brackets.

Arkansas (24)

United States v. Mississippi County, E.D. Ark. [10-15-1986]

Townsend, et al v. Watson, 1:89cv1111 (W.D. Ark. 1998)

James v. Snowden, 2:89cv54 (E.D. Ark. 1990)

Hunt v. Arkansas, 5:89cv406 (E.D. Ark. 1991)

Baxter v. Smith, 5:89cv416 (E.D. Ark. 1990)

Blunt v. Knight, 5:89cv417 (E.D. Ark. 1991)

U.S. v. City of Magnolia, W.D. Ark. [4-26-1990] [*History, Scope, and Purpose*, **2837**]

Penn v. Hazen Education Bd., 4:90cv793 (E.D. Ark. 1991)

Teal v. Womack, 5:90cv364 (E.D. Ark. 1990)

Hill v. Rochelle, 5:90cv602 (E.D. Ark. 1992)

Bell, et al v. Galloway, 6:90cv6089 (W.D. Ark. 1991)

Jones v. City of Camden, 1:91cv1110 (W.D. Ark. 1992)

Govan v. Huttig School District, 1:91cv1153 (W.D. Ark. 1993)

Reed v. Coles, 2:91cv12 (E.D. Ark. 1991)

Henderson v. Pickens, 4:91cv4025 (W.D. Ark. 1992)

Brown v. Grumbles, 5:91cv628 (E.D. Ark. 1993)

Childs v. Diemer, 5:91cv646 (E.D. Ark. 1993)

Jones v. City of Lonoke, 4:92cv539 (E.D. Ark. 1992)

Kemp, et al v. Hope Ar, City Of, et al., 4:92cv4124 (W.D. Ark. 1993)

Montgomery v. Mcgehee School District, 5:92cv18 (E.D. Ark. 1993)

Montgomery v. City of Mcgehee, 5:92cv25 (E.D. Ark. 1992)

Norman v. Dumas School District, 5:92cv345 (E.D. Ark. 1993)

Gordon v. City of Hot Springs, 6:93cv6070 (W.D. Ark. 1993)

Cox v. Donaldson, 5:02cv319 (E.D. Ark. 2003)

California (13)

United States v. City of Los Angeles, C.D. Cal. [11-26-1985] [*History, Scope, and Purpose,* **2836**]

Reyes v. Alta Hosp. Dist., No. 1:90cv620 (E.D. Cal.)

Reyes v. City of Dinuba, No. 1:91cv168 (E.D. Cal.)

Espino v. Cutler-Orosi Unified Sch. Dist., No. 1:91cv169 (E.D. Cal.)

Reyes v. Dinuba Elementary Sch. Dist., No. 1:91cv170 (E.D. Cal.)

Elizondo v. Dinuba Joint Union High School, No. 1:91cv171 (E.D. Cal.)

Martinez v. City of Bakersfield, No. 1:91cv590 (E.D. Cal.)

Mendoza v. Salinas Valley Mem. Hosp., No. 5:92cv20462 (E.D. Cal.)

United States v. Alameda County, N.D. Cal. [4-13-1995] – Also a Sec. 203 Case [*History, Scope, and Purpose,* 2838]

Garcia v. City of Los Angeles, No. 2:96cv7661 (C.D. Cal.)

United States v. City of Santa Paula, No. 2:00cv3691 (C.D. Cal.) [*History, Scope, and Purpose,* 2838]

United States v. Upper San Gabriel Valley Municipal Water District, No. 2:00cv7903 (C.D. Cal.) [*History, Scope, and Purpose,* 2838]

Common Cause v. Jones, No. 2:01cv3470 (C.D. Cal.)

Colorado (1)

Martinez v. Romer, No. 1:91cv1972 (D. Colo.)

Connecticut (1)

Bridgeport Coalition for Fair Representation v. City of Bridgeport, No. 3:93cv1476 (D.Conn.). [*Evidence of Continuing Need,* 4064, 4067-68]

Florida (11)

Williams v. City of Leesburg, No. 83-66-CIV-OC-14 (M.D. Fla. 1985). [*Evidence of Continuing Need,* **1484]**

Madison Co. Chapter NAACP v. Madison County, No. TCA-84-7234 (M.D. Fla. 1986)[*Evidence of Continuing Need,* **1484]**

Potter v. Washington County, 653 F. Supp. 121 (N.D. Fla. 1986) [*Evidence of Continuing Need,* **1484, 4565]**

Bradford Co. Branch NAACP v. Bradford Co. School Board, No. 86-4-CIV-J-12 M.D.Fla.1986). [*Evidence of Continuing Need,* **1484-85]**

Bradford Co. Branch NAACP v. Bradford Co. Commission, No. 86-4-CIV-J-14 (M.D.Fla.1986). [*Evidence of Continuing Need,* **1484-85]**

Tallahassee Branch NAACP v. Leon County, 827 F.2d 1436 (11th Cir. 1987). [*Evidence of Continuing Need,* **1484, 4566]**

Coleman v. Fort Pierce City Council, No. 2:92cv14157 (S.D. Fla.) [*Evidence of Continuing Need,* **487-91]**

Anderson v. West Palm Beach City, No. 9:94cv8135 (S.D. Fla.) [*Evidence of Continuing Need,* **500-02]**

George v. City of Cocoa, No. 6:93cv257 (S.D. Fla.). [*Evidence of Continuing Need,* **477-81, 4575]**

NAACP v. Harris, No. 1:01cv120 (S.D. Fla.) [*Evidence of Continuing Need*, **1200-03, 1491-92**]

United States v. Osceola County, **Fla.**, M.D. Fla. [6-28-2002] – Also a Sec. 203 Case [*Evidence of Continuing Need*, **4581**; *History, Scope, and Purpose*, ***2839***]

Illinois **(2)**

Banks v. City of Peoria, No. 2:87cv2371 (C.D. Ill.)

Black v. McGuffage, No. 1:01cv208 (N.D. Ill.). [*Evidence of Continuing Need*, **4462, 4348**]

Indiana **(3)**

Dickinson v. Indiana State Election Bd., 817 F. Supp. 737 (S.D. Ind. 1992). [*Evidence of Continuing Need*, **4359-60**]

Anderson v. Morgan, No. 1:94cv1447 (S.D. Ind.)

Hines v. Marion Co. Election Bd., 166 F.R.D. 402 (S.D. Ind. 1995). [*Evidence of Continuing Need*, **4359**]

Maryland **(3)**

United States v. City of Cambridge, D. Md. [12-5-1984]. [*Evidence of Continuing Need*, **5540**; *History, Scope, and Purpose*, **2836**]

United States v. Dorchester County, D. Md. [12-5-1984] [*History, Scope, and Purpose*, **2836**]

Conaway v. Maryland, No. 1:90cv610 (D. Md.)

Massachusetts (2)

United States v. City of Lawrence, D. Mass. [11-5-1998] – Also Sec. 203 [*Evidence of Continuing Need*, **4072-73, 4080**; *History, Scope, and Purpose*, ***2838***]

United States v. City of Boston, No. 05-11598 (D. Mass. 2005) – Also Sec. 203 [*History, Scope, and Purpose*, **2839**]

Michigan (1)

United States v. City of Hamtramck, No. 2:00-73541 (E.D. Mich.) [*Evidence of Continuing Need*, **321-22, 4373**; *History, Scope, and Purpose*, **2838**]

Missouri (1)

Rojas v. Moriarty, 1994 Lexis 4033 (W.D. Mo. 1994) [*Evidence of Continuing Need*, **4384**]

Montana (3)

Matt v. Ronan School District, No. 99-94 (D. Mont.) [*Evidence of Continuing Need*, **1150, 1252**]

Alden v. Bd. of County Comm'rs of Rosebud County, 1:99cv148 (D. Mont.) [*Evidence of Continuing Need*, **1150, 1246**]

United States v. Roosevelt County, No. 1:00cv50 (D. Mont.) [*History, Scope, and Purpose*, **2838**]

New Jersey (1)

United States v. Passaic City and Passaic County, D.N.J. [6-2-1999] – Also Sec. 203, 208 [*Evidence of Continuing Need*, **4133-34, 4138,** *History, Scope, and Purpose*, **2838**]

New Mexico (7)

United States v. Chaves County, D.N.M. [1-10-1985] [*History, Scope, and Purpose*, **2836**]

United States v. Roswell Independent School District, D.N.M. [3-12-1985] [*History, Scope, and Purpose*, **2836**]

United States v. McKinley County, No. 86-0028 (D.N.M.1986) – Also Sec. 203 [*Evidence of Continuing Need*, **4026-28, 4035;** *History, Scope, and Purpose*, **2836**]

United States v. State of New Mexico and Sandoval County, No. 88-1457 (D.N.M. 1990) – Also Sec. 203 [*Evidence of Continuing Need*, **4029-30, 4035;** *History, Scope, and Purpose*, **2837**]

United States v. Cibola County, No. 93-1134 (D.N.M. 2004) – Also Sec. 203 [*Evidence of Continuing Need*, **4033-35;** *History, Scope, and Purpose*, **2837**]

United States v. Socorro County, No. 93-1244 (D.N.M. 1994) – Also Sec. 203 [*Evidence of Continuing Need*, **4030-31;** *History, Scope, and Purpose*, **2837**]

United States v. Bernalillo County, No. 98-156 (D.N. M. 1998) [*History, Scope, and Purpose*, **2838**]

New York (3)

United Parents Association v. Bd. Of Elections, No. 89 CIV 0612 (E.D.N.Y.) [*Evidence of Continuing Need*, **1889**]

Arbor Hill Concerned Citizens Neighborhood Ass'n, No. 1:03cv502 (N.D.N.Y.)

Montano v. Suffolk County Legislature, No. 2:03cv1506 (E.D.N.Y.)

North Carolina (13)

NAACP v. City of Statesville, 606 F. Supp. 569 (W.D.N.C. 1985) [*Evidence of Continuing Need*, **1763, 1785-86**]

NAACP v. Forsyth County, No. 6:86cv803 (M.D.N.C.) [*Evidence of Continuing Need*, **1764, 1787**]

NAACP v. City of Thomasville, No. 4:86cv291 (M.D.N.C. 1987) [*Evidence of Continuing Need*, **1764, 1786**]

NAACP of Stanley Co. v. City of Albemarle, No. 4:87cv468 (M.D.N.C.) [*Evidence of Continuing Need*, **1784**]

NAACP v. Richmond County, No. 3:87cv484 (M.D.N.C.) [*Evidence of Continuing Need*, **1788**]

NAACP v. Duplin Co., No. 88-5-CIV-7 (E.D.N.C.) [*Evidence of Continuing Need*, **1786**]

Hall v. Kennedy, No. 88-117-CIV-3 (E.D.N.C.) [*Evidence of Continuing Need*, **1773-74**]

Johnson v. Town of Benson, No. 88-240-CIV-5 (E.D.N.C.) [*Evidence of Continuing Need,* **1779]**

Patterson v. Siler City, No. C-88-701 (M.D.N.C.) [*Evidence of Continuing Need,* **923-24]**

Sewell v. Town of Smithfield, No. 89cv360 (E.D.N.C.) [*Evidence of Continuing Need,* **1794]**

Montgomery County Branch of the NAACP v. Montgomery County, No. 3:90cv27 (M.D.N.C.) [*Evidence of Continuing Need,* **1782-83]**

NAACP v. Rowan-Salisbury Bd. of Educ., No. 4:91cv293 (M.D.N.C.) [*Evidence of Continuing Need,* **1789]**

Rowsom v. Tyrrell County Bd. of Comm'rs, No. 2:93cv33 (E.D.N.C.) [*Evidence of Continuing Need,* **953-54]**

North Dakota (1)

United States v. Benson County, D.N.D. [3-6-2000] [*History, Scope, and Purpose,* **2838]**

Pennsylvania (1)

United States v. Berks County, E.D. Pa. [2-25-2003] – Also Sec. 4(e), 208 [*Evidence of Continuing Need,* **4118, 4120-21, 4127;** *History, Scope, and Purpose,* **2839]**

Rhode Island (1)

Metts v. Almond, No. 1:02cv204 (D.R.I.) [*Evidence of Continuing Need,* **4081-82, 4086]**

Utah (1)

United States v. San Juan County, No. C-83-1286 (D. Utah, 1984) – Also Sec. 203 [*Evidence of Continuing Need,* **4058-59;** *History, Scope, and Purpose,* **2835]**

South Dakota (4)

Buckanaga v. Sisseton Independent School District, South Dakota, 804 F.2d 469 (8th Cir. 1986) [*Evidence of Continuing Need,* **1999, 4514, 4731]**

United States v. Day County and Enemy Swim Sanitary Dist., No. 1:99cv1024 (D.S.D.) [*Evidence of Continuing Need,* **2000, 4403-04, 4425;** *History, Scope, and Purpose,* **2838]**

Weddell v. Wagner Community School District, No. 4:02-4056 (D.S.D.) [*Evidence of Continuing Need,* **1172-73]**

Kirkie v. Buffalo County, No. 3:03cv3011 (D.S.D.) [*Evidence of Continuing Need,* **1171-72, 4734]**

Tennessee (2)

United States v. City of Memphis, W.D. Tenn. [2-15-1991] [*History, Scope, and Purpose,* **2838, 2837]**

United States v. Crockett County, No. 1:01cv1129 (W.D. Tenn.) [*History, Scope, and Purpose,* **2839]**

APPENDIX C — DECLARATION OF ROBERT S. BERMAN WITH ATTACHMENTS, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NOVEMBER 15, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:10-cv-00651-JDB

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity as
Attorney General of the United States,

Defendant

DECLARATION OF ROBERT S. BERMAN

I, Robert S. Berman, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am an attorney who currently serves as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have supervisory responsibility for the administrative review of voting changes submitted to the Attorney

General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for 32 years with over 20 years of service in the Voting Section.

2. I have personal knowledge of the information contained in this declaration based upon my review of relevant records maintained by the Department of Justice, as well as my professional experience with, and personal knowledge of, Department of Justice policies and procedures.

3. At least 31 subjurisdictions located in whole or in part in Shelby County have submitted voting changes for administrative review under Section 5.

4. Since Shelby County was first required to comply with Section 5, the Department of Justice has received at least 682 submissions for review involving Plaintiff Shelby County or jurisdictions located in whole or in part in Shelby County. Of the 682 submissions, 291 were received from 19 jurisdictions located wholly within Shelby County.

5. The Attorney General has received at least 69 submissions for Section 5 review on behalf of Plaintiff Shelby County.

6. On April 8, 2010, the Department informed county officials that no objection would be interposed to Shelby County's most recent submission, which included a polling place change.

7. Section 5 submissions from the Cities of Birmingham, Calera, Chelsea, and Helena, all subjurisdictions located in whole or in part in Shelby County, are currently pending the Attorney General's administrative review.

8. The Attorney General has interposed five objections to changes affecting voting in jurisdictions wholly or partially contained within Shelby County: a July 7, 1975, objection to six annexations to the City of Alabaster; a December 27, 1977, objection to two annexations to the City of Alabaster; a May 4, 1987, objection to annexations to the City of Leeds; an August 16, 2000, objection to the designation of two annexations to Ward 1 of the City of Alabaster (at the same time 42 annexations adopted between 1992 and 2000 were precleared); and an August 25, 2008, objection to 177 annexations, their designation to districts, and a redistricting plan for the City of Calera.

9. On March 13, 2008, the City of Calera, a subjurisdiction of Shelby County, submitted a redistricting plan, along with 177 annexations that the City adopted between 1995 and 2007 but had not previously submitted, and their designation to districts, to the Attorney General for administrative review under Section 5.

10. On August 25, 2008, the Attorney General interposed an objection to the voting changes occasioned by the City of Calera's proposed redistricting plan and 177 annexations. The letter, which is dated August 25,

2008, and provides the factual and legal basis for the Attorney General's decision to interpose an objection, is appended as Attachment A.

11. On August 26, 2008, and October 7, 2008, the City of Calera conducted elections under the redistricting plan, which included the electorate of the objected-to 177 annexations, that was the subject of the Attorney General's August 25, 2008, objection. Attachment C at 4 (Consent Decree in *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. Oct. 29, 2008)).

12. On October 24, 2008, the United States filed an action against the City of Calera under Section 5 seeking to enjoin further implementation of changes affecting voting that had not received Section 5 preclearance. Attachment B (Complaint, *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. Oct. 24, 2008)).

13. On October 29, 2008, the court temporarily resolved this City of Calera matter through a consent decree that provided for an interim change in the method of election to an interim limited voting election plan, pending the results of the 2010 Census and a new special municipal election. *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. 2008); Attachment C (Oct. 29, 2008 Consent Decree).

14. On November 17, 2008 and March 24, 2009, the Attorney General denied the City of Calera's requests to withdraw his objections. Attachments D and E (Nov. 17, 2008 and Mar. 24, 2009 letters).

15. On September 25, 2009, after the adoption of the interim limited voting election plan, the Attorney General withdrew his objection to the 177 annexations to the City of Calera and also informed city officials that no objection would be interposed to the city's proposed interim voting plan for the 2009 municipal election in Calera. The Attorney General's September 25, 2009, letter did not, however, withdraw his objection to the 2008 redistricting plan or the designation of annexations to districts. The September 25, 2009, letter is appended as Attachment F.

The Administrative Review Process

16. The Attorney General endeavors to comply with Congress's intent that the administrative review of voting changes submitted pursuant to Section 5 be an efficient, convenient, and affordable alternative to seeking a declaratory judgment from a three-judge court in the United States District Court for the District of Columbia.

17. To that end, the Attorney General has a long-standing policy of providing information to covered jurisdictions concerning the administrative review process by publishing the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 in the Code of Federal Regulations. 28 C.F.R. part 51. These procedures were first promulgated in 1971. 36 Fed. Reg. 18186 (Sept. 10, 1971), and are revised when necessary. *See, e.g.*, 75 Fed. Reg. 332050 (June 10, 2010).

18. The Attorney General also has created a website that provides information concerning the Section 5 process (http://www.usdoj.gov/crt/voting/).

19. The Attorney General provides a toll-free telephone number for submitting officials to contact Department of Justice staff members, who are available to guide those officials through the submission process.

20. The Attorney General's procedures have always provided covered jurisdictions with the option to request expedited consideration of voting changes. 28 C.F.R. § 51.34. The Attorney General makes every effort to accommodate covered states and local jurisdictions that experience emergencies prior to elections that require expedited consideration of voting changes. Situations calling for expedited consideration include events such as fires or natural disasters that affect which polling places can be used in an election, or pre-election litigation that threatens to stop the conduct of an election. In appropriate circumstances, the Attorney General has made determinations within 24 hours or less of receipt of a submission.

21. The Attorney General also allows covered jurisdictions to send Section 5 submissions by overnight delivery. Shelby County availed itself of this option in a 2007 submission, which the jurisdiction sent by overnight delivery to the Attorney General.

22. For some years, the Department has allowed jurisdictions to make submissions and submit additional

information on pending Section 5 submissions by telefacsimile. Shelby County availed itself of these options in 2004 and 2007, respectively, when it faxed a submission and additional information on pending Section 5 submissions to the Attorney General.

23. The Attorney General allows jurisdictions to make Section 5 submissions through a web-based application (http://wd.usdoj.gov/crt/voting/sec_5/evs/).

24. The Attorney General allows jurisdictions to submit additional information on pending Section 5 submissions by electronic mail.

Termination of Coverage Under the Act's Special Provisions

25. A jurisdiction may seek to terminate coverage under Section 4 of the Act, and thereby be relieved of the responsibility of complying with Section 5. 42 U.S.C. 1973b(a)(1).

26. Since 1965, of the approximately 943 county, parish, and township-level jurisdictions that conduct voter registration and were originally covered by Section 4, 57 of these jurisdictions (around 6.4%) have successfully bailed out and maintained their bailed out status. One state and several other jurisdictions also successfully bailed out and were later re-covered by new coverage determinations or by new court findings. Overall, since 1965, there have been 44 cases filed in which bailout was sought under Section 4(a). The

United States consented to bailout in 36 of those cases and bailout was granted (and in one of these cases bailout was later rescinded); in three cases, the United States opposed bailout and the court denied bailout; in five cases, the jurisdiction dismissed its bailout action voluntarily after the United States opposed the bailout request.

27. Since the new bailout standard enacted in 1982 went into effect in 1984, the United States has consented to bailout in 21 cases. This included 18 cases involving county level jurisdictions (with 51 subjurisdictions) and three cases involving smaller jurisdictions. Hence, a total of 72 jurisdictions have been granted bailout since 1984.

28. If a jurisdiction requests termination of Section 4 coverage, the Attorney General conducts an independent investigation into whether the jurisdiction meets the statutory requirements.

29. The Attorney General has consented to every bailout action by a political subdivision filed since 1984, the effective date for the revised bailout provision.

30. Currently, the Attorney General is reviewing the informal requests of numerous jurisdictions to consent to terminate coverage under Section 4.

31. Since the Supreme Court's decision in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513-17 (2009), the Attorney General has consented

to bailout by three smaller subjurisdictions, including the Northwest Austin Municipal Utility District itself.

32. The Attorney General's independent investigations involve interviewing minority contacts, reviewing electoral behavior within the jurisdiction, and researching whether there are any unsubmitted voting changes, including reviewing a jurisdiction's minutes for the last 10 years to see if the jurisdiction has implemented any changes affecting voting that have not received the requisite Section 5 preclearance.

33. Shelby County advises that it has implemented at least one voting change prior to submitting the change for review. The County admits that it held a referendum election on April 9, 2002, prior to obtaining Section 5 preclearance. Complaint at 14; Pl. Statement of Material Facts 3-4. The County subsequently submitted for review and the Attorney General ultimately precleared under Section 5 the law providing for the April 9, 2002, referendum election.

34. The Attorney General has entered into consent decrees allowing bailout under Section 4 with other jurisdictions including, but not limited to, Roanoke County, Virginia, Shenandoah County, Virginia, and Frederick County, Virginia, where the jurisdictions had implemented isolated voting changes prior to submitting them for Section 5 review.

35. The Attorney General has neither conducted discovery in this case nor conducted the statutorily-

required independent investigation as to Shelby County's eligibility to terminate Section 4 coverage. Accordingly, the Attorney General is unable to make a determination at this time as to whether Shelby County is eligible to terminate Section 4 coverage.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 15, 2010.

/s/

Robert S. Berman

ATTACHMENT A

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

August 25, 2008

Dan Head, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Head:

This refers to 177 annexations, their designations to districts, and the 2008 redistricting plan for the City of Calera in Shelby County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 7, 2008, request for additional information on June 24, 2008; additional information was received through August 18, 2008.

According to the 2000 Census, the City of Calera has a total population of 3,158 persons, of whom 628 (19.9%) were identified as African American. We understand that the city has experienced sizeable growth since that time, due primarily to residential development on the 177 annexations now under review. The city has provided estimates that its population is at 10,806 persons as of December 2006, of whom 20 percent are identified as African American.

The submitted annexations and redistricting plan would eliminate the city's sole majority African-American district. This district and the single-member district method of election were adopted pursuant to a consent decree approved 18 years ago by the court in *Dillard v. City of Calera*, Civil Action No. 2:87cv1167-MHT. Under this arrangement, the district has elected an African-American candidate for the last 20 years.

We have carefully considered the information you have provided, as well as information and materials from other interested parties. Under Section 5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of2006, Public Law 109-246, 120 Stat. 577 (2006) ("Voting Rights Act"), the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *See also Georgia v. Ashcroft*, 123 U.S. 2498 (2003); Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52 (c). As discussed further below, I cannot conclude that the city has sustained its burden of showing that the proposed change does not have a discriminatory purpose or effect. Therefore, based on the information available to us, I object to the voting changes on behalf of the Attorney General.

The United States Supreme Court has held that where annexations decrease minority voting strength, the reasons for the annexations must be objectively verifiable and legitimate, and the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community in the expanded city. *City of Richmond v. United States*, 422 U.S. 358, 370-3 (1975); *see also*, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *City of Port Arthur v. United States*, 459 U.S. 159 (1982); *City of Rome v. United States*, 446 U.S. 156 (1980).

For 13 years, the city has failed to submit their adopted annexations for Section 5 review. Our Department has not received an annexation submission from the city since 1993, and the city admits that it is at fault for not submitting the 177 annexations. The only submission in the last 13 years was a proposed redistricting plan based on the 2000 Census which included no mention of the missing annexations.

In a similar situation, the United States Supreme Court in *City of Rome v. United States*, 446 U.S. at 186, made it clear that the current population of the annexations needs to be included for Section 5 review:

> Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data.

The Supreme Court found that the City of Rome failed to provide the necessary information about total population, voting age population, and a racial composition for each. *Id.* Likewise, the City of Calera also has failed to provide any reliable current population information about the 177 annexations here.

The demographic data provided by the city regarding total population and voting age population in the city as a whole is also unreliable. Beginning with total population, the city used certificate of occupancy data to estimate total population in December 2006 of 10,806. The city arrived at this number by decreasing the persons per household multiplier of 2.3 significantly from the 2000 Census without explanation. Had the city used the 2000 Census number, the population estimate would have been approximately 12,000 persons. The United States Census Bureau estimated the population in July 2006 at 8,329 and in July 2007 at 9,398. The city has not explained why its population estimate is substantially higher than the Census estimate. Likewise, the city fails to provide reliable voting age population.

The estimate of racial composition in the city has no basis. The city has claimed that the population is 20 percent black throughout the newly annexed areas, but no attempt has been made to determine their composition. Simply because black population in the city was 20 percent of the population in 2000, does not mean that would be the percentage of black population in the newly annexed areas. In fact, both city-wide voter registration and school data in recent years appear to show growth in the black population. In failing to provide adequate numbers to evaluate the annexations and concomitant redistricting plan, the city fails to meet its burden of proof.

The City of Calera also appears to have failed to consider how the African-American population would be fairly reflected in the post-annexation election system moving forward. In March 2007, three months prior to the adoption of the proposed redistricting plan, the State of Alabama and plaintiffs filed a Joint Motion to Show Cause asking why the case should not be dismissed. In that order to show cause, they stated that the Alabama legislature in Act No. 2006-252 provide that the Calera City Council can increase the size of the city council under the single-member district method of election by general or local law in the future. The court dissolved the consent decree on May 9, 2007. According to the geographer hired by the city, he was willing to provide information for the city to consider alternative methods of election that would have provided black voters a better opportunity to elect a candidate of choice, but the city council expressed no interest in these alternatives.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. *See* 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the annexations and concomitant redistricting plan will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Calera plans to take concerning this matter. If you have any questions, you should call Eric Rich (202-305-0107), an attorney in the Voting Section.

Sincerely,

/s/
Grace Chung Becker
Acting Assistant Attorney General

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

CV-08-BE-1982-S

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE CITY OF CALERA, ALABAMA; GEORGE W. ROY, Mayor of City of Calera; JERRY DAVIS, ERNEST MONTGOMERY, BOBBY JOE PHILLIPS, DAVID BRADSHAW and MILE ROBERSON, Council members of City of Calera; LINDA STEELE, City Clerk for City of Calera;

Defendants.

COMPLAINT

The United States of America, plaintiff herein, alleges:

1. This action is brought on behalf of the United States by the Attorney General pursuant to Sections 5 and 12(d) of the Voting Rights Act of 1965, as amended 42 U.S.C. 1973c and 1973j(d), and pursuant to 28 U.S.C. 2201, to enforce rights guaranteed by Section 5 of the

Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. 1973c, 42 U.S.C. 1973j(f), and 28 U.S.C. 1345. Venue properly lies in this Court under 28 U.S.C. 1391(b)(1), (2). The City of Calera, Alabama, lies within this Judicial District and is the place where the events giving rise to the claim occurred. Defendant City of Calera officials also reside and perform their official duties in this Judicial District. Upon information and belief, all Defendants reside in the State of Alabama.

PARTIES

3. The Attorney General, representing plaintiff United States of America, is charged by the Voting Rights Act with the statutory responsibility both for the Act's Administrative preclearance process, and with bringing actions in Federal court to enforce the Act's requirements. *See* 42 U.S.C. 1973j(d).

4. Defendant City of Calera, Alabama, is charged with the responsibility of ensuring that its elections laws, as applied, comply with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c ("Section 5").

5. Defendant George W. Roy is the Mayor of the City of Calera and in that capacity serves as the head of the Executive Branch of city government. Defendant Roy is charged with the responsibility of legislating and enforcing

compliance with city ordinances, including drawing voting districts and annexations pertaining to the establishment of city municipal election districts. Defendant Roy is sued in his official capacity.

6. Defendants Jerry Davis, Ernest Montgomery, Bobby Joe Phillips, David Bradshaw and Mile Roberson are Council Members of the City of Calera City Council and in that capacity charged with the responsibility of legislating ordinances, including drawing voting districts and annexations pertaining to the establishment of city municipal election districts. Defendants Davis, Montgomery, Phillips, Bradshaw and Roberson are sued in their official capacities.

7. Defendant Linda Steele is the City Clerk for the City of Calera and in such capacity presides over the election process, including voter registration, candidate qualifying, running of the municipal elections, and certifies results of elections as well as actions taken by the City of Calera City Council. Defendant Steele is sued in her official capacity.

ALLEGATIONS

8. The defendants named herein have authority under Alabama law to enact or administer voting qualifications or prerequisites to voting, or standards, practices, or procedures with respect to voting different from those in force or effect on November 1, 1964.

9. The City of Calera, Alabama, is subject to the preclearance requirements of Section 5.

10. Section 5 states that any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect in the City of Calera, Alabama, on November 1, 1964, may not be lawfully implemented unless the State of Alabama, or other appropriate authority with the power to enact or administer voting changes such as the City of Calera, obtains a declaratory judgment from the United States District Court for the District of Columbia that the changes does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. However, such change may be implemented without such judgment if it has been submitted to the United States Attorney General, and the Attorney General has not interposed an objection within sixty days. 42 U.S.C. 1973c.

11. According to the U.S. Census Bureau, in 2000, Calera had 3,158 residents, of whom 628 (19.9%) are African American, 60 (1.9%) are Hispanic, 27 (0.9%) are Native American, and 18 (0.6%) are Asian. The voting-age population totaled 2,314 residents, with 404 (17.5%) African Americans, 33 (1.4%) Hispanics, 22 (1.0%) Native Americans, and 9 (0.4%) Asians. According to the Census Bureau, as of July 2004, the City of Calera's population was 5,918; as of July 2006, the population was 8,329; and as July 2007, the population estimate indicates there is a population of 9,398. The City of Calera estimated that as of December 2006, its populations was 10,806, of whom 20.24 percent are African American.

12. As of August 10, 2004, the City of Calera had 3,027 registered voters, of whom 400 (13.2%) were identified

as African American, and 43 (1.4%) identified as "other." As of July 30, 2008, Shelby County, wherein the City of Calera is located, reported that there are 4,680 registered voters in the City of Calera, of whom 773 (16.5%) are African American, 11 (0.2%) are Hispanic, 1 (0.02%) is Native American, 3 (0.1%) are Asian, and 84 (1.7%) are listed as "other."

13. The City of Calera is governed by a mayor and five council members. The mayor is a voting member of the Council and is elected at-large for a four-year term. Council members are elected from single-member districts to serve concurrent four-year terms. General elections occur in August of Presidential election years.

14. The City of Calera's five single-member districts were created by a consent decree in the case of *Dillard v. City of Calera*, M.D. Alabama, Civil Action No. 2:87cv1167-MHT(WO, in which the Court found evidence of racially polarized voting. The parties agreed to change the City of Calera's form of government for the election of its Council members from at-large, numbered posts to the current five single-member district plan, with one majority African American district. The consent decree was entered on January 3, 1990.

15. On March 7, 2007, the State of Alabama and plaintiffs in the case filed a Joint Motion to Show Cause asking why the case should not be dismissed. In that order to show cause, the parties argued that the Alabama legislature in Act No. 2006-252 provided that the City Council for the City of Calera could thereafter increase the size of the city council under the single-member

district method of election by general or local law. Act No. 2006-252 also provided authority for the city to have single-member districts. Given the ability of the city to change the size of its body with the single-member district method of election, there was no reason for the court to retain jurisdiction to administer the consent decree, and thus, the Court dismissed the case on May 9, 2007.

16. The City of Calera submitted for review under Section 5 177 annexations to the district boundaries and jurisdiction of the City that had been implemented between 1993 and 2008. The City of Calera also submitted for review under Section 5 a concomitant redistricting plan which provided for a change in the boundaries of the City Council's voting districts. The proposed redistricting maintained five single-member districts, but had the effect of dissolving the only majority-minority district. The redrawn district 2 reduced the African American registered voters in the district from 70.9% to 29.5%.

17. On August 25, 2008, the Attorney General interposed a timely objection under Section 5 to the submitted annexations to the City of Calera's redistricting plan and the 177 annexations on the grounds that the submitting authority had failed to meet its burden of establishing that the proposed changes would not have a discriminatory purpose and effect on minority voters. The objection letter is attached as Exhibit A.

18. The City of Calera held an election for mayor and council members on August 26, 2008 and a run-off election on October 7, 2008 using the objected-to district

boundaries and electorate that included the objected-to annexations.

19. Defendants have not obtained a judgment from the United States District Court for the District of Columbia pursuant to Section 5 declaring that the proposed districts and annexations have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.

20. The failure of defendants to obtain Section 5 preclearance of the proposed district boundaries and annexations renders these voting changes legally unenforceable.

21. Unless enjoined by this Court, defendants will continue to violate the Voting Rights Act by continuing to administer and implement the objected-to change in district boundaries and electorate by certifying the results of the August 26, 2008 and October 7, 2008 elections. The prevailing candidates will be sworn into office on November 3, 2008.

WHEREFORE, the United States of America prays that a court of three judges be convened to hear this action pursuant to 42 U.S.C. 1973c and 28 U.S.C. 2284 and thereafter enter a judgment:

(1) Declaring that the changes in district boundaries and electorate for City of Calera elections constitute changes affecting voting within the meaning of Section 5 of the

Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, and are legally unenforceable because they have not received the requisite preclearance under Section 5 of the Voting Rights Act;

(2) Declaring that implementation of the changes in district boundaries and electorate for City of Calera elections violates Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c; and

(3) Enjoining defendants, their successors in office, their agents and all persons acting in concert or participation with them, from administering or implementing the district boundaries and electorate to which the Attorney General has interposed a timely objection unless and until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, is obtained; and

(4) Enjoining defendants, their successors in office, their agents and all persons acting in concert or participation with them, from certifying the results of the August 26, 2008, and October 7, 2008 municipal elections, which was based on the district boundaries and electorate to which the Attorney General has interposed a timely objection unless and until preclearance

under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, is obtained; and

(5) Enjoining defendants, their successors in office, their agents and all persons acting in concert or participation with them, from swearing in the prevailing candidates on November 3, 2008, which would be based on the district boundaries and electorate to which the Attorney General has interposed a timely objection unless and until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

MICHAEL B. MUKASEY
Attorney General

/s/
GRACE CHUNG BECKER
Acting Assistant Attorney General
Civil Rights Division

ALICE H. MARTIN
United States Attorney

/s/________________________
Sharon D. Kelly
Chief, Civil Division
U.S. Attorneys Office

/s/________________________
CHRISTOPHER COATES
Chief, Voting Section
TIMOTHY F. MELLETT
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Appendix C

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CIVIL ACTION NO.
CV-08-BE-1982-S

CONSENT DECREE

Three-Judge District Court

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE CITY OF CALERA, ALABAMA, *et al.*,

Defendants.

The Attorney General of the United States of America ("Attorney General") filed this action pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c (Section 5"). The Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 42 U.S.C. 1973C and 1973j(f). In accordance with the provisions of 42 U.S.C. 1973c and 28 U.S.C. 2284, the Section 5 claim must be heard and determined by a court of three judges. The events relevant to this action occurred in the City of

Calera, Alabama, which is located in the United States District Court for the Northern District of Alabama, Southern Division. *See* 28 U.S.C. 124.

The Attorney General, representing plaintiff United States of America, is charged by the Voting Rights Act with the statutory responsibility both for the Act's administrative preclearance process, and with bringing actions in Federal court to enforce the Act's requirements. *See* 42 U.S.C. 1973j(d).

The State of Alabama and its subdivisions are subject to the preclearance requirements of Section 5. *See* 42 U.S.C. 1973c; *see also* 28 C.F.R. Part 51, Appendix. Section 5 provides that any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect in the State of Alabama or its subdivisions on November 1, 1964, may not be lawfully implemented unless such change has been submitted to the Attorney General, and the Attorney General has not interposed an objection within sixty days, or the jurisdiction obtains a declaratory judgment from the United States District Court for the District of Columbia that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 42 U.S.C. 1973c.

Defendant City of Calera ("City") is a subdivision of the State of Alabama and is therefore subject to the Section 5 preclearance requirements. The City is governed by a mayor, elected at large, and a five-member city council, elected from five single-member districts, each for four-year concurrent terms.

Defendant Mayor and City Council members are the governing body for the City and, along with the City Clerk, are responsible for implementing and administering voting changes and conducting elections for the City.

On March 18, 2008, the City submitted for Section 5 review 177 annexations to the district boundaries of the City that had been implemented between 1993 and 2008 and a concomitant redistricting plan which provided for a change in the boundaries of the City Council's voting districts. On May 7, 2008, the Attorney General informed the City of Calera that determination was not possible in that supplementary information was required. On July 24, 2008, the City submitted that additional information to enable the Attorney General to conduct his review.

On August 25, 2008, the Attorney General interposed a timely objection under Section 5 to the submitted annexations to the City of Calera's redistricting plan and the 177 annexations on the grounds that the submitting authority had failed to meet its burden of establishing that the proposed changes would not have a discriminatory purpose or effect on minority voters.

On August 26, and October 7, 2008, the City proceeded with municipal elections using the district boundaries and electorate that included the annexations objected to by the Attorney General under section 5 of the Voting Rights Act.

To avoid protracted and costly litigation, the parties have agreed that this lawsuit should be resolved through the terms of this Consent Decree ("Decree"). Accordingly, the United States and the Defendants hereby consent to the entry of this Decree, as indicated by the signatures of counsel at the end of this Decree. The parties waive a hearing and entry of findings of fact and conclusions of law on all issues involved in this matter. Each party shall bear its own costs and fees. Defendants are committed to fully complying with all the Section 5 preclearance requirements in the future. Accordingly, the United States and Defendants stipulate and agree to the following:

1. The City of Calera, Alabama is a covered jurisdiction within the meaning of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

2. The 177 annexations and the concomitant redistricting plan submitted by the City of Calera to the Attorney General constitute voting changes within the meaning of Section 5. The voting changes are legally unenforceable unless they receive the requisite preclearance under Section 5 of the Voting Rights Act. *See Clark v. Roemer*, 500 U.S. 649 (1991); 28 C.F.R. 51.10.

3. On August 25, 2008, the Attorney General interposed a timely objection to the 177 annexations and the concomitant redistricting plan submitted by the City of Calera. These annexations and the redistricting plan have not received preclearance from the United States District Court for the District of Columbia or the United States Attorney General, as required under Section 5 of the Voting Rights Act.

4. Defendants' conducted the August 26, and October 7, 2008, City of Calera municipal elections based on the unprecleared voting changes, including the annexations and the concomitant redistricting plan. The candidates who prevailed in those elections would be sworn into office on November 3, 2008.

5. Irreparable harm would be caused by Defendants' continued administration and implementation of the unprecleared voting changes.

6. On September 16, 2008, Defendants sought reconsideration of the August 25, 2008, objection, and the Attorney General has committed to providing a decision by no later than November 17, 2008. The Attorney General will issue a decision by October 31, 2008, if it is possible.

Accordingly, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. In the event that the Attorney General withdraws the August 25, 2008, objection, the United States agrees that the necessary Section 5 preclearance will have been obtained, and the candidates prevailing in the August 26, and October 7, 2008 elections may be sworn into office.

2. In the event that the Attorney General has not made a decision by October 31, 2008, the Defendants, their agents, their successors in office, and all persons acting in concert with them, are ENJOINED from allowing the candidates prevailing in the August 26, and October 7, 2008 elections to be sworn into office, unless the Attorney General subsequently withdraws the August 25, 2008

objection, or unless the United States District Court for the District of Columbia preclears the annexations and redistricting plan.

3. In the event that the Attorney General continues the August 25, 2008, objection, Defendants, their agents, their successors in office, and all persons acting in concert with them, are PERMANENTLY ENJOINED from allowing the candidates prevailing in the August 26, and October 7, 2008 elections to be sworn into office, unless the Attorney General subsequently withdraws the August 25, 2008 objection, or unless the United States District Court for the District of Columbia preclears the annexations and redistricting plan.

4. Defendants, their agents, their successors in office, and all persons acting in concert with them, are ENJOINED from administering or attempting to administer any election using the 177 annexations and concomitant redistricting plan until Defendants obtain Section 5 preclearance.

5. If the August 25, 2008 objection is not withdrawn, Defendants shall reschedule the August 26, and October 7, 2008 municipal elections to a special election date in 2009. Defendants shall follow state law requirements in conducting the election, and Defendants shall submit the special election date for the necessary Section 5 preclearance.

6. This decree is final and binding between the parties and their successors in office regarding the claims raised in this action. This Decree shall remain in effect

through December 31, 2009, or until the annexations and redistricting plan are precleared, whichever occurs first.

7. The Court shall retain jurisdiction of this case to enter further relief or such other orders as may be necessary for the effectuation of the terms of this agreement and to ensure compliance with Section 5 of the Voting Rights Act.

Agreed to this 29 day of October, 2008.

AGREED AND CONSENTED TO:

For Plaintiff:

MICHAEL B. MUKASEY
Attorney General

/s/
GRACE CHUNG BECKER
Acting Assistant Attorney General
Civil Rights Division

/s/
CHRISTOPHER COATES
Chief, Voting Section
TIMOTHY F. MELLETT
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ALICE H. MARTIN
United States Attorney

/s/ ____________________
Sharon D. Kelly
Chief, Civil Division
U.S. Attorneys Office

For Defendants:

/s/ ____________________
FRANK ELLIS, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Appendix C

JUDGMENT AND ORDER

This Court, having considered the United States' claim under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, and having determined that it has jurisdiction over this claim, has considered the terms of the Consent Decree, and hereby enters the relief set forth above and incorporates those terms herein.

ENTERED and ORDERED this 29th day of October, 2008.

/s/ ____________________________
UNITED STATES CIRCUIT JUDGE

/s/ ____________________________
UNITED STATES DISTRICT JUDGE

/s/ ____________________________
UNITED STATES DISTRICT JUDGE

ATTACHMENT D

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 17, 2008

Frank C. Ellis, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Ellis:

This refers to your request that the Attorney General reconsider and withdraw the August 25, 2008, objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to 177 annexations, their designation to districts, and the 2008 redistricting plan for the City of Calera in Shelby County, Alabama. We received your request on September 16, 2008, with additional information received through November 7, 2008.

We have reconsidered our earlier determination in this matter. We based this review on the information and arguments you have advanced in support of your request, along with the other information in our files and comments received from other interested parties. The city submitted data from a demographic survey conducted subsequent to our objection. The survey purports to indicate population, by race, that has been added to the city as a result of post-2000 residential development. The survey was sent to 3,055 households in 32 new housing developments. There were 21 new housing developments in the annexed areas and 11 new housing developments within the 1993 boundaries of the city. The survey requested information about total population, voting age population, registered voters, and whether survey respondents were "white" or "non-white." The city received 990 responses, a 31 percent return rate. According to survey data, 12.7 percent of the population in respondent households is nonwhite. The city cites this result as evidence that it would have been impossible to reapportion the city's five districts while maintaining the black majority in District 2.

Although the information provided does increase the understanding of the population growth in the City of Calera, the city has failed to provide information necessary to the review of the submitted changes. We have requested that the city provide reliable estimates for the entire area of annexed territory. These projections should include the total and voting-age population, broken out by race. Our guidelines identify the information necessary to the review of annexations and redistricting plans. In particular, 28 C.F.R. 51.28 (a)(1) requires that jurisdictions provide the "Total and voting-age population of the affected area before and after the change, by race and language group;" and subsection (a)(3) requires "Any estimates of population, by race and language group, made in connection with the adoption of the change." The jurisdiction failed to provide these estimates.

The city did not use the survey results to estimate the population for the districts in the proposed redistricting plan. The city also failed to provide the racial breakdown in each district. This would have allowed the city to determine if adding or removing different developments may have avoided the resulting elimination of the ability of black voters to elect a candidate of choice.

The city also has failed to address a key concern as to whether the survey data supports the city's assertion that a less retrogressive district plan could not have been drawn. The results of the August 26, 2008, election demonstrate the impact of the changes on the minority franchise in the city. Prior to this election, voters in District 2 had elected an African-American councilman for 20 years. In the election under the objected-to district lines, the African-American incumbent was defeated, although the prevailing candidate has been enjoined by a three-judge court from taking office. *United States v. City of Calera*, 2:08-cv-1982-KOB (N.D. Ala.) (October 29, 2008). The city has not provided any analysis demonstrating that it could not develop a proposed plan that would increase the black population in District 2. Thus, the city has failed to demonstrate that the retrogression was unavoidable.

Finally, the city has failed to consider alternative election methods for mitigating the impact of the proposed changes. The Supreme Court has held that where annexations decrease minority voting strength, the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community in the expanded city. *City of Richmond v. United States*, 422 U.S. 358, 370-3 (1975); *see also*, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *City of Port Arthur v. United States*, 459 U.S. 159 (1982); *City of Rome v. United States*, 446 U.S. 156 (1980).

In light of these considerations, I remain unable to conclude that the City of Calera has carried its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973): 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must decline to withdraw the objection to the 177 annexations, their designations to districts, and the 2008 redistricting plan.

As we previously advised, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. We remind you that unless the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the annexations, their designations and the concomitant redistricting plan will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Calera plans to take concerning this matter. If you have any questions, you should call Mr. Eric Rich (202-305-0107), an attorney in the Voting Section.

Because the Section 5 status of the changes is before the Court in *United States v. City of Calera*, 2:08-cv-1982-KOB (N.D. Ala.), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/
Grace Chung Becker
Acting Assistant Attorney General

Appendix C

ATTACHMENT E

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 24, 2009

Frank C. Ellis, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Ellis:

This refers to your second request that the Attorney General reconsider and withdraw the August 25, 2008, objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to 177 annexations, their designation to districts, and the 2008 redistricting plan for the City of Calera in Shelby County, Alabama. We received your request on January 23, 2009; supplemental information was received through March 10, 2009.

On September 16, 2008, the Department received the city's first request for reconsideration of the August 25, 2008 objection. On November 17, 2008, the Department continued the August 25, 2008 objection, finding that the city failed to provide necessary information in a number of key areas. We received your second request for reconsideration on January 23, 2009. In this latest reconsideration request, the city submitted analysis of the demographic survey data and responses to our November 17, 2008 letter.

Having reviewed these materials, I remain unable to conclude that the City of Calera has carried its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973): 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must again decline to withdraw the objection to the 177 annexations, their designations to districts, and the 2008 redistricting plan.

According to the 2000 Census, the City of Calera has a total population of 3,158 persons, of whom 628 (19.9%) were identified as African American. The city has experienced sizeable growth since that time, due primarily to residential development on the 177 annexations now under review. In the latest reconsideration request, the city's analysis showed, "approximately 13%, of 995 persons, of an estimated 7,648 residents who have moved into the City of Calera are minority residents." January 22, 2009 letter, Exhibit 1 at 2. If these figures are added together, the total population is 10,806, of whom 1,623 (15%) were identified as non-white.[1]

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[1] The city failed to estimate the total population and the minority population in a consistent manner. The city arrived at a total population estimate by using 2000 Census total population and adding an estimate for the total population based upon building permit and certificate of occupancy data from 2006. The city determined the estimate for the percentage of minority

The city states that the survey data demonstrates a dramatic drop in the city's nonwhite population as a percentage of the city as a whole since the 2000 Census. The city also has revised the numbers for its proposed districts based on a new analysis by its geographer. The analysis shows that the proposed District 2 would have a 31.5 percent nonwhite population, a drop from the city's estimate in its initial submission.

Although the city claims that African-Americans have become a smaller percentage of the population as a whole over the years, the city does not adequately account for the fact that, both citywide voter registration and school data in recent years have shown that the black population has become a larger percentage of the population. For example, in 2004 the non-white voter registration was 14.7 percent and the black registration was 13.2 percent of total registrants. Registration data obtained from the November 2008 general election show that non-white registration is 21.3 percent of Calera's registrants and black registrants comprise nearly 19 percent of the total. In contrast, the city's estimates show a total minority population of 15 percent. There has been no evidence presented to show that black voters are more likely to register to vote than white voters in the City of Calera.

The question of reliability is highly relevant in light of the fact that the submitted annexations and redistricting plan would eliminate the city's sole majority African-

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population by using the survey data from 2008. The city then used the minority population percentage from the survey and applied it to the total population data from 2006 to arrive at the number of minority persons in the five proposed districts.

American district. This district and the single-member district method of election were adopted pursuant to a consent decree approved 18 years ago by the court in *Dillard v. City of Calera*, Civil Action No. 2:87cv1167-MHT. As you are aware, the black incumbent lost his bid for reelection in an election that was held under the new district lines, even though the city had not obtained Section 5 preclearance for the annexations and districting plan.

Once again, the city has failed to appropriately consider alternative election methods for mitigating the impact of the proposed changes. The Supreme Court has held that where annexations decrease minority voting strength, the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community in the expanded city. *City of Richmond v. United States*, 422 U.S. 358, 370-3 (1975); *see also, City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *City of Port Arthur v. United States*, 459 U.S. 159 (1982); *City of Rome v. United States*, 446 U.S. 156 (1980).

The consent decree in *Dillard v. City of Calera* was dissolved because, *inter alia*, the State of Alabama had adopted law that allowed jurisdictions to maintain minority representation by increasing the size of the governing body or by other methods. The city can increase the number of seats to provide representation and then draw a district that will allow black voters to elect a candidate of choice. The city states that it could only achieve a majority-minority district by implementing a 15-district plan. Our analysis of registered voters show that a viable district is possible under an eight-district plan. Moreover, our analysis suggests that alternatives are available even under a five-district plan to mitigate retrogression.

As we previously advised, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. We remind you that unless the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the annexations, their designations and the concomitant redistricting plan will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Calera plans to take concerning this matter. If you have any questions, you should call Mr. Erich Rich (202-305-0107), an attorney in the Voting Section.

Because the Section 5 status of the changes is before the Court in *United States v. City of Calera*, 2:08-cv-1982-KOB (N.D. Ala.), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/
Loretta King
Acting Assistant Attorney General

ATTACHMENT F

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 25 2009

Dan Head, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear. Mr. Head:

This refers to your third request that the Attorney General reconsider and withdraw the August 25, 2008, objection to 177 annexations interposed under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. This also refers to the interim voting plan for the 2009 municipal election, which consists of a change in method of election from five single-member districts to an at-large, limited voting plan, an increase in the number of council members from five to six, and a plurality vote requirement; and five additional annexations with one technical correction to a previously submitted annexation, for the City of Calera in Shelby County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on July 29, 2009; supplemental information was received through August 25, 2009.

On September 16, 2008, the Department received the city's first request for reconsideration of the August 25 objection. On November 17, 2008, the Department continued the objection, finding that the city failed to provide necessary information in a number of key areas. We received your second request for reconsideration on January 23, 2009. On March 24, 2009, the Department once again continued the objection, with similar findings.

In this latest reconsideration request, the city submitted an interim voting plan for the 2009 municipal election that will be used in lieu of a single-member district plan. We have reconsidered our earlier determination regarding the 177 annexations based on the information and arguments you have advanced in support of your request, along with other information in our files and comments received from other interested persons.

The city's adoption of the at-large, limited voting plan with six councilmembers for the 2009 municipal election reflects a good faith effort to effectively remedy the concerns raised in our objection and subsequent objection continuations. The interim plan does not depend upon the location of minority populations in order to provide African-American voters a meaningful opportunity to elect a candidate of choice. Instead, the voting system proposed here will preserve African-American voting strength so long as these voters equal or exceed a specific percentage of the electorate, known as the "threshold of exclusion." Our review of voter registration and turnout data shows that the interim voting plan will provide African-American voters with the opportunity to elect a candidate of choice to the city council.

Accordingly, pursuant to the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.48(b), the objection interposed against the 177 annexations is hereby withdrawn. No other portion of the August 25 objection has been withdrawn (i.e. the 2008 redistricting plan or the designation of the 177 annexations to districts).

With regard to the interim voting plan for the 2009 municipal election, which consists of a change in method of election from five single-member districts to an at-large, limited voting plan, an increase in the number of council members from five to six, and a plurality vote requirement; as well as five additional annexations with one technical correction to a previously submitted annexation, the Attorney General does not interpose any objection to the specified changes. Approval of this interim plan does not change the benchmark (submission no 2004-3101) for any plans submitted after the 2010 Census. In addition, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of all of the submitted changes. 28 C.F.R. 51.41.

Sincerely,

/s/
Loretta King
Acting Assistant Attorney General

APPENDIX D — DECLARATION OF DR. SARAH BRINEGAR, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, JANUARY 14, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:10-cv-00651-JDB

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity
as Attorney General of the United States,

Defendant

DECLARATION OF DR. SARAH BRINEGAR

Pursuant to 28 U.S.C. § 1746, I, Sarah Brinegar, make the following declaration:

1. My name is Sarah Brinegar. I am a Social Science Analyst employed since January, 2008 by the Voting Section, Civil Rights Division, of the United States Department of Justice. My responsibilities include obtaining and analyzing Census data in support of voting rights litigation and administrative review of voting changes submitted for review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c ("Section 5"); using Geographic Information Systems to draw and assess districting plans in the course of voting rights litigation and Section 5 review; and instructing attorneys in the use of Census data.

2. I am a professional geographer by training, earning a B.A. in geography from the University of Illinois (Champaign-Urbana) in 1992; an M.A. in geography from Western Illinois University in 1996; and a Ph.D. in geography from Arizona State University in 2000. These degree programs included training in quantitative research methods and computer based mapping and analysis.

3. From May 2001 to December 2007, I was a faculty member of the Geography Department at Marshall University, West Virginia. When I left Marshall University to take my current position in the Department of Justice, I was a tenured Associate Professor. To date, I have authored solely or been the lead author in six research articles published in peer-reviewed scientific journals, four of which utilized quantitative research methods.

4. I have been asked by attorneys for the Department of Justice to determine the proportion of the country's Black population which resides inside and outside of Section 5 covered jurisdictions. I have also been asked to determine the proportion of the country's minority population which resides inside and outside of Section 5 covered jurisdictions.

Method

5. Determining population counts within and without Section 5 covered jurisdictions involved downloading Census 2000 data into a statistical software program (SPSS), specifying Section 5 covered jurisdictions, and performing basic calculations. A dataset consisting of

Census 2000 redistricting data (PL94-171, Table PL2) for all U.S. counties was downloaded from the Census Bureau's webpage and imported into an SPSS datafile. To split the datafile and obtain separate population figures for those counties inside Section 5 jurisdictions versus those outside, a dummy variable was created so that covered jurisdictions = 1, and non-covered jurisdictions = 0. The Civil Rights Division's webpage provided the listing of covered jurisdictions.[1] Another variable representing all minorities was calculated by adding together the major minority groups in the census data plus those who indicated more than one race.[2] One last variable was created to produce an inclusive Black population category consisting of Black(NH) alone and those persons reporting two races, *i.e.*, Black(NH) and White(NH). Similarly, Census 2000 redistricting data for the 12 covered townships in Michigan and New Hampshire were obtained and processed, then subtracted from non-covered totals and added to the covered totals.

Results

6. The following population counts and proportions were obtained as described above:

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[1] See http://www.justice.gov/crt/about/vot/sec_5/covered.php.

[2] "All minorities" derived from the following categories found in Table PL2: Hispanic, Black(NH) alone, Asian(NH) alone, American Indian/Native Alaskan(NH) alone, Native Hawaiian/Other Pacific Islander(NH) alone, some other race alone, and population of two or more races.

Appendix D

	Total Population	**White (NH) Alone**	**Black (NH) Alone**	**Black (NH) plus Biracial***	**All Minorities**
United States	281,422	194,553	33,948	34,645	86,869
Covered Jurisdictions	67,588	39,334	13,592	13,725	28,254
Non-covered Jurisdictions	213,834	155,219	20,356	20,920	58,615

Data Source: Census 2000, PL 94-171 dataset, table PL2
Data expressed in 1000s
* Biracial: Black(NH) and White(NH)

a. proportion of Black(NH) Alone in Section 5 covered jurisdictions = 40.0%

b. proportion of Black(NH) plus Biracial in Section 5 covered jurisdictions = 39.6%

c. proportion of All Minorities in Section 5 covered jurisdictions = 32.5%

Summary

7. According to Census 2000 Redistricting Data, only 40% of non-Hispanic Blacks and 33% of all minorities reside within Section 5 covered jurisdictions.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of January, 2011.

/s/________________________
Sarah Brinegar

APPENDIX E — SUPPLEMENTAL DECLARATION OF ROBERT S. BERMAN, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, JANUARY 14, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity as
Attorney General of the United States,

Defendant

Civil Action No.
1:10-cv-00651-JDB

Supplemental Declaration of Robert S. Berman

I, Robert S. Berman, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am an attorney who currently serves as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have supervisory responsibility for the administrative review of voting changes submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act

of 1965, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for 32 years with over 20 years of service in the Voting Section.

2. I have personal knowledge of the information contained in this declaration based upon my review of relevant records maintained by the Department of Justice, as well as my professional experience with, and personal knowledge of, Department of Justice policies and procedures.

Bailout History

3. The Voting Rights Act of 1965 included a bailout provision that permitted jurisdictions covered by Section 4 to seek to terminate their coverage by bringing a declaratory judgment action in this court. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438.

4. In 1982, Congress amended the bailout provision, substantially expanding the opportunity for covered jurisdictions to terminate coverage. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131. The new bailout standard became effective on August 5, 1984. *Ibid.*

5. In *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2514 (2009), the Supreme Court adopted a still "broader reading of the bailout provision." The Court's reading permits covered subjurisdictions,

rather than covered counties and states exclusively, to petition for bailout from Section 4 coverage.

6. There were 23 bailout cases filed prior to August 5, 1984. Those cases are listed, in chronological order, in Attachment A.

7. There have been 21 bailout cases filed by political subdivisions since August 5, 1984, when the new bailout standard went into effect. The United States consented to bailout in each case. Those cases are listed, in chronological order, in Attachment A.

Current Bailout Investigations

8. The Voting Section is currently investigating numerous potential bailouts. Those bailout investigations were initiated after the jurisdictions involved contacted the Department of Justice.

9. Those bailout investigations span six states and involve a variety of types of governmental units.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of January 2011.

s/
Robert S. Berman

Appendix E

ATTACHMENT A

Bailout Cases Before August 5, 1984

1. *Alaska v. United States,* No. 101-66 (D.D.C. Aug. 17, 1966) (U.S. consented to judgment) (state later partially re-covered based on new coverage determinations after 1970 VRA amendments, and fully re-covered based on new coverage determinations after 1975 VRA amendments);

2. *Apache County v. United States,* 256 F. Supp. 903 (D.D.C. 1966) (Apache, Coconino, and Navajo Counties) (Arizona) (U.S. consented to judgment) (counties later re-covered based on new coverage determinations after both 1970 and 1975 VRA amendments);

3. *Elmore County v. United States,* No. 320-66 (D.D.C. Sept. 22, 1966) (Idaho) (U.S. consented to judgment) (county later re-covered based on new coverage determinations after 1970 VRA amendments);

4. *Wake County v. United States,* No. 1198-66 (D.D.C. Jan. 23, 1967) (North Carolina) (U.S. consented to judgment);

5. *Gaston County v. United States,* 288 F. Supp. 678 (D.D.C. 1968), *affd,* 395 U.S. 285 (1969) (North Carolina) (bailout denied);

6. *Nash County v. United States,* No. 1702-66 (D.D.C. Sept. 26, 1969) (North Carolina) (county stipulated to dismissal in wake of Gaston County decision);

7. *Alaska v. United States*, No. 2122-71 (D.D.C. Mar. 10, 1972) (election districts 8 (Anchorage), 11 (Kodiak), 12 (Aleutian islands), and 16 (Fairbanks-Fort Yukon)) (U.S. consented to judgment) (state later fully re-covered based on new coverage determinations after 1975 VRA amendments);

8. *New York v. United States*, No. 2419-71 (D.D.C. Apr. 13, 1972), *affd on other grounds sub nom. NAACP v. New York*, 413 U.S. 345 (1973) (Bronx, Kings, and New York Counties) (U.S. consented to judgment); termination of coverage rescinded (Orders of Jan. 10 and Apr. 30, 1974), *affd mem.* 419 U.S. 888 (1974) (counties re-covered by D.D.C. on motion of U.S. based on a finding in related case, *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974), that counties had used discriminatory test or device) (Bronx and Kings Counties were later covered a second time based on new coverage determinations after 1975 VRA amendments);

9. *Virginia v. United States*, 386 F. Supp. 1319 (D.D.C. 1974), *affd*, 420 U.S. 901 (1975) (bailout denied);

10. *Yuba County v. United States*, No. 75-2170 (D.D.C. May 25, 1976) (California) (Jurisdiction dismissed action);

11. *New Mexico v. United States*, No. 76-0067 (D.D.C. July 30, 1976) (Curry, McKinley, and Otero Counties) (U.S. consented to judgment);

12. *Maine v. United States,* No. 75-2125 (D.D.C. Sept. 17, 1976) (Towns of Cadwell, Limestone, Ludlow, Nashville, Reed, Woodland, Connor, New Gloucester, Sullivan, Winter Harbor, Chelsea, Sommerville, Carroll, Charleston, Webster, Waldo, Beddington, and Cutler) (U.S. consented to judgment);

13. *El Paso County v. United States,* No. 77-0815 (D.D.C. Nov. 8, 1977) (Colorado) (Jurisdiction dismissed action);

14. *Choctaw and McCurtain Counties v. United States,* No. 76-1250 (D.D.C. May 12, 1978) (Oklahoma) (U.S. consented to judgment);

15. *Alaska v. United States,* No. 78-0484 (D.D.C. May 10, 1979) (Jurisdiction dismissed action);

16. *City of Rome v. United States,* 472 F. Supp. 221 (D.D.C. 1979), *affd,* 446 U.S. 156 (1980) (bailout denied);

17. *Campbell County v. United States,* No. 82-1862 (D.D.C. Dec. 17, 1982) (Wyoming) (U.S. consented to judgment);

18. *Massachusetts v. United States,* No. 83-0945 (D.D.C. Sept. 29, 1983) (Towns of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham) (U.S. consented to judgment);

19. *Alaska v. United States,* No. 84-1362 (D.D.C. May 1, 1984) (Jurisdiction dismissed action);

20. *Connecticut v. United States*, No. 83-3103 (D.D.C. June 21, 1984) (Towns of Groton, Mansfield, and Southbury) (U.S. consented to judgment);

21. *Board of County Commissioners v. United States*, No. 84-1626 (D.D.C. July 30, 1984) (El Paso County, Colorado) (U.S. consented to judgment);

22. *Waihee v. United States*, No. 84-1694 (D.D.C. July 31, 1984) (Honolulu County, Hawaii) (U.S. consented to judgment); and

23. *Idaho v. United States*, No. 82-1778 (D.D.C. July 31, 1984) (Elmore County) (U.S. consented to judgment).

Bailout Cases After August 5, 1984

1. *City of Fairfax v. Reno*, No. 97-02212 (D.D.C. Oct. 21, 1997) (including the City of Fairfax School Board) (Virginia) (U.S. consented to judgment);

2. *Frederick County v. Reno*, No. 99-00941 (D.D.C. Sept. 10, 1999) (including the Frederick County School Board; the Towns of Middletown and Stephens City; and the Frederick County Shawneeland Sanitary District) (Virginia) (U.S. consented to judgment);

3. *Shenandoah County v. Reno*, No. 99-00992 (D.D.C. Oct. 15, 1999) (including the Shenandoah County School Board; the Towns of Edinburg, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock; the Stoney Creek Sanitary District; and the Toms

Brook-Maurertown Sanitary District) (Virginia) (U.S. consented to judgment);

4. *Roanoke County v. Reno,* No. 00-01949 (D.D.C. Jan. 24, 2001) (including the Roanoke County School Board and the Town of Vinton) (Virginia) (U.S. consented to judgment);

5. *City of Winchester v. Reno,* No. 00-03073 (D.D.C. June 1, 2001) (Virginia) (U.S. consented to judgment);

6. *City of Harrisonburg v. Reno,* No. 02-00289 (D.D.C. Apr. 17, 2002) (including the Harrisonburg City School Board) (Virginia) (U.S. consented to judgment);

7. *Rockingham County v. Reno,* No. 02-00391 (D.D.C. May 24, 2002) (including the Rockingham County School Board and the Towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville) (Virginia) (U.S. consented to judgment);

8. *Warren County v. Ashcroft,* No. 02-01736 (D.D.C. Nov. 26, 2002) (including the Warren County School Board and the Town of Front Royal) (Virginia) (U.S. consented to judgment);

9. *Greene County v. Ashcroft,* No. 03-01877 (D.D.C. Jan. 19, 2004) (including the Greene County School Board and the Town of Standardsville) (Virginia) (U.S. consented to judgment);

10. *Pulaski County v. Gonzales,* No. 05-01265 (D.D.C. Sept. 27, 2005) (including the Pulaski County School Board and the Towns of Pulaski and Dublin) (Virginia) (U.S. consented to judgment);

11. *Augusta County v. Gonzales,* No. 05-01885 (D.D.C. Nov. 30, 2005) (including the Augusta County School Board and the Town of Craigsville) (Virginia) (U.S. consented to judgment);

12. *City of Salem v. Gonzales,* No. 06-00977 (D.D.C. July 27, 2006) (Virginia) (U.S. consented to judgment);

13. *Botetourt County v. Gonzales,* No. 06-01052 (D.D.C. Aug. 28, 2006) (including the Botetourt County School Board and the Towns of Buchanan, Fincastle, and Troutville) (Virginia) (U.S. consented to judgment);

14. *Essex County v. Gonzales,* No. 06-01631 (D.D.C. Jan. 31, 2007) (including the Essex County School Board and the Town of Tappahannock) (Virginia) (U.S. consented to judgment);

15. *Middlesex County v. Gonzales,* No. 07-01485 (D.D.C. Jan. 7, 2008) (including the Middlesex County School Board and the Town of Urbanna) (Virginia) (U.S. consented to judgment);

16. *Amherst County v. Mukasey,* No. 08-00780 (D.D.C. Aug. 13, 2008) (including the Town of Amherst) (Virginia) (U.S. consented to judgment);

17. *Page County v. Mukasey,* No. 08-01113 (D.D.C. Sept. 15, 2008) (including the Page County School Board and the Towns of Luray, Stanley, and Shenandoah) (Virginia) (U.S. consented to judgment);

18. *Washington County v. Mukasey,* No. 08-01112 (D.D.C. Sept. 23, 2008) (including the Washington County School Board and the Towns of Abington, Damascus, and Glade Spring) (Virginia) (U.S. consented to judgment);

19. *Northwest Austin Municipal Utility District Number One v. Mukasey,* No. 06-01384 (D.D.C. Nov. 3, 2009) (Texas) (U.S. opposed on ground that jurisdiction was not a political subdivision and bailout was denied on that ground by D.D.C. on May 30, 2008. On appeal, the Supreme Court reversed on that ground on June 22, 2009, and held that the jurisdiction was a political subdivision. On remand, the U.S. consented to judgment.);

20. *City of Kings Mountain v. Holder,* No. 10-01153 (D.D.C. Oct. 22, 2010) (North Carolina) (U.S. consented to judgment); and

21. *City of Sandy Springs v. Holder,* No. 10-01502 (D.D.C. Oct. 26, 2010) (Georgia) (U.S. consented to judgment).

APPENDIX F — SECOND SUPPLEMENTAL DECLARATION OF ROBERT S. BERMAN, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FEBRUARY 16, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:10-cv-00651-JDB

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity as
Attorney General of the United States,

Defendant.

SECOND SUPPLEMENTAL DECLARATION OF ROBERT S. BERMAN

I, Robert S. Berman, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am an attorney who currently serves as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have supervisory responsibility for the administrative review of voting changes submitted to the Attorney

General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for 32 years with over 20 years of service in the Voting Section.

2. I have personal knowledge of the information contained in this declaration based upon my review of relevant records maintained by the Department of Justice, as well as my professional experience with, and personal knowledge of, Department of Justice policies and procedures.

3. The following is a list of cases where a court entered an order granting relief pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. 1973a(c):

    a. *United States v. Thurston County*, C.A. No. 78-0-380 (D. Neb. May 9, 1979)

    b. *McMillan v. Escambia County*, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979)

    c. *Woodring v. Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983)

    d. *Sanchez v. Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984)

    e. *United States v. McKinley County*, No. 86-0029-C (D.N.M. Jan. 13, 1986)

    f. *United States v. Sandoval County*, C.A. No. 88-1457-SC (D.N.M. filed Dec. 5, 1988)

g. *Brown v. Board of Commissioners of the City of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 11, 1990)

h. *Cuthair v. Montezuma-Cortez School District Number RE-1*, No. 89-C-964 (D.Col. Apr. 9, 1990). *See also* 7 F. Supp. 2d 1152 (D. Colo. 1998)

i. *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *appeal dismissed*, 498 U.S. 1129 (1991)

j. *Garza and United States v. Los Angeles County*, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991)

k. *United States v. Cibola County*, C.A. No. 93-1134-LH/LFG (D.N.M. filed Oct. 22, 1993)

l. *United States v. Socorro County*, C.A. No. 93-1244-JP (D.N.M. filed Oct. 22, 1993)

m. *United States v. Alameda County*, C.A. No. C 95-1266 (SAW) (N.D. Cal. filed Apr. 13, 1995)

n. *United States v. Bernalillo County*, C.A. No. 93-156-BB/LCS (D.N.M. filed Feb. 26, 1998)

o. *Kirke v. Buffalo County*, C.A. No. 03-CV-3011 (D.S.D. filed Mar. 20, 2003)

p. *Blackmoon v. Charles Mix County*, C.A. No. 05-CV-4017 (D.S.D. filed Jan. 27, 2005)

q. *United States v. Village of Port Chester*, C.A. No. 06-CV-15173 (S.D.N.Y. filed Dec. 15, 2006)

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of February 2011.

/s/

Robert S. Berman

APPENDIX G — SUPPLEMENTAL DECLARATION OF DR. PEYTON MCCRARY, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FEBRUARY 16, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA,

Plaintiff,

v.

ERIC H. HOLDER, Jr., in his official capacity
as Attorney General of the United States,

Defendant

Civil Action No. 1:10-cv-00651-JDB

SUPPLEMENTAL DECLARATION OF DR. PEYTON MCCRARY

Pursuant to 28 U.S.C. 1746, I, Peyton McCrary, make the following declaration:

1. My name is Peyton McCrary, and I reside in Arlington, Virginia. I am an historian employed since August, 1990, by the Voting Section, Civil Rights Division, of the Department of Justice. My responsibilities include the planning, direction, coordination, or performance of historical research or statistical analysis in connection with litigation. On occasion I am asked to provide written or courtroom testimony on behalf of the United States.

2. My initial declaration in this case was filed November 15, 2010. I incorporate by reference the summary of professional qualifications provided in that declaration, including the attached *Curriculum Vitae*, which I prepared and know to be accurate.

3. In this court's Minute Order dated February 4, 2011, the parties were directed to brief the following question: "in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it 'rational in both practice and theory,' *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), for Congress to preserve the existing coverage formula in Section 4(b) of the Act?" As a result, attorneys for the Department of Justice have asked me to clarify certain empirical facts regarding the course of Section 2 litigation that were part of the record before Congress in 2005-2006. Because Section 2 litigation is nationwide and not restricted to jurisdictions covered by Section 5, it offers a means of comparing racial discrimination affecting voting in covered with non-covered jurisdictions.

4. In my initial declaration I documented two key characteristics of Section 2 litigation: 1) the volume of cases settled in favor of minority plaintiffs was substantially larger in unreported cases than in cases with reported decisions; and 2) the volume of cases settled in favor of minority plaintiffs in both reported and unreported cases was substantially larger in jurisdictions covered by Section 5 than in non-covered jurisdictions. In that declaration I also documented that this pattern was evident in the record before Congress when it reauthorized Section 5 in 2006.

5. In this supplemental declaration I have broken these data into separate patterns by state and, within partially covered states, I have separated the findings for covered and non-covered counties. The purpose is to provide empirical evidence – from the record before Congress in 2006 – concerning the issues posed by the court's order.

6. Table 1 provides the number of reported Section 2 cases with outcomes favorable to minority plaintiffs in states that are entirely covered by the formula set forth in Section 4(b) of the Voting Rights Act. These data are taken from Ellen Katz, et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (2005), *reprinted in To Examine Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16, 964-1124 (2005), and finalized as published at 39 U. Mich. J.L. Reform 643 (2006). I have used the numbers from the finalized database. Table 1 also identifies for each of the covered states the number of favorable outcomes in unreported Section 2 cases, taken from Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005* (2006), *reprinted in Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 104-289 (2006).[1]

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[1] In its analysis the National Commission report utilized a version of the Michigan study directed by Professor Katz – known as the Voting Rights Initiative (VRI) – available on the VRI website as of Jan. 16, 2006. Thus the numbers in Table 5 of the National Commission report drawn from the Michigan

Table 1 does *not* consider the pattern for covered jurisdictions in partially covered states, which is examined separately below.

Table 1: State-by-state Pattern of Section 2 Outcomes in States Entirely Covered by Section 5

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
Covered States		
Alabama	12	192
Alaska	0	0
Arizona	0	2
Georgia	3	69
Louisiana	10	17
Mississippi	18	67

---

study differ slightly from both the numbers on the record before Congress and the finally published version cited in the text above. In this supplemental declaration I have relied on the numbers for partially covered states from the finalized Michigan database – the only version available electronically – and the number of outcomes in unreported cases listed in Table 5 of the National Commission report. The slight differences in the numbers reported in different versions of the Michigan study do not affect the conclusions to be drawn from the data.

South Carolina	3	33
Texas	7	206
Virginia	4	15
Total (covered states)	***57***	***601***

7. Table 2 (see next page) relies on the Michigan study once again for outcomes in reported cases in non-covered states. The numbers for outcomes in unreported cases in non-covered states are taken from Attachment B to my initial Declaration of November 15, 2010, relying in part on summaries of cases in the record before Congress (cited in my initial declaration).

8. As the data in Tables 1 and 2 make clear, looking only at liability findings of a Section 2 violation gives a skewed picture of Section 2 litigation. In states entirely covered by Section 5 (see Table 1) the 57 favorable outcomes in reported decisions represented only 9.5% of the total outcomes (601) in both reported and unreported cases. For Alabama, reported decisions account for only 6.3% of the total favorable outcomes.

9. The data reported in Table 2 below also reflect a disparity between reported and unreported cases. The number of favorable outcomes in reported cases (38) represents 41.3% of total outcomes (92).

10. A comparison of the data in Tables 1 and 2 makes clear that minority plaintiffs brought many more successful Section 2 cases in covered states than in non-covered states. Looking just at reported cases, covered states accounted for 57 favorable outcomes and

non-covered states for only 38. Looking at the total of both reported and unreported cases, the disparity was much greater: states covered by Section 5 accounted for 601 Section 2 cases with favorable outcomes to minority plaintiffs – ***more than six times*** the 92 favorable outcomes in non-covered states.

Table 2: State-by-State Pattern of Section 2 Outcomes in States Not Covered by Section 5

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
Non-Covered States		
Arkansas	4	28
Colorado	2	3
Connecticut	1	2
Delaware	1	1
Hawaii	1	1
Idaho	0	0
Indiana	1	4
Iowa	0	0
Illinois	9	11
Kansas	0	0
Kentucky	0	0

Maine	0	0
Maryland	2	5
Massachusetts	1	3
Minnesota	0	0
Missouri	1	2
Montana	2	5
Nebraska	1	1
Nevada	0	0
New Jersey	1	2
New Mexico	0	7
North Dakota	0	1
Ohio	2	2
Oklahoma	0	0
Oregon	0	0
Pennsylvania	3	4
Rhode Island	1	2
Tennessee	4	6
Utah	0	1
Vermont	0	0
Washington	0	0
West Virginia	0	0
Wisconsin	1	1
Wyoming	0	0
Total (non-covered states)	***38***	***92***

11. The pattern in states only partially covered by the formula in Section 4(b) is more complex. Only one of the partially covered states contains more than a handful of covered jurisdictions: North Carolina. Forty of North Carolina's 100 counties are subject to Section 5 review. According to the 2000 Census, these covered counties contain only 36.2% of the state's population.[2] Looking at reported decisions, six of the 10 favorable outcomes (60%) were in covered counties. The disparity is even greater when examining all Section 2 cases, both reported and unreported; 36 of 55 favorable outcomes (65.5%) occurred in covered counties.[3] Thus the pattern of Section 2 litigation in North Carolina is similar to that when comparing covered and non-covered states.

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[2] These and all references to the population of jurisdictions are taken from Census 2000, Summary File 1, Table P1.

[3] See the case summaries for North Carolina in *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 923-33, 937-42, 944, 947, 951-60, 1769-77, 1779, 1781-95, 1797-98, 1800-02 (2006) [hereinafter *Evidence of Continuing Need*].

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
North Carolina (40 covered)	6	36
(60 non-covered counties)	4	19

12. To compare Section 2 litigation in California's four covered counties with outcomes in the state's other 54 counties is not particularly informative; non-covered California counties contain 97.6% of the state's population and thus dwarf the number of people in areas covered by Section 5. Not surprisingly, the number of favorable outcomes in the rest of the state (15) is much greater than in the four covered counties (1).[4]

---

[4] See Declaration of Dr. Peyton McCrary, November 15, 2010, Attachment B.

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
California (4 covered counties)	0	1
(54 non-covered counties)	3	15

13. Similarly, only 5 of Florida's 67 counties are subject to Section 5 review and account for only one of eighteen favorable outcomes.[5] These counties contain only 8.7% of the state's population. Only three of New York's 62 counties are covered, but they contain 28.1% of the state's population. The covered counties account for four of the seven favorable outcomes, however.[6] In South Dakota only two of 66 counties are covered, containing 2.7% of the state's population; they account for one of the four outcomes favorable to minority plaintiffs.[7]

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[5] *Evidence of Continuing Need*, 477-81, 491-92, 498-502, 1482 n. 137, 1484-85; Declaration of Dr. Peyton McCrary, November 15, 2010, Attachment B.

[6] *Evidence of Continuing Need*, 1837, 1855-56, 1874-75, 1878; Declaration of Dr. Peyton McCrary, November 15, 2010, Attachment B.

[7] *Evidence of Continuing Need*, 1161-63, 1171-73; Declaration of Dr. Peyton McCrary, November 15, 2010, Attachment B.

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
Florida (5 covered counties)	1	1
(62 non-covered counties)	6	17
New York (3 covered counties)	1	4
(59 non-covered counties)	4	7
South Dakota (2 covered counties)	1	1
(64 non-covered counties)	0	4

14. In Michigan only two townships (out of 1242) are covered under the formula in Section 4(b), and in New Hampshire only 10 towns (out of 246) are covered. The covered townships include less than one percent of Michigan's population. The covered towns in New Hampshire contain less than two percent of that state's population. Neither state has had any successful Section 2 litigation, either in covered or non-covered jurisdictions.

15. Pairing individual states – covered vs. non-covered states – can present a misleading view of the pattern of Section 2 outcomes, especially if one looks only at reported decisions. Illinois, for example, accounts for nine favorable outcomes in reported decisions – more than several states entirely covered by Section 5. When examining unreported as well as reported cases, however, all of the covered states except one (Arizona) have more favorable outcomes than the 11 in Illinois (comparing Tables 1 and 2). Georgia and South Carolina have three favorable outcomes apiece in reported cases – fewer than Arkansas, Tennessee, and Illinois. Looking at unreported as well as reported cases, however, reveals that Georgia has 69 favorable outcomes and South Carolina, 33, more than the 28 in Arkansas and far more than any other non-covered state.

16. In short, examining the pattern of outcomes in Section 2 litigation broken down by state – and by county within partially covered states – reinforces the assessment that the coverage formula set forth in Section 4(b) of the Voting Rights Act targets those areas of the country where racial discrimination affecting voting is most concentrated.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of February, 2011.

/s/
Peyton McCrary

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC 2 6 2012
OFFICE OF THE CLERK

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Shelby County, Alabama.

Respondents are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS. iii

TABLE OF CITED AUTHORITIES vi

BRIEF FOR PETITIONER. 1

OPINIONS BELOW. 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 1

STATEMENT OF THE CASE 1

- A. History of the Voting Rights Act. 1
  - 1. The Voting Rights Act of 1965. 1
  - 2. The 1970, 1975, and 1982 Reauthorizations 6
  - 3. The 2006 Reauthorization 9
  - 4. The *Northwest Austin* Litigation 11

Page

B. Proceedings Below 12

SUMMARY OF THE ARGUMENT 17

ARGUMENT 23

I. CONGRESS DID NOT BUILD A RECORD OF CURRENT CONDITIONS ESTABLISHING THAT SECTION 5 PRECLEARANCE REMAINS APPROPRIATE 23

A. The widespread and ingenious voting discrimination that once made Section 5 preclearance an appropriate enforcement remedy has ended. 24

B. The lower court's reasons for upholding Section 5 conflict with this Court's decisions and would justify preclearance in perpetuity 34

II. CONGRESS DID NOT DOCUMENT CURRENT CONDITIONS JUSTIFYING SECTION 4(B)'S UNEQUAL TREATMENT OF SOVEREIGN STATES. 40

A. Section 4(b)'s coverage formula is no longer rational in theory. 40

Page

B. Section 4(b)'s coverage formula is no longer rational in practice. 43

CONCLUSION 58

ADDENDUM — RELEVANT STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution .1a

Fifteenth Amendment to the United States Constitution .2a

42 U.S.C. § 1973
Voting Rights Act § 2 . . . . .3a

42 U.S.C. § 1973a
Voting Rights Act § 3 . . . . .4a

42 U.S.C. § 1973b
Voting Rights Act § 4 . . . . .6a

42 U.S.C. § 1973c
Voting Rights Act § 5 . . . . .18a

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Page

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393 U.S. 544 (1969) 2, 28

Beer v. United States,
425 U.S. 130 (1976) 8, 26, 28

Bond v. United States,
131 S. Ct. 2355 (2011) 24

Chisom v. Roemer,
501 U.S. 380 (1991) 31

City of Boerne v. Flores,
521 U.S. 507 (1997) . . . . *passim*

City of Pinson v. Holder,
12-cv-255 (D.D.C. Apr. 20, 2012) 56

City of Rome v. United States,
446 U.S. 156 (1980) . . . . *passim*

City of Sandy Springs v. Holder,
No. 10-cv-1502 (D.D.C. Oct. 26, 2010) 56

Coleman v. Court of Appeals of Md.,
132 S. Ct. 1327 (2012) .33, 39, 53

Fayetteville v. Cumberland County,
No. 90-2029, 1991 WL 23590 (4th Cir. Feb. 28,
1991) 36

Page

Georgia v. Ashcroft,
539 U.S. 461 (2003) . . . . *passim*

Georgia v. United States,
411 U.S. 526 (1973) 6

Gregory v. Ashcroft,
501 U.S. 452 (1991) 24

Nev. Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 38

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) . . . . *passim*

Nw. Austin Mun. Util. Dist. No. One v. Mukasey,
573 F. Supp. 2d 221 (D.D.C. 2008). 53

Oregon v. Mitchell,
400 U.S. 112 (1970) 17, 34

Presley v. Etowah County Comm'n,
502 U.S. 491 (1992) 27

Reno v. Bossier Parish Sch. Bd.,
520 U.S. 471 (1997) ("*Bossier I*"). 26

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) ("*Bossier II*"). . . . . *passim*

Page

South Carolina v. Katzenbach,
383 U.S. 301 (1966) . . . . *passim*

Tennessee v. Lane,
541 U.S. 509 (2004) 34, 37, 38

Terry v. Adams,
345 U.S. 461 (1953) 31

Texas v. United States,
831 F. Supp. 2d 244 (D.D.C. 2011) 26

Thornburg v. Gingles,
478 U.S. 30 (1986) 41

United States v. Bd. of Comm'rs of Sheffield,
435 U.S. 110 (1978) 24

United States v. Georgia,
546 U.S. 151 (2006) 33

Constitution & Statutes:

U. S. const. Amendment X 1, 7, 23, 24, 34

U. S. const. Amendment XIV. . . . . *passim*

U. S. const. Amendment XV . . . . *passim*

28 U.S.C. § 1254(1). 1

Page

42 U.S.C. § 1973 1

42 U.S.C. § 1973a 1, 17, 33, 57

42 U.S.C. § 1973b 1, 54, 55, 56

42 U.S.C. § 1973c 1, 10

42 U.S.C. § 1973l 15

42 U.S.C. § 1983 20

42 U.S.C. § 1988 33

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) ("VRARAA") . . . . . . *passim*

Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) 2

Pub. L. No. 91-285, 84 Stat. 134 (1982) 6

Pub. L. No. 94-73, 89 Stat. 400 (1975) 7

Pub. L. No. 97-205, 96 Stat. 131 (1982) 8

Federal Register Notices:

30 Fed. Reg. 9897 (Aug. 7, 1965) 3

Page

30 Fed. Reg. 14505 (Nov. 19, 1965) 3

31 Fed. Reg. 19 (Jan. 4, 1966). 3

31 Fed. Reg. 982 (Jan. 25, 1966). 3

31 Fed. Reg. 3317 (Mar. 2, 1966) .3

36 Fed. Reg. 5809 (Mar. 27, 1971) .6

39 Fed. Reg. 16912 (May 10, 1974). 6

40 Fed. Reg. 43746 (Sept. 23, 1975). 7

40 Fed. Reg. 49422 (Oct. 22, 1975). 7

41 Fed. Reg. 784 (Jan. 5, 1976). 7

41 Fed. Reg. 34329 (Aug. 13, 1976) 7

Other Authorities:

151 Cong. Rec. H5131, H5181 (daily ed. July 13, 2006) 44

151 Cong. Rec. H5182 (daily ed. July 13, 2006) 49

Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 Ohio St. L.J. 177 (2005) 30

Page

H.R. Rep. No. 109-478 (2006) (House Report). . . *passim*

H.R. Rep. No. 91-397, reprinted in 1970 U.S.C.C.A.N. 3277. 6

Introduction to the Expiring Provisions of the Voting Rights Act, 109th Cong. at 216 (May 9, 2006) 35

Ellen Katz & The Voting Rights Initiative, *VRI Database Master List*, *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls 47, 48, 50

Ellen Katz *et al.*, *Documenting Discrimination in Voting*, 39 U. Mich. J.L. Reform 643 (2006) 36

Modern Enforcement of the Voting Rights Act, Hearing before the Senate Committee on the Judiciary, 109th Cong., at 110 (May 10, 2006) 25

Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174 (2007) 45

S. Rep. No. 109-295 (2006) (Senate Report). . . . . *passim*

The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong. (May 16, 2006) 45, 46, 51

Page

To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., at 974, 1019-20 (Oct. 18, 2005) 47

Voting Rights Act: Evidence of Continued Need: Hearing. Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., at 208 (Mar. 8, 2006) 51

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is available at 679 F.3d 848 and is reprinted in the appendix to the Petition for Certiorari ("Pet. App.") at 1a-110a. The opinion of the United States District Court for the District of Columbia is available at 811 F. Supp. 2d 424 and is reprinted at Pet. App. 111a-291a.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its decision on May 18, 2012. Pet. App. 1a. This Court granted a timely petition for certiorari on November 9, 2012. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1973, 42 U.S.C. §1973a, 42 U.S.C. §1973b, and 42 U.S.C. §1973c are reprinted in an addendum to this brief.

STATEMENT OF THE CASE

A. History of the Voting Rights Act

1. The Voting Rights Act of 1965

In 1965, 95 years after the Fifteenth Amendment's ratification, African-Americans were still widely denied the right to vote throughout the South. Despite the Fifteenth Amendment's unequivocal command, as well as prior congressional efforts to strengthen the ability to challenge voting rights abuses in court, discriminatory devices and extra-legal harassment were rampant. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Further, states and localities routinely evaded curative judicial actions by enacting alternatives with the same discriminatory effect. *Id* at 312-15; *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969).

To end "nearly a century of systematic resistance to the Fifteenth Amendment" and "to banish the blight of racial discrimination in voting," *Katzenbach*, 383 U.S. at 308, 328, Congress invoked its Fifteenth Amendment enforcement authority to enact the Voting Rights Act of 1965 ("VRA"). The VRA created a network of stringent remedies that signaled Congress' determination to ensure that African-Americans could freely exercise the franchise. Section 2 of the VRA created a nationwide judicial remedy against any "voting qualification or prerequisite to voting, or standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. No. 89-110, §2, 79 Stat. 437 (1965). That remedy is available to both government and private plaintiffs.

Other VRA provisions operated against "covered" States and political subdivisions identified by a statutory formula. A jurisdiction became "covered" if it "maintained on November 1, 1964, any test or device" prohibited by Section 4(a) and "less than 50 per centum of the persons of voting age residing therein were registered on November

1, 1964" or "less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* §4(b), 79 Stat. at 438.[1] Congress determined that this formula accurately captured those jurisdictions where systematic voting abuses were ongoing and ingenious defiance was to be expected. To limit over- and under-inclusion, Congress permitted a presumptively covered jurisdiction to "bailout" by showing that it had not used a "test or device" in the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race, *id.* §4(a), 79 Stat. at 438, and empowered federal courts in appropriate circumstances to "bail in" a non-covered jurisdiction found to have violated the Fifteenth Amendment, *id.* §3(c), 79 Stat. at 437.

Those temporary measures, which were enacted for a five-year period, included a prohibition on the use of certain voting qualifications (including literacy tests), *id.* §4(a), 79 Stat. at 438; an exposure to having federal examiners rather than state officials administer voting qualifications, *id.* §§6(b), 7, 9, 13(a), 79 Stat. at 440-44; and Section 5's unprecedented "preclearance" requirement, *id.* §5, 79 Stat. at 439. Section 5 overrode the prerogative of "covered" jurisdictions to establish voting practices and procedures by suspending "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" until the Attorney General or a three-judge court in Washington, DC was satisfied that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* Preclearance prevented flagrant Fifteenth Amendment violators "from circumventing the direct prohibitions imposed by provisions such as §§2 and 4(a)." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 218 (2009) ("*Nw. Austin*") (Thomas, J., concurring the judgment in part and dissenting in part).

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[1] Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and parts of North Carolina, Arizona, Idaho, and Hawaii became covered under this formula. *See* 30 Fed. Reg. 9897 (Aug. 7, 1965); 30 Fed. Reg. 14505 (Nov. 19, 1965); 31 Fed. Reg. 19 (Jan. 4, 1966); 31 Fed. Reg. 982 (Jan. 25, 1966); 31 Fed. Reg. 3317 (Mar. 2, 1966). As a political subdivision of Alabama, Shelby County became a covered jurisdiction. Pet. App. 123a-124a.

In 1966, the Court rejected South Carolina's constitutional challenge to Section 5 preclearance and Section 4(b)'s coverage formula. *Katzenbach*, 383 U.S. at 324-33. Congress had compiled "reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act," which justified Fifteenth Amendment enforcement. *Id.* at 329. The legislative record painstakingly documented the web of discriminatory practices used to deny African-Americans ballot access, and statistical evidence verified the widespread impact of voting discrimination throughout the South. The "registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration." *Id.* at 313. Moreover, "voter turnout levels in covered jurisdictions ha[d] been at least 12% below the national average in the 1964 Presidential election." *Nw. Austin*, 557 U.S. at 222 (Thomas, J.).

The Court nevertheless recognized that the VRA was an "uncommon exercise of congressional power" and a departure from the "doctrine of equality of the states." *Katzenbach*, 383 U.S. at 328-29, 334. Accordingly, the Court's decision turned on finding that Congress had evidence supporting the need for preclearance to combat systematic evasion and that the "covered" jurisdictions had been singled out by a formula "rational in both practice and theory." *Id.* at 330.

Preclearance met the urgent need to put an end to gamesmanship in covered jurisdictions. "Congress knew that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 335. It thus "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies prescribed for voting discrimination contained in the Act itself." *Id.* Given the failure of traditional alternatives, "the specific remedies in the Act were an appropriate means of combating the evil." *Id.* at 328. "[L]egislative measures not otherwise appropriate" were constitutional under those "exceptional conditions" and "unique circumstances." *Id.* at 334-35.

Section 4(b) was rational in theory because "the use of tests and devices for voter registration" were the "tool for perpetrating the evil," and a voting rate in the 1964 presidential election at least 12 points below the national average" was indicative of "widespread and persistent" efforts to disenfranchise African-Americans. *Id.* at 330-31. It was rational in practice because the formula omitted none of the jurisdictions where voting discrimination was worst. *Id.* at 329. That there were "no States or political subdivisions exempted from coverage under §4(b) in which the record reveal[ed] recent racial discrimination involving tests and devices ... confirme[d] the rationality of the formula." *Id.* at 331.

2. The 1970, 1975, and 1982 Reauthorizations

Congress had "expected that within a 5-year period Negroes would have gained sufficient voting power in the States affected so that special federal protection [by preclearance] would no longer be needed." H.R. Rep. No. 91-397, reprinted in 1970 U.S.C.C.A.N. 3277, 3281. In 1970, however, Congress found it necessary to reauthorize the expiring provisions for five years, Pub. L. No. 91-285, 84 Stat. 314 (1970), and to expand Section 4(b)'s formula to add coverage of any jurisdiction that had maintained a prohibited "test or device" on November 1, 1968, and had voter registration on that date or turnout in the 1968 presidential election of less than 50 percent, *id.* §4, 84 Stat. at 315.[2] Congress also extended Section 4(a)'s temporary ban on the use of any prohibited "test or device" to non-covered jurisdictions for a period of five years. *Id.* §6, 84 Stat. at 315. The Court upheld the reauthorization as constitutional for "the reasons stated at length in *South Carolina v. Katzenbach.*" *Georgia v. United States*, 411 U.S. 526, 435 (1973).

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[2] Parts of Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming became covered because of the 1970 reauthorization. 36 Fed. Reg. 5809 (Mar. 27, 1971); 39 Fed. Reg. 16912 (May 10, 1974).

In 1975, Congress extended the VRA's temporary provisions for seven years, Pub. L. No. 94-73, 89 Stat. 400 (1975), and further expanded coverage to any jurisdiction that had maintained a prohibited "test or device" on November 1, 1972, and had voter registration on that date or turnout in the 1972 presidential election of less than 50 percent, *id.* §202, 89 Stat. at 401.[3] Also, the nationwide ban on prohibited "tests or devices" was made permanent. *Id.* §201, 89 Stat. at 400.

The Court upheld the 1975 reauthorization. In doing so, it stressed that the "7-year extension of the Act was necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." *City of Rome v. United States*, 446 U.S. 156, 182 (1980). As the Court explained, "significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions" and "though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *Id.* at 180-81.

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[3] Congress also amended the definition of "test or device" to include "any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language," in a jurisdiction where more than 5% "of the citizens of voting age residing in such State or political subdivision are members of a single language minority." Pub. L. No. 94-73, §203, 89 Stat. at 401-402. Alaska, Arizona, Texas, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota, fell within the 1975 reauthorization. 40 Fed. Reg. 43746 (Sept. 23, 1975); 40 Fed. Reg. 49422 (Oct. 22, 1975); 41 Fed. Reg. 784 (Jan. 5, 1976); 41 Fed. Reg. 34329 (Aug. 13, 1976).

In 1982, Congress reauthorized the VRA for 25 years. Pub. L. No. 97-205, 96 Stat. 131 (1982). Congress did not amend Section 5 or Section 4(b)'s coverage formula, but altered Section 4(b)'s bailout provision in several ways. First, Congress permitted a "political subdivision" within a fully-covered State to seek bailout. *Id.* §2(b)(2), 96 Stat. at 131. Second, Congress made bailout eligibility contingent on specific categories of conduct by all "governmental units" within the territory seeking bailout. *Id.* §2(b)(4)(D), 96 Stat. at 131-32. Third, Congress expanded the "clawback" period of the bailout provision from five years to ten years. *Id.* §2(b)(5), 96 Stat. at 133.

Although the 1982 reauthorization was not challenged facially, the Court twice interpreted Section 5 to limit the federalism burden of preclearance. In *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"), the Court cautioned that interpreting Section 5's discriminatory "purpose" preclearance requirement too broadly would exacerbate federalism costs "perhaps to the extent of raising concerns about §5's constitutionality," *id.* at 336. It thus interpreted the "purpose" prong to impose only the "trivial" burden of proving the absence of a "retrogressive" purpose. *Id.* at 331.

The Court cabined the intrusiveness of Section 5's "effect" prong in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). It interpreted "effective exercise of the electoral franchise," the retrogression standard first set forth in *Beer v. United States*, 425 U.S. 130 (1976), to take into account a "minority group's opportunity to participate in the political process" and not just "the comparative ability of a minority group to elect a candidate of its choice." *Id.* at 479-80. This test more closely tracked the constitutional standard, which guarantees electoral opportunity not electoral results, and thus helped to avoid the equal-protection problems associated with making minority candidate success the exclusive focus of preclearance determinations. *Id.* at 491 (Kennedy, J., concurring).

3. The 2006 Reauthorization

Prior to Section 5's expiration, Congress held reauthorization hearings addressing particular topics, including the preclearance standard, this Court's interpretations of Section 5 between 1982 and 2006, evidence supporting the "continuing need" for preclearance, and possible modification of the coverage formula. The Senate and House of Representatives issued reports summarizing their findings. H.R. Rep. No. 109-478 (2006) ("*House Report*"); S. Rep. No. 109-295 (2006) ("*Senate Report*").

In 2006, Congress reauthorized the VRA for another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) ("VRARAA"). Congress acknowledged "that the number of African-Americans who are registered and who turn out to cast ballots ha[d] increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." *House Report* at 12. Congress also found that "the disparities between

African-American and white citizens who are registered to vote ha[d] narrowed considerably in six southern States covered by the temporary provisions … and … North Carolina." *Id.* Congress concluded that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *Id.*

Despite these gains, Congress did not update Section 4(b)'s coverage formula, choosing again to base coverage on election data from 1964, 1968, and 1972. Nor did Congress ease Section 5's preclearance burden. Instead, it made the burden more onerous by amending Section 5 to overrule *Bossier II* and *Ashcroft*. Section 5's "purpose" prong now denies preclearance to a change made for "any discriminatory purpose," 42 U.S.C. §1973c(c), and its "effect" prong now requires denial of preclearance if the change "diminish[es] the ability of [minority] citizens … to elect their preferred candidates of choice," *id.* §1973c(b), (d). And unlike in 1965, 1970, and 1975—where Congress imposed preclearance for periods of five and seven years despite deep and widespread voting discrimination in covered jurisdictions—the 2006 reauthorization extended Section 5 for an additional twenty-five years.

Congress justified reauthorization by finding that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." VRARAA, §2(b)(2), 120 Stat. at 577. These "second generation" barriers were evidenced by racially polarized voting; Section 5 preclearance statistics; "section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the [VRA]." *Id.* §2(b)(8), 120 Stat. at 578.

4. The *Northwest Austin* Litigation

In resolving a constitutional challenge by a covered jurisdiction on statutory grounds, the Court in *Northwest Austin* held that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of dramatic changes in the covered jurisdictions. 557 U.S. at 204. Writing for eight Justices, Chief Justice Roberts explained that Section 5 "imposes current burdens and must be justified by current needs," and Section 4(b)'s "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. "These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. Additional constitutional concerns are raised in saying that this tension between §§2 and 5 must persist in covered jurisdictions and not elsewhere." *Id.*

Justice Thomas would have decided the merits of the constitutional challenge. In his view, "the lack of current evidence of intentional discrimination with respect to voting" meant that Section 5 "could no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment." *Id.* at 216. Justice Thomas recognized that "Congress passed §5 of the VRA in 1965 because that promise had remained unfulfilled for far too long. But now—more than 40 years later—the violence, intimidation, and subterfuge that led Congress to pass §5 and this Court to uphold it no longer remains. An acknowledgment of §5's unconstitutionality represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA." *Id.* at 229.

B. Proceedings Below

1. In April 2010, Shelby County, seeking resolution of the "serious constitutional questions" unresolved in *Northwest Austin,* sought a declaration that Section 5 and Section 4(b) are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing those provisions. The district court granted summary judgment to the Attorney General, Pet. App. 111a-291a, and Shelby County timely appealed.

2. By a 2-1 vote, the D.C. Circuit affirmed. Writing for the majority, Judge Tatel concluded that "*Northwest Austin* sets the course for our analysis," thus requiring that Section 5's "'current burdens'" be justified by "'current needs'" and that Section 4(b)'s "'disparate geographic coverage [be] sufficiently related to the problem that it targets'" to justify its departure from the fundamental principle of "'equal sovereignty.'" *Id.* 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203).

Turning to the evidence needed to sustain Section 5's reauthorization, the court concluded that preclearance need not be justified by "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment." *Id.* 24a. In its view, the issue was not "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." *Id.* 26a. Also, although acknowledging that "the Supreme Court ... has [n]ever held that [intentional] vote dilution violates the Fifteenth Amendment," the court concluded that Congress could rely on such evidence because Section 5 also enforces the Fourteenth Amendment. *Id.* 27a.

"Having resolved these threshold issues," *id.* 29a, the court held the legislative record sufficient to sustain Section 5. It found that "the record contains numerous 'examples of modern instances' of racial discrimination in voting," *id.* 29a (quoting *City of Boerne v. Flores*, 521 U.S. 507 530 (1997)), and that "several categories of evidence in the record support Congress' conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed," *id.* 31a. The court also concluded that Section 5's "deterrent" effect supported reauthorization, *id.* 47a, and ultimately held that Congress' decision was "reasonable" and "deserves judicial deference," *id.* 68a, 48a.

The court also upheld Section 4(b). It rejected Shelby County's argument that the formula is no longer rational in theory as "rest[ing] on a misunderstanding" because Congress did not rely on any logical connection between the concededly outdated triggers for coverage and the evidence on which Congress purported to rely. *Id.* 56a. The court concluded that the coverage triggers "were never selected because of something special that occurred in those years." *Id*. Congress "identified the jurisdictions it sought to cover ... and then worked backward reverse-engineering a formula to cover those jurisdictions." *Id*. The court nevertheless recognized that whether Section 4(b) was constitutional "present[ed] a close question" given the evidence of Section 2 litigation that Congress included in the legislative record. *Id*. 58a (discussing the Katz Study of Section 2 litigation).

Relying on a post-enactment declaration that the United States submitted to the district court, the court found that several covered States "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." *Id*. 59a. The court reasoned that these States "appear comparable to some non-covered states only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." *Id* 59a-60a. Finally, (again relying on post-enactment evidence) it concluded that the availability of bail-in and bailout alleviated any remaining concerns with Section 4(b)'s imperfections. *Id*. 61a-65a.

3. Judge Williams dissented. He found Section 4(b)'s coverage criteria defective whether "viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of §5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?)." *Id*. 70a. Per Judge Williams, although "sometimes a skilled dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder ... Congress hasn't proven so adept." *Id*.

Judge Williams explained that the requirement that Section 4(b) be "sufficiently related to the problem it targets" means that "[t]he greater the burdens imposed by §5, the more accurate the coverage scheme must be." *Id.* 71a. He found several aspects of the preclearance regime troubling. First, Section 5 creates severe federalism problems by "mandat[ing] anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes." *Id.* Second, Section 5's "broad sweep" applies "without regard to kind or magnitude" of the voting change. *Id.* 72a. Third, the 2006 amendments to the preclearance standard increased Section 5's federalism burden and "not only disregarded but flouted Justice Kennedy's" equal-protection concerns. *Id.* 73a.

Judge Williams agreed that "[w]hether Congress is free to impose §5 on a select set of jurisdictions also depends in part ... on possible shortcomings in the remedy that §2 provides for the country as a whole." *Id.* 77a. But he added that "it is easy to overstate the inadequacies of §2, such as cost and the consequences of delay" because "plaintiffs' costs for §2 suits can in effect be assumed by" the Department of Justice ("DOJ"), and where DOJ does not step in, "§2 provides for reimbursement of attorney and expert fees for prevailing parties." *Id.* (citing 42 U.S.C. §1973*l*(e)). Further, courts can "use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." *Id.* 77a-78a.

Judge Williams then reasoned that "a distinct gap must exist between the current level of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to §5's harsh remedy, even if one might find §5 appropriate for a subset of that group." *Id.* 78a. Instead he found a negative correlation "between inclusion in §4(b)'s coverage formula and low black registration or turnout," noting that "condemnation under §4(b) is a marker of higher black registration and turnout." *Id.* 83a. The same was true for minority elected officials. *Id.* 85a.

Evidence of "second generation" barriers only further undermined the formula. *Id.* 91a-93a. "The five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions .... Of the ten jurisdictions with the greatest number of successful §2 lawsuits, only four are covered .... A formula with an error rate of 50% or more does not seem 'congruent and proportional.'" *Id.* 93a. Judge Williams rejected as unreliable the Attorney General's post-enactment survey of "purportedly successful, but unreported §2 cases." *Id.* 93a-94a. Judge Williams also attributed no significance to Section 5's "deterrent effect" as it "would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens ... must be justified by current needs' would mean little if §5's supposed deterrent effect were enough to justify the current scheme." *Id.* 94a. And he explained that "tacking on a waiver procedure such as bailout" could never solve the coverage formula's severe problems. *Id.* 101a (citation and quotation omitted).

Judge Williams thus concluded that "[b]ased on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a substantial amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*." *Id.* 96a. "[T]here is little to suggest that §4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination." *Id.* 104a. Section 4(b) could not satisfy "*Northwest Austin*'s requirement that current burdens be justified by current needs." *Id.*

SUMMARY OF THE ARGUMENT

The Fifteenth Amendment's guarantee that "[t]he right of citizens ... to vote shall not be denied or abridged by ... any State on account of race, color or previous condition of servitude," U.S. Const. amend. XV, §1, limits but does not usurp the States' sovereign power to regulate elections, *see Oregon v. Mitchell*, 400 U.S. 112, 126 (1970). When Congress, as in the VRA, seeks "to enforce this article," U.S. Const. amend. XV, §2, it is the Article III responsibility of this Court to ensure that Congress is reacting to constitutional violations and has appropriately addressed them without intruding into matters reserved to the States under the Tenth Amendment or unjustifiably denying equal State sovereignty. *See Nw. Austin*, 557 U.S. at 205.

The VRA created a network of prophylactic remedies designed "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. at 308. Section 2, as amended, creates a nationwide right of action and bans any law that even unintentionally "results in a denial or abridgment" of the right to vote. 42 U.S.C. §1973(a). Congress also has permanently outlawed literacy tests and other ballot-access restrictions that were used to disenfranchise minority voters. And Congress has enacted a "bail in" provision that can subject any state or local jurisdiction found to have violated constitutional voting rights to judicially-supervised preclearance. None of these provisions is challenged here.

Shelby County challenges the reauthorization until 2031 of Section 5's preclearance obligation and Section 4(b)'s coverage formula. Section 5 exacts a heavy, unprecedented federalism cost by forbidding the implementation of all voting changes in jurisdictions identified by Section 4(b) until federal officials are satisfied that the changes do not undermine minority voting rights. *Nw. Austin*, 557 U.S. at 202. And Section 4(b)'s coverage formula "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 203 (citation and quotation omitted). Whether these "legislative measures not otherwise appropriate" remain constitutional under current conditions is the crux of this case. *Katzenbach*, 383 U.S. at 335.

This Court has previously upheld the preclearance regime against facial constitutional challenge under conditions then-prevailing in covered jurisdictions. *Id.* at 303; *Rome*, 446 U.S. at 180-81. But "[p]ast success alone ... is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202. Section 5 "imposes current burdens and must be justified by current needs." *Id.* at 203. Absent the documented "widespread and persisting" pattern of constitutional violations and the continuing alteration of discriminatory voting laws to circumvent minority litigation victories that supported preclearance in the first place, Section 5's federalism cost is too great. *Katzenbach*, 383 U.S. at 309.

In 2006, Congress was unable to develop this record. Congress acknowledged that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *House Report* at 12. Indeed, there is broad agreement that "[t]hings have changed in the South .... Blatantly discriminatory evasions of federal decrees are rare." Voter registration and turnout "now approach parity" and "minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202 (citations omitted).

At most, the 2006 legislative record shows scattered and limited interference with voting rights, a level plainly insufficient to sustain Section 5 preclearance. The lower court speculated that the lack of evidence of discriminatory practices in the covered jurisdictions arose not from changed attitudes, but from Section 5's "deterrent" effect. Pet. App. 42a-44a. But speculative deterrence is plainly insufficient to impose preclearance. Congress needed to find that Section 5 was justified under actual conditions uniquely present in the covered jurisdictions; it could not proceed from an unsubstantiated and unbounded assumption that the covered jurisdictions have a latent propensity to discriminate that does not exist elsewhere in the country. *Nw. Austin*, 557 U.S. at 226 (Thomas, J.); Pet. App. 94a (Williams, J.).

In 2006, Congress shifted its reliance to evidence of "second generation" barriers that are not even remotely probative of intentional interference with the right to vote—let alone the kind of systematic violations that previously justified Section 5. *Nw. Austin*, 557 U.S. at 228 (Thomas, J.); Pet. App. 97a (Williams, J.). Moreover, Congress could not legitimately rely on vote dilution to fill the gap in the legislative record. Vote dilution does not violate the Fifteenth Amendment, *Bossier II*, 528 U.S. at 334 n.3, and this Court has never upheld Section 5 under the Fourteenth Amendment, Pet. App. 27a. Preclearance is not an appropriate remedy for practices that affect the weight of votes cast and can be effectively addressed via Section 2.

Nothing in the legislative record indicates that more traditional and less intrusive remedies such as 42 U.S.C. §1983 and Section 2 of the VRA are an inadequate solution for the residuum of voting discrimination. In fact, "the majority of §5 objections today concern redistricting," Pet. App. 99a (Williams, J.), and Section 2 is an effective vehicle for challenging redistricting changes—especially statewide redistricting plans. Moreover, there is no evidence in the legislative record that adverse Section 2 decrees are being evaded by recalcitrant jurisdictions, and the discriminatory tests and devices that recalcitrant jurisdictions employed to make case-by-case litigation futile have been permanently banned.

Unlike Section 5's sweeping suspension of all voting changes, Section 2 creates a nationwide right of action allowing direct challenge to discriminatory voting laws and thus ties its remedy to proven violations. Especially in conjunction with Section 3's bail-in mechanism, which can be utilized to remedy a judicial finding that a jurisdiction has violated constitutional voting rights, Section 2 is now the "appropriate" prophylactic remedy for any pattern of discrimination that Congress documented in the 2006 legislative record.

But even if preclearance were still appropriate for *some* jurisdictions, Section 4(b)'s coverage formula is a wholly inappropriate mechanism for identifying them. In *Katzenbach*, the Court upheld Section 4(b)'s coverage formula because it accurately captured "the geographic areas where immediate action seemed necessary" and where "local evils" had caused significant violations of Fifteenth Amendment voting rights. 383 U.S. at 328-29. The Court therefore found the formula "rational in both practice and theory." *Id.* at 330. In other words, Section 4(b)'s "disparate geographic coverage [must be] sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. "The evil that §5 is meant to address" must remain "concentrated in the jurisdictions singled out for preclearance" and must "account[s] for current political conditions." *Id.* The reauthorized coverage formula cannot meet this standard.

The formula is not rational in theory. *Katzenbach* held that the "the misuse of tests and devices ... was the evil for which the new remedies were specifically designed" and that "a low voting rate [was] pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S. at 330-31. Thus, the Court found a rational connection between the triggers for coverage and the problems that preclearance was devised to remedy. But that rational connection no longer exists. Congress justified Section 5's reauthorization based on "second generation" barriers in the record, which relate primarily to the weight of a vote once cast. Yet coverage under Section 4(b) continues to depend only on registration and turnout data from 1964, 1968, and 1972, which point to decades-old ballot-access interference. Accordingly, there is a serious mismatch between the formula's triggers for coverage and the purported constitutional basis for reauthorization of preclearance.

The formula fares no better in practice. If the statutory benchmarks for coverage had been applied to the last three presidential elections preceding reauthorization, Hawaii (which is not covered) would be the only State subject to preclearance. Further, the "second generation barriers" are not "concentrated in the jurisdictions singled out for coverage." *Nw. Austin*, 557 U.S. at 203. Section 2 litigation and racially polarized voting occur nationwide. If Congress were serious about imposing preclearance on jurisdictions where such problems are most prominent, States like New York, Illinois, and Tennessee would have been covered instead of many (if not most) of the covered jurisdictions. The "modest palliative" of bailout, which now looks to a covered jurisdiction's ongoing compliance with Section 5 rather than whether it should have been covered in the first place, cannot save such an inappropriate formula. Pet. App. 101a (Williams, J.).

* * *

The Voting Rights Act of 1965 changed the course of history in the covered jurisdictions. But the record before Congress in 2006 bears little resemblance to the record that led the Court to uphold Section 5's sweeping prophylactic remedy in *Katzenbach* and *Rome*. "Admitting that a prophylactic law as broad as §5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory." *Nw. Austin*, 557 U.S. at 226 (Thomas, J.). Sections 5 and 4(b) have accomplished their mission and their encroachment on Tenth Amendment rights and the constitutional principle of equal sovereignty is no longer appropriate.

ARGUMENT

I. Congress Did Not Build A Record Of Current Conditions Establishing That Section 5 Preclearance Remains Appropriate.

Northwest Austin "sets the course" for evaluating whether reauthorizing Section 5 for another 25 years appropriately enforces the Fifteenth or Fourteenth Amendment. Pet. App. 14a. Section 5 "imposes current burdens and must be justified by current needs" because "[p]ast success alone ... is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202-03.[4] Congress must establish, in other words, that "exceptional conditions" and "unique circumstances" previously justifying "legislative measures not otherwise appropriate" still exist. *Katzenbach*, 383 U.S. at 334. As shown below, changes over time have foreclosed that finding.

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[4] "[T]he questions the Court raised" in *Northwest Austin* are the "very questions one would ask to determine whether section 5 is 'congruen[t] and proportional[ ] [to] the injury to be prevented.'" Pet. App. 16a (quoting *Boerne*, 521 U.S. at 520). Although *Boerne* has been applied in the Fourteenth Amendment setting, it should apply equally in Fifteenth Amendment cases given the "parallel" enforcement clauses. *Boerne*, 521 U.S. at 518. Regardless, Section 5 and Section 4(b) are no longer "appropriate" enforcement legislation under any applicable standard of review.

A. The widespread and ingenious voting discrimination that once made Section 5 preclearance an appropriate enforcement remedy has ended.

The Court repeatedly has found that Section 5 imposes burdens on States different in kind from any other federal enforcement remedy. "[The] Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). Preclearance overrides that sovereign authority and goes far "beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. It thus prevents covered jurisdictions from "respond[ing], through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). By design, then, Section 5 is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies" and a "substantial departure … from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting).

Section 5's federalism costs are also concrete. Preclearance has an outsized effect on the basic operation of state and local government. Based on the experience of covered jurisdictions between 1982 and 2006, renewed

Section 5 will foreclose the implementation of more than 100,000 electoral changes unless and until they are precleared. *Senate Report* at 13-14. Under Section 5, a covered jurisdiction that wishes to change its laws must either go "hat in hand to [DOJ] officialdom to seek approval," Pet. App. 71a (Williams, J.), or embark on expensive litigation in a remote judicial venue if it wishes to make any voting change. Both routes can be burdensome and require covered jurisdictions to allocate substantial resources to Section 5 compliance. Brief of Arizona, Alabama, Georgia, South Carolina, South Dakota, and Texas as Amici Curiae in Support of Petitioner at 23-26, No. 12-96 (filed August 23, 2012). "Without any measureable benefit, preclearance compliance has over the past decade required the commitment of state and local resources easily valued at over a billion dollars." Modern Enforcement of the Voting Rights Act, Hearing before the Senate Committee on the Judiciary, 109th Cong., at 110 (May 10, 2006) (Coleman).

Congress compounded the burdens of preclearance in 2006 by expanding the *substantive* grounds for denying preclearance at a time when the "conditions that [the Court] relied upon in upholding the statutory scheme in *Katzenbach* and [*Rome*] ha[d] unquestionably improved." *Nw. Austin*, 557 U.S. at 202. Given this improvement in conditions throughout the covered jurisdictions, *any* increase in the preclearance burden is by definition "an unwarranted response" to the problem confronting Congress. *Boerne*, 521 U.S. at 530. There is no justification for making it more difficult to secure preclearance in 2006 than it was in 1965.

Congress' changes to Section 5 only made matters worse. "As a practical matter it is never easy to prove a negative." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier I*") (citations and quotations omitted). But preclearance must now be denied unless a covered jurisdiction proves the absence of "any discriminatory purpose." VRARAA, 120 Stat. at 577 (2006). Congress thus ignored this Court's warning that imposing such a difficult preclearance burden "would exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality." *Bossier II*, 528 U.S. at 321-22 (citations and quotations omitted).

The amended preclearance standard also forecloses any change that diminishes a minority group's "ability to elect" a favored candidate even if it would not interfere with any voter's "effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141. By changing Section 5's mission from preventing "backsliding," *Bossier II*, 528 U.S. at 335, to ensuring a certain number of minority-preferred elected officials, Congress further detached Section 5 from its original anti-discrimination objective. The "ability to elect" standard makes preclearance far more difficult to secure, *see, e.g.*, *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011), and exacerbates the concern that, by making race the "predominant factor," Congress has created a "scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). The 2006 preclearance standard thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between

§5 and the Reconstruction Amendments' commitment to non-discrimination." Pet. App. 75a (Williams, J.).

2. A uniquely burdensome enforcement remedy that radically departs from the ordinary operation of our federal system can be supported only by a legislative record documenting "current needs" of corresponding magnitude. It was the "unremitting and ingenious defiance" of the Fifteenth Amendment that justified this uncommon remedy in *Katzenbach*. 383 U.S. at 309. Then, registration data, turnout statistics, and the absence of minorities in public office, all of which the Court deemed reasonable barometers of pervasive interference with the right to register and vote, showed that the defiance was unremitting. *Id.* at 313, 329-30. In *Rome*, the Court further examined the "number and nature of [Section 5] objections interposed by the Attorney General" between 1965 and 1975. 446 U.S. at 181. This was all considered "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329. Thus, while the "suspension of new voting regulations pending preclearance was an extraordinary departure from the traditional course of relations between the States and the Federal Government," it was "constitutional as a permitted congressional response to the unremitting attempts by some state and local officials to frustrate their citizens' equal enjoyment of the right to vote." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992) (citing *Katzenbach*, 383 U.S. at 334).

But more than the documented refusal to honor Fifteenth Amendment guarantees made preclearance necessary; preclearance responded to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 328, 335. The congressional record documented the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer*, 425 U.S. at 140; *Allen*, 393 U.S. at 548. Hence, "Section 5 was directed at preventing a particular set of invidious practices that had the effect of undo[ing] or defeat[ing] the rights recently won by nonwhite voters." *Miller*, 515 U.S. at 925.

The invidious practice of subtly and continuously altering discriminatory voting laws to circumvent the effect of minority litigation victories gave Congress "reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under these unique circumstances, Congress responded in a permissibly decisive manner." *Katzenbach*, 383 U.S. at 335. In short, "the constitutionality of §5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible." *Nw. Austin*, 557 U.S. at 225 (Thomas, J.).

3. The 2006 legislative record failed to document "current needs" that could justify the "current burdens" of preclearance. Nothing in the record suggests that covered jurisdictions remain engaged in the pervasive voting discrimination and electoral gamesmanship that once made case-by-case adjudication of constitutional violations a futile enterprise and spurred Congress to act. Section 5 is only constitutionally defensible as a last resort. Because such extraordinary conditions no longer exist, Congress failed to "justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 334.

Evidence related to restricted ballot access that the Court relied on in *Katzenbach* and *Rome* confirms that current conditions cannot justify preclearance. As Congress found, "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected officials." VRARAA, §2(b)(1), 120 Stat. at 577; *House Report* at 12 (concluding that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated"). "Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202.

The "number and nature" of Section 5 objections, *Rome*, 446 U.S. at 181, further confirms that a prior restraint is unnecessary. Between 1982 and 2004, only 0.74% of all preclearance submissions resulted in an objection (752 of 101,440 submissions). *Senate Report* at 13. Even more significantly, the objection rate has been declining steadily. In 1982, the objection rate was 2.32%; by 2003, the rate had fallen to 0.17%, and the rates in 2004 and 2005 were 0.06% and 0.02%, respectively.[5] *Id.* In the year before Section 5's reauthorization, the Attorney General objected to *one* preclearance submission. By comparison, the objection rate between 1965 and 1974 was 14.2%. *House Report* at 22. That difference is massive.

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[5] The Senate Report indicates that the objection rate was 0.002% in 2005. This figure is inaccurate. It reflects a computational error that becomes apparent when the numbers of submissions are compared with the number of objectives.

If that rate had prevailed, there would have been 14,404 objections between 1982 and 2004 instead of only 752. This evidence does not remotely suggest "unremitting" and "ingenious" defiance of minority voting rights.

Furthermore, unlike the "nature" of preclearance objections from the years immediately following the VRA's passage, modern preclearance denials are "poor proxies for intentional discriminatory state action in voting." Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 Ohio St. L.J. 177, 190 (2005). A preclearance denial provides no proof of intentional discrimination because Section 5's proper focus during the relevant period was retrogression. *Ashcroft*, 539 U.S. at 480; *Miller*, 515 U.S. at 926. And even when the Attorney General went beyond his statutory authority to block preclearance submissions based on a covered jurisdiction's purportedly discriminatory intent, he often did so in pursuit of the unconstitutional "'black-maximization' policy." *Miller*, 515 U.S. at 921. Nor are more information requests from the DOJ ("MIRs") evidence of a constitutional violation; they show only that the Attorney General has "insufficient information ... to enable" him "to make a [preclearance] determination." *House Report* at 40. Preclearance statistics between 1982 and 2006—administrative or judicial—thus are not "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329.[6]

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[6] A Section 5 enforcement action is similarly unreliable, *see* VRARAA, §2(b)(4)(A), as it can establish only that a voting change—and quite possibly a nondiscriminatory one—was not properly submitted for preclearance.

The other evidence of "second generation" barriers is even less indicative of voting discrimination. Racially polarized voting, which Congress called the "clearest and strongest evidence" of the need to reauthorize Section 5, *House Report* at 34; VRARAA, §2(b)(3), 120 Stat. at 577, is not governmental discrimination—the only type of conduct Congress may remedy, *Terry v. Adams*, 345 U.S. 461, 473 (1953)—let alone intentional discrimination. "[T]he continued filing of section 2 cases," VRARAA, §2(b)(4)(C), 120 Stat. at 578, establishes nothing more than a yet-unproven allegation that a law not requiring proof of intentional discrimination has been violated, *Chisom v. Roemer*, 501 U.S. 380, 393 (1991). And the dispatching of election observers, VRARAA, §2(b)(5), 120 Stat. at 578, reflects only the Attorney General's prediction that there *might* be conduct with the effect of disenfranchising minority citizens, which *might* or *might not* be intentional voting discrimination. *House Report* at 44. In sum, "second generation" evidence "bears no resemblance to the record initially supporting §5, and is plainly insufficient to sustain such an extraordinary remedy." *Nw. Austin*, 557 U.S. at 228 (Thomas, J.).

But even if the Court gives weight to all of the evidence in the legislative record, it at most shows scattered and limited interference with Fifteenth Amendment rights in some covered jurisdictions and thus cannot sustain a remedy as intrusive as preclearance. Like the Religious Freedom Restoration Act, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions." *Boerne*, 521 U.S. at 532. Given Section 5's unprecedented federalism costs, *Nw. Austin*, 557 U.S. at 202, "[t]he burden remains with Congress to prove that the urgent circumstances warranting §5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute," *id*. at 229 (Thomas, J.).

In addition, most of this scattered evidence relates to vote dilution. Pet. App. 28a-29a. But vote dilution does not violate the Fifteenth Amendment, *Bossier II*, 528 U.S. at 334 n.3; Pet. App 27a, thus distinguishing this case from *Katzenbach* and *Rome*, which upheld Section 5 exclusively under the Fifteenth Amendment. And even assuming that Congress also acted under Section 5 of the Fourteenth Amendment, the legislative record does not reflect vote dilution so serious as to warrant preclearance of all voting changes. Congress identified only twelve published judicial decisions between 1982 and 2006 with a finding of intentional discrimination, and half of them involved discrimination against white voters. *Senate Report* at 13. Nor is there evidence that covered jurisdictions have tried to evade federal decrees arising from a judicial finding of intentional vote dilution.

In any event, the character of modern vote dilution cannot justify preclearance. Whereas the South during the 1960s was plagued with vote-denial schemes interfering with ballot access, modern vote dilution claims involve diminishing the effect of ballots once cast. Because there are countless ways to suppress minorities' ability to cast votes, Section 2 suits in the vote-denial context were particularly vulnerable to "the extraordinary stratagem of contriving new rules … in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 335. In contrast, because vote-dilution claims involving minorities' group-voting power typically arise in the districting context, it is nearly impossible for a jurisdiction to evade a Section 2 decree. Any invalidated district will be replaced with a valid one under judicial supervision; jurisdictions simply cannot continually "contriv[e] new" *districts* "in the face of adverse federal court decrees." *Id.* Section 2 is an effective way of redressing vote dilution.

Indeed, given current conditions, other remedies already on the books are "appropriate" remedies "drawn in narrow terms to address or prevent" any residuum of voting discrimination that exists throughout the nation. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1334 (2012). Voters denied their constitutional rights can bring a Section 1983 action for declaratory and injunctive relief and may recover attorneys' fees if victorious. *See* 42 U.S.C. §1988. Moreover, Section 2 applies nationwide, permitting specific challenges to discriminatory voting practices and focusing a judicial remedy on proven violations. *United States v. Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that ... Congress [has] the power to 'enforce ... the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."). Section 2 also prophylactically bans any practice that even unintentionally "results in the denial or abridgment" of the right to vote. 42 U.S.C. §1973(a). Especially in conjunction with Section 3's bail-in mechanism, Section 2 can effectively remedy the "lesser" harm that Congress documented in 2006, *Boerne*, 521 U.S. at 530.

B. The lower court's reasons for upholding Section 5 conflict with this Court's decisions and would justify preclearance in perpetuity.

The court of appeals did not dispute that the first-generation barriers relied upon in *Katzenbach* and *Rome* were no longer present. Pet. App. 22a-23a. Instead, it relied upon legal theories alien to this Court's decisions analyzing the scope of Congress' enforcement authority. If the lower court's reasoning is correct, preclearance would no longer be an extraordinary remedy for rampant constitutional evasion—but a permanent usurpation of the Tenth Amendment powers reserved to the States.

1. By treating the judicial task as akin to review of agency decisions, Pet. App. 47a, the court inappropriately deferred to Congress in every aspect of its analysis. The judiciary has the Article III responsibility to ensure that Congress has documented "reliable evidence of actual voting discrimination" before exercising its enforcement authority. *Katzenbach*, 383 U.S. at 329; *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("Congress may impose prophylactic §5 legislation" only when "there has been an identified history of relevant constitutional violations."). In *Boerne*, the Court rejected Congress' determination that a "widespread pattern of religious discrimination" existed, because the legislative record did not document constitutional violations. 521 U.S. at 531. Congress may rely on evidence from "any probative source." *Katzenbach*, 383 U.S. at 330. But the ultimate responsibility for deciding whether that evidence establishes a constitutional violation rests with this Court. *Mitchell*, 400 U.S. at 125-26; *Boerne*, 539 U.S. at 519-20; *Nw. Austin*, 557 U.S. at 224-26 (Thomas, J.).

The court below acknowledged its obligation to ensure that Congress documented "substantial probative evidence" of a widespread pattern of voting discrimination, Pet. App. 47a, yet upheld Section 5 principally by deferring to Congress on the evidence's probative value. For example, it relied on preclearance objections that purportedly were based on a finding of discriminatory intent, *id.*, without determining whether those Section 5 objections were based on constitutional violations or, instead, the Attorney General's mistaken interpretation of that standard. And the court had every reason to believe that preclearance objections based on a finding of intentional discrimination during the relevant period deviated from the constitutional standard. *See, e.g.*, *Miller*, 515 U.S. at 917 (explaining that DOJ "would accept nothing less than abject surrender to its maximization agenda"); Introduction to the Expiring Provisions of the Voting Rights Act, 109th Cong. at 216 (May 9, 2006) (Hasen) (explaining that the Attorney General followed a "policy of objecting to certain state actions that were perfectly constitutional").[7]

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[7] The court also deferred to Congress' supposed judgment that "absolute numbers" of preclearance objections were more probative than "objection rates." Pet. App. 35a. But nothing in the legislative record suggests that Congress made such a determination. Moreover, looking to absolute numbers ignores that there were six times as many submissions between 1982 and 2004 (101,400) than between 1965 and 1982 (15,416). *House Report* at 22. The annual objection rate is thus far more probative of current conditions. Otherwise, there would be no difference between 100 objections out of 200 submissions or 100 objections out of 1,000,000 submissions.

The court's deference to Congress' assessment of the evidence also pervaded its examination of other second-generation evidence. It acknowledged that MIRs "are less probative of discrimination" than preclearance objections, but permitted Congress to conclude that "some" of them are probative. Pet. App. 35a-36a. It found deployment of observers "hardly conclusive evidence of unconstitutional discrimination," but held that Congress "could reasonably rely upon it as modest additional evidence of current needs." *Id.* 40a. It found Congress "reasonably concluded that successful section 2 suits provide powerful evidence of unconstitutional discrimination," *id.* 38a, even though such suits, *i.e.*, those "resulting in outcomes favorable to minority plaintiffs," *id.* 49a, included many suits with no finding of intentional discrimination, suits not resolved on the merits, or both, Ellen Katz et al., *Documenting Discrimination in Voting,* 39 U. Mich. J.L. Reform 643, 653-54 n.35 (2006).[8] And, finally, it found Congress "could reasonably have concluded" that all 105 Section 5 enforcement actions could "provide at least some evidence" supporting reauthorization because *two* of them suggested intentional discrimination. Pet. App. 40a.

The Constitution grants Congress power to *enforce* the Reconstruction Amendments, not to rewrite them. The Court thus must draw "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."

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[8] For example, one case was included in the legislative record as a successful Section 2 case even though it was dismissed because the suit "challenged the lawfulness of a system which was no longer viable" and there was "a scant amount of evidence in support of the claims." *Fayetteville v. Cumberland County,* No. 90-2029, 1991 WL 23590, at *2 (4th Cir. Feb. 28, 1991).

Boerne, 521 U.S. at 519. The court below abdicated that Article III duty by deferring to Congress' conclusion that the legislative record includes "reliable evidence," *Katzenbach*, 383 U.S. at 329, of a widespread pattern of "relevant constitutional violations," *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). "[A]s broad as the congressional enforcement power is, it is not unlimited." *Boerne*, 521 U.S. at 518. If Congress can dictate the constitutional significance of the evidence in the legislative record, "it is difficult to conceive of a principle that would limit congressional power." *Id.* at 529.

2. Not only did the lower court indulge in excessive deference, it held Congress to a lighter evidentiary burden than precedent allows. Ignoring this Court's repeated conclusion that Section 5 was an appropriate response to evasionary tactics and electoral gamesmanship, *supra* at 5, the court looked exclusively to the "magnitude" of violations to decide whether "section 2 litigation remains inadequate." Pet. App. 26a. It claimed that the inherent characteristics of case-by-case adjudication necessitated preclearance because "section 2 claims involve 'intensely complex litigation that is both costly and time-consuming,'" despite the availability of preliminary injunctive relief. *Id*. 45a (internal citations and quotations omitted). But Congress could not have thought that it was the almost universal attributes of traditional litigation that made Section 2 ineffective. If it had, Section 5 would have been extended nationwide.

But even if Section 2 litigation does have the sometimes frustrating attributes of ordinary civil litigation, case-by-case enforcement is hardly futile under current conditions. In 1965, "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, *because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.*" *Katzenbach*, 383 U.S. at 328 (emphasis added). Absent similar evidence in the 2006 legislative record, or at least evidence of discrimination in covered jurisdictions "so extensive that elimination of it through case-by-case enforcement would be impossible," *Nw. Austin*, 557 U.S. at 225 (Thomas, J.), there is no basis for upholding Section 5. If the efficient prevention of isolated violations could sustain the invasive preclearance obligation, then Section 5 would be a constitutional remedy even where the legislative record documents the existence of minimal voting discrimination. Such a result cannot be reconciled with *Katzenbach* or any other decision.

Under the lower court's constitutional reasoning, preclearance could be imposed to counteract any perceived threat of Fourteenth or Fifteenth Amendment violation given the lure of prior restraint. Instead of creating a right of action to remedy discrimination against the disabled in accessing judicial services, *Lane*, 541 U.S. at 517, or against women in the workplace, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003), Congress could suspend the right of state and local governments to make physical changes to their facilities or make changes to their employee leave policies "until they have been precleared by federal authorities in Washington, D.C," *Nw. Austin*, 557 U.S. at 202. But *Katzenbach* teaches that an unprecedented preclearance remedy requires evidence of systematic violations not remediable by less restrictive means. Federalism interests cannot be trampled solely in the interest of an efficient remedy.

3. Finally, the court of appeals paradoxically cited the absence of current voting discrimination as proof that preclearance should continue for 25 years. At every turn, the court assumed that the lack of evidence was the result of Section 5's alleged "deterrent" effect, finding "that Section 5 deters jurisdictions from even attempting to enact [discriminatory] laws, thereby reducing the need for section 2 litigation in covered jurisdictions." Pet App. 38a. Based on this line of reasoning, the court found that "Congress had 'some reason to believe that without [section 5's] deterrent effect on potential misconduct,' the evidence of continued discrimination in covered jurisdictions 'might be considerably worse.'" *Id.* 42a-43a (quoting *Senate Report* at 11).

But this is precisely the kind of "supposition and conjecture" that cannot sustain enforcement legislation. *Coleman*, 132 S. Ct. at 1336. There is no evidence in the legislative record suggesting that the racial animus of the 1960s in covered jurisdictions has been hibernating for two generations. Congress is not entitled to blindly assume that the concededly fragmentary evidence of voting discrimination is the product of Section 5 deterrence. That offensive theory, *see Nw. Austin*, 557 U.S. at 226 (Thomas, J.), could never be disproved. As verifiable evidence of voting discrimination continued to abate, the "deterrent" effect would be assigned the credit thus depriving covered jurisdictions of the constitutional prerogative to regulate their own elections "to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens ... must be justified by current needs' would mean little if §5's supposed deterrent effect were enough to justify the current scheme." Pet. App. 94a (Williams, J.) (internal citation omitted).

II. Congress Did Not Document Current Conditions Justifying Section 4(b)'s Unequal Treatment of Sovereign States.

Even if preclearance might remain an appropriate response to ongoing discrimination in *some* jurisdictions, Section 4(b)'s formula is no longer an "appropriate" means of determining the jurisdictions that should be subject to coverage. A "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. An appropriate coverage formula must be "rational in both practice and theory." *Katzenbach*, 383 U.S. at 330. As shown below, the archaic coverage formula reauthorized in 2006 is neither.

A. Section 4(b)'s coverage formula is no longer rational in theory.

1. In *Katzenbach*, the Court found Section 4(b)'s formula sound in theory because its inputs—"the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average"—reliably indicated a "widespread and persistent" use of intentionally discriminatory tactics to keep minorities from voting. 383 U.S. at 330-31. Tying coverage to "the use of tests and devices for voter registration" was appropriate because "of their long history as a tool for perpetrating the evil"; tying coverage to low registration and turnout rates was appropriate "for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id.* at 330.

But this now decades-old data does not describe current conditions. The discriminatory tests and devices targeted in Section 4(b) have been permanently banned for over 35 years, and the rates of minority registration and voting in 1964, 1968, and 1972 are vastly different from the "current political conditions" in the covered jurisdictions, *Nw. Austin*, 557 U.S. at 203. As "[v]oter turnout and registration rates now approach parity," there is no rational basis for Congress' determination that election data from 1964, 1968, and 1972 identifies those jurisdictions likely to discriminate between 2007 and 2031. *Id.* at 202. It would have made little theoretical sense for Congress to base coverage in 1965 on voting data from the 1916, 1920, and 1924 elections. It made even less sense to rely on data from 1964, 1968, and 1972 in 2006. The coverage formula is unconstitutional for this reason alone.

2. The coverage formula also suffers from another fundamental theoretical flaw. Although the statutory coverage factors—registration and turnout statistics—reflect interference with the ability to cast a ballot, Congress did not reauthorize Section 5 to deal with the "first generation" problem of ballot access. Congress found that ballot-access problems had largely been solved and instead justified reauthorization based on "second generation" barriers to electoral success. *Supra* at 9-11. Therefore, there is a serious mismatch between the problem that Congress targeted and the triggers for coverage under Section 4(b)'s formula. Vote dilution and the other "second generation" barriers affect voting impact, *see Thornburg v. Gingles*, 478 U.S. 30, 48 (1986), but they do not deny ballot access to anyone and thus do not "inevitably affect the number of actual voters," *Katzenbach*, 383 U.S. at 330.

It is irrational to retain a coverage formula that utilizes indicators of interference with the ability to cast a ballot in order to identify jurisdictions that employ electoral practices undermining the effectiveness of the ballot once cast. Congress' failure to change the coverage formula to respond to its shift in focus is particularly problematic because there are readily available criteria and data that would have identified those States and localities where these "second generation" problems are most prevalent.

The court of appeals acknowledged these arguments but brushed them aside. The court found it unnecessary to evaluate the theoretical basis for Section 4(b)'s coverage formula and suggested that theoretical irrationality was not "Shelby County's real argument." Pet. App. 57a. But that is demonstrably wrong. Shelby County advanced this issue and briefed it extensively both in the district court (including in supplemental briefing on whether the reauthorization of Section 4(b) was "rational in both practice and theory," Pet. App. 292a-293a) and on appeal. As the coverage formula's theoretical basis was one of the key reasons for upholding it in *Katzenbach*, Shelby County has always pressed this issue.

3. Brushing aside the absence of theoretical justification for the formula, the court asserted that Shelby County's argument "rests on a misunderstanding of the coverage formula" because Congress "identified the jurisdictions it sought to cover ... and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Id.* 56a. In the court's view, the triggers "were never selected because of something special that occurred in [the identified] years" and "tests, devices, and low participation

rates" were not Congress' main targets; they were instead "proxies for pernicious racial discrimination in voting." *Id.* 56a-57a. According to the court of appeals, the only question to be answered "is not whether the formula relies on old data or techniques, but instead whether it ... continues to identify the jurisdictions with the worst problems." *Id.* 57a.

But determining whether the formula is rational in practice is not a substitute for testing it in theory. *Katzenbach* concluded that the formula was constitutional in part because there was a rational connection between the triggers for coverage and the problems preclearance was designed to remedy. Refusing to squarely address this aspect of the inquiry ignores the Court's recent warning that the formula must be "sufficiently related to the problem" targeted by Congress. *Nw. Austin*, 557 U.S. at 203. Bypassing this question admits that it has no answer.

B. Section 4(b)'s coverage formula is no longer rational in practice.

1. In *Katzenbach*, the Court found that Section 4(b)'s coverage formula when tested in practice accurately captured those jurisdictions where there was "reliable evidence of actual voting discrimination." 383 U.S. at 329. Those jurisdictions that had "misuse[d] ... tests and devices" were committing the "evil for which the new remedies were specifically designed." *Id.* at 331. Thus, that "no States or political subdivisions [were] exempted from coverage under §4(b) in which the record reveal[ed] recent racial discrimination involving tests and devices ... confirm[ed] the rationality of the formula." *Id.*

By 2006, however, suspect tests and devices had been permanently banned and the evidence in the legislative record of comparative voter registration and turnout data "suggests that the coverage formula lacks any rational connection to current levels of voter discrimination." Pet. App. 95a (Williams, J.). In fact, had Congress tied preclearance to voting data from the 1996, 2000, and 2004 Presidential elections in order to capture those jurisdictions with current first-generation problems, *none* of the currently covered States would be subject to preclearance—only Hawaii would be covered. 151 Cong. Rec. H5131, H5181 (daily ed. July 13, 2006).

Moreover, "the racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide." *Nw. Austin*, 557 U.S. at 203. For example, a comparison of white and black registration and turnout rates from the 2004 election demonstrates that there is "no positive correlation between inclusion in §4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exits, it appears to be negative—*condemnation under §4(b) is a marker of higher black registration and turnout.*" Pet. App. 83a (Williams, J.) (emphasis added); *Senate Report* at 11 ("[P]resently in seven of the covered States, African-Americans are registered at a rate higher than the national average"; in two more, black registration in the 2004 election was "identical to the national average"; and in "California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election ... was higher than that for whites."). The formula thus clearly "fails to account for current political conditions." *Nw. Austin*, 557 U.S. at 203.

2. If "second generation barriers" are now the "evil §5 is meant to address," that evil is not "concentrated in the jurisdictions singled out for coverage." *Id.* "Congress heard warnings from supporters of extending §5 that the evidence in the record did not address 'systematic differences between the covered and the non-covered areas of the United States[,] ... and, in fact, the evidence that is in the record suggests that there is more similarity than difference.'" *Id.* at 204 (quoting The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., at 10 (May 16, 2006) (Pildes) ("*Continuing Need*")). It was readily apparent that "identify[ing] continuing problems in the covered jurisdictions, such as racially polarized voting, in complete isolation from consideration of whether similar problems exist in non-covered sites" was constitutionally problematic. *Continuing Need* at 200 (Pildes).

Yet Congress never addressed this issue "in any detail in the [Senate] hearings or in the House" and "little evidence in the [legislative] record examines whether systematic differences exist between the currently covered and non-covered jurisdictions." *Id.* at 200-01 (Pildes). It may be that Congress was unwisely persuaded to conclude that it need not address the issue. *See id.* at 95 ("I do not believe that [*Boerne*] requires Congress to engage in a new and detailed comparison of voting practices and procedures and levels of minority participation and electoral success in covered and non-covered jurisdictions before renewing section 5.") (Karlan). Or Congress might have known that conducting such a study could make reauthorization more difficult to achieve. *See Nw. Austin*, 557 U.S. at 204 (citing Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 208 (2007)). Regardless, Congress did not seriously consider whether the "statute's disparate geographic coverage is sufficiently related to the problem that it targets," *id.* at 203, let alone make an actual *finding* of meaningfully greater incidence of "second generation barriers" in the covered jurisdictions, VRARAA, §2(b)(4), 120 Stat. at 577. Given this failure, Congress was clearly acting as the proverbial "dart-thrower." Pet. App. 70a (Williams, J.).

Had Congress studied the issue, it would have been plain that there are no longer "systematic differences between the covered and the non-covered areas of the United States[;] ... in fact, the evidence that is in the record suggests that there is more similarity than difference." *Continuing Need* at 10 (Pildes) (quoted in *Northwest Austin*, 557 U.S. at 204). Evidence of "second generation" barriers for which there is comparative data in the legislative record confirms that the "evil" Congress targeted in Section 5 is "no longer ... concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203.

A state-by-state comparison of Section 2 litigation data and racially polarized voting statistics confirms the irrationality of using Section 4(b)'s formula to address "second generation barriers."[9] The Katz Study of Section

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[9] Section 2 litigation and racially-polarized voting statistics are the only "second generation barriers" that could plausibly bear on this issue. Preclearance statistics provide no basis for a comparative analysis because non-covered jurisdictions are not subject to Section 5. Similarly, during the relevant period, the Attorney General was authorized to send observers only to covered jurisdictions or non-covered jurisdictions bailed-in under Section 3. Pet. App. 240a-241a n.13.

2 litigation—which the court of appeals considered "the most concrete evidence comparing covered and noncovered jurisdictions in the legislative record," Pet. App. 49a—conclusively demonstrates that Congress did not correctly identify the States to be covered.

For example, taking the States with the highest number of Section 2 lawsuits filed since 1982, the nine fully-covered States are only 5 of the top 10, 6 of the top 14, and 7 of the top 26. *See* Ellen Katz & The Voting Rights Initiative, *VRI Database Master List, available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls (cited in To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., at 974, 1019-20 (Oct. 18, 2005)). In fact, noncovered Illinois had more Section 2 lawsuits filed since 1982 than all but three fully-covered States. *Id.* The same is true of New York, and Florida, even disregarding the suits filed against their scattered covered jurisdictions. Notably, one fully-covered State (Alaska) did not have a single reported Section 2 suit filed during the entire period covered by the legislative record. *Id.* Thus, if reported Section 2 suits were a proper basis for coverage, Alaska could be covered only if every State in the Union were covered.

Similarly, focusing on adjudicated Section 2 violations, fully-covered States make up only 5 of the top 10, 6 of the top 18, and 7 of all 25. *Id.* Neither Alaska nor Arizona had a single Section 2 violation, yet Illinois had more of these than five fully-covered States (and all of the partially covered States). *Id.* And of the 20 States with Section 2 lawsuits that resulted in findings of intentional discrimination, only 4 were fully-covered States. *Id.* On the other hand, of the 6 States with more than one finding of intentional discrimination, 4 were non-covered States. *Id.*[10] In particular, Illinois and Tennessee had more Section 2 lawsuits that resulted in findings of intentional discrimination than all but one covered State. And with regard to Section 2 suits with "outcomes favorable to minority voters," fully-covered States make up only 4 of the top 8, 5 of the top 11, and 7 of all 30. *Id.* While Alaska and Arizona had none of these cases, there were more of these cases in non-covered Illinois and the non-covered portions of Florida than in five fully-covered States. *Id.*

The outcome is the same for racially polarized voting. Of the 105 instances of racially polarized voting, only 48 occurred in covered States, and only 52 in all covered jurisdictions. *Id.* Among those 105 instances, only 4 of the 10 States with the highest number of instances of racially polarized voting are fully-covered States. *Id.* Two fully-covered States (Arizona and Alaska) did not have a single reported suit with a finding of racially polarized voting. *Id.* On the other hand, non-covered Arkansas, Illinois, and Tennessee, and the non-covered portions of Florida and New York each had more instances of racially polarized voting than five of the nine fully-covered States. *Id.* Finally, of the 16 instances of racially polarized voting the Katz Study identified as having occurred after 2000, only 5 (or 31%) occurred in covered States. *Id.*

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[10] Of the data in the Katz Study, intentional-discrimination findings should be the only relevant statistic since preclearance has always been justified primarily on the basis of "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329.

Ultimately, whether the Court considers all of the Section 2 lawsuits filed or any subset thereof, the answer is the same: Section 4(b)'s formula is a "remarkably bad fit" to the problems Congress was addressing. Pet. App. 95a (Williams, J.); *id.* 93a ("A formula with an error rate of 50% or more does not seem 'congruent and proportional.'"). "There is a lot of paper, but not many facts or statistics to show why Georgia is different from Tennessee or why Texas is different from Oklahoma or why racially polarized voting in Wisconsin shouldn't be addressed with a remedy such as [Section 5]." 151 Cong. Rec. H5182 (daily ed. July 13, 2006) (Rep. Westmoreland).

3. Because the Katz Study could not provide a basis for defending Section 4(b)'s coverage formula on its own terms, the court of appeals was forced to dig deeper. First, it considered only a carefully selected slice of data—Section 2 cases resulting in outcomes "favorable to minority plaintiffs," a characterization that vastly overstates their significance, Pet. App. 132a (Williams, J.), especially as Congress looked only to "continued *filing* of Section 2 cases in covered jurisdictions," VRARAA §2(b)(4)(C), 120 Stat. at 578 (emphasis added). As noted above, many of these Section 2 cases involved no finding of intentional discrimination, were not resolved on the merits, or both; and some of the "outcomes" deemed "favorable to minority voters" merely reflected voluntary changes in voting laws. *See supra* at 36 and n.8.

Second, the court primarily reviewed this slice of data in the aggregate, lumping States into "covered" and "non-covered" categories. But aggregating denies equal dignity to each sovereign State by obscuring each State's individual record and thus concealing the fact that many of them have records similar to (or better than) many non-covered States. As noted above, there was not a single Section 2 suit in Alaska or Arizona—much less a "successful" one—in the entire 24-year period. *VRI Database Master List.* Using the lower court's preferred metric, then, no non-covered State had a better record than Alaska or Arizona. Moreover, eight non-covered States or non-covered portions of partially-covered States had at least as many "successful" Section 2 suits as Georgia and South Carolina, and six had at least as many as Virginia. *See id.* Only three fully-covered States had more "successful" Section 2 suits than Illinois, and only four fully-covered States had more than Tennessee and Arkansas and the non-covered portions of New York and Florida. *See id.*

Had the court of appeals assessed each State on an individual basis, it would have discovered that the formula is both grossly under- and over-inclusive. In other words, the court could not possibly have concluded that the coverage formula captures "the jurisdictions with the worst problems." Pet. App. 57a. What the court labeled a "close question," *id.* 58a, is in fact not close at all.

Even viewing the covered States collectively, the Katz Study fails to show a meaningful difference between covered and non-covered jurisdictions. There were more Section 2 lawsuits filed in non-covered jurisdictions (171) than in covered jurisdictions (160). *See VRI Database Master List.* Additionally, there were almost twice as many Section 2 suits resulting in a finding of intentional discrimination in non-covered jurisdictions (21) than in covered jurisdictions (12), *id.*, and on a closer "reading of the cases Professor Katz lists, there are even fewer," Pet.

App. 97a (Williams, J.); *see also Continuing Need* at 202 ("[T]hese [Section 2] violations are not overwhelmingly or systematically concentrated in Section 5 areas; [the Katz] report itself documents that these violations arise in many places with significant minority populations.... Since 1990, for example, there are as many judicial findings of Section 2 violations in Pennsylvania as in South Carolina—and more in New York.") (Pildes).

To be sure, the court made much of the fact that covered jurisdictions "accounted for 56 percent of *successful* section 2 litigations since 1982." Pet. App. 49a (emphasis added). But a narrow 56% to 44% divide is woefully insufficient to justify retaining the outmoded coverage formula; as the National Commission on the Voting Rights Act found, this data shows that a "significant" number of Section 2 cases "resolved favorably to plaintiffs" occurred in non-covered jurisdictions. *See* Voting Rights Act: Evidence of Continued Need: Hearing. Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., at 208 (Mar. 8, 2006). Such a narrow covered-versus-non-covered split does not show that Section 2 litigation is concentrated in covered jurisdictions and thus cannot provide a legitimate basis for "depart[ing] from the fundamental principle of equal sovereignty," *Nw. Austin*, 557 U.S. at 203.

Moreover, whatever the "persuasive power of this statistic" it dissolves once the Court "disaggregate[s] the data by state." Pet. App. 91a (Williams, J.). Although the Katz Study found 68 "successful" Section 2 cases in the sixteen fully or partially-covered States, Congress could have selected an almost entirely different set of States for coverage and reached the same result. For example, more successful Section 2 suits (69) would have occurred in covered jurisdictions had Congress selected Arkansas (4), California (3), Colorado (2), Florida (7), Illinois (9), Louisiana (10), Maryland (2), Massachusetts (1), Montana (2), New York (5), North Carolina (10), Ohio (2), Pennsylvania (3), Tennessee (4), Virginia (4), and Wisconsin (1).

And this is not a contrived example. Even excluding all of the seven original fully-covered States, one could still compile a list of sixteen States with nearly as many successful Section 2 suits (65) as occurred in the covered jurisdictions (68): Arkansas (4), California (3), Colorado (2), Delaware (1), Florida (7), Illinois (9), Maryland (2), Montana (2), New York (5), North Carolina (10), Ohio (2), Pennsylvania (3), Rhode Island (1), Tennessee (4), Texas (9), and Wisconsin (1). Because Section 2 litigation is not concentrated in covered States, there are seemingly innumerable combinations that would prove this same point. In short, the Katz data do not at all suggest that the coverage formula is rational in practice. They demonstrate the opposite.

Seemingly aware of this problem, the lower court examined the Katz data state-by-state only after supplementing it with data included in a post-enactment declaration submitted by Peyton McCrary, a DOJ employee. Pet. App. 93a. The court conceded that the declaration should be "approach[ed] … with caution," *id.* 54a, because it was executed during this litigation and depended on extra-record evidence collected by different groups and pursuant to different methods than the Katz Study, *id.* The declaration also classified cases that were resolved through a settlement as "successful," despite the fact that this inference is "exceptionally weak," as it "overlooks not only the range of outcomes embraced in the concept of settlement but also the strategic factors, including legal fees and reputational risk, that go into a jurisdiction's decision to settle." *Id.* 93a-94a (Williams, J.). Even ignoring these flaws, the McCrary declaration should never have been accepted. The statute's constitutionality must be measured against the legislative record alone. Pet. App. 299a-300a; *Coleman*, 132 S. Ct. at 1336-37; *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008).

In any event, the court's attempt to analogize the 2006 record to the 1965 record based on this extra-record evidence fails. The 1965 record documented States where "federal courts ha[d] repeatedly found substantial voting discrimination," a second category where "there was more fragmentary evidence of recent voting discrimination," and a third category where the use of tests and devices and low voter turnout justified coverage, "at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In contrast, the 2006 record could not possibly place any State within the first category and at most three States in the second category, "leav[ing] six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully-covered states (Virginia and Alaska) were not included in either category one or two," Pet. App. 97a. (Williams, J.). It is worth emphasis that none of these States now employ tests or devices, making them unlike even the category-three cases of decades ago. Moreover, the jurisdictions arguably falling in category three have records virtually indistinguishable from (if not better than) several non-covered States.

Had Congress chosen to individually identify those States with the highest incidence of "second generation barriers," many (if not most) of the nine fully covered States would have avoided coverage. But States like New York, Illinois, and Tennessee and several others clearly would have been on that hypothetical coverage list. If Congress genuinely considered Section 2 litigation a legitimate barometer for whether a State should be subject to preclearance until 2031, it should not have retained the Section 4(b) formula, and it could not have targeted these nine States for coverage.

4. The court of appeals retreated to bailout as a solution to the irrationality of the coverage formula. Pet. App. 61a-64a. But there are several reasons why bailout is incapable of saving Section 4(b). First, history has shown that bailout can at best ameliorate over-inclusiveness only at the margin. Even ignoring that the court relied on bailout figures artificially inflated by post-reauthorization evidence, only a tiny percentage of the more than 12,000 covered jurisdictions have bailed out of coverage since 1982. Pet. App. 100a ("[O]nly 136 of the more than 12,000 covered political subdivisions (i.e., about 1%) have applied for bailout (all successfully).")

The reason why bailout is so infrequent is statutory. Bailout eligibility requires not only that a covered jurisdiction have a ten-year record of perfect compliance with statutory bailout criteria, but also that all of its sub-jurisdictions have the same spotless record. 42 U.S.C. §1973b. Because any failure resets the ten-year bailout clock, "the promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J.). Bailout clearly affects the scope of Section 4(b)'s coverage only at the margin, and it thus cannot possibly solve the formula's massive over- and under-inclusiveness problems. Pet. App. 99a-101a (Williams, J.).

Second, bailout today is fundamentally different from bailout in 1965. As originally enacted, the VRA permitted bailout for any jurisdiction that had not used a voting "test or device" in the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race. *See supra* at 3. Bailout thus was intended to correct the formula's inadvertent overreach by removing jurisdictions that "should not have been covered in the first place." BIO at 4. But after the 1982 amendments to the VRA, that is no longer its purpose. Under the current statute, a covered jurisdiction cannot secure bailout by demonstrating that it should not have been covered in the first place. Nor are the statutory criteria purely objective. Rather, to secure bailout, covered jurisdictions also must prove to the satisfaction of DOJ and DDC that, among other things, they:

> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected [under the Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

42 U.S.C. §1973b(a)(1)(F)(i)-(iii).

And even if a covered jurisdiction can satisfy these highly subjective criteria, it remains subject to Section 5's "clawback" provision, *id.* §1973b(a)(5), which essentially requires a jurisdiction to continue to satisfy the statutory criteria for bailout for an additional ten-year period before becoming fully non-covered. Thus, bailout does not afford a jurisdiction "a change in its status from covered to non-covered." BIO 24. And it does not liberate jurisdictions that should have never been covered in the first place. Instead, it turns covered jurisdictions into parolees that may ultimately be liberated only if they (and their sub-jurisdictions) continue to comply with the statutory criteria during a ten-year period of supervised release.

DOJ's implementation of bailout illustrates the point. For example, DOJ recently required Pinson, Alabama, as a condition of bailout, to take "certain additional constructive measures" including the formation of a "citizens' advisory group that is representative of the City's diversity" to make election recommendations to the City and a report to the United States within 90 days after any municipal election administered by the City that details the "steps taken to increase opportunities for recruitment and participation of a diverse group of poll officials as well as the total number of persons by race who served as election officials in the election." *City of Pinson v. Holder*, 12-cv-255 (D.D.C. Apr. 20, 2012) (Doc. 11) (¶¶ 47-50); *see also City of Sandy Springs v. Holder*, No. 10-cv-1502 (D.D.C. Oct 26, 2010) (Doc. 8) (¶¶ 44-51) (imposing similar "administration and reports requirements" as a condition to bailout). If DOJ viewed bailout as an acknowledgement of the formula's over-inclusiveness, it would not force a jurisdiction to agree to onerous non-statutory conditions to secure bailout.

In short, there is no nexus between bailout under the current version of the VRA and the over-inclusiveness problem in Section 4(b)'s coverage formula. Bailout—as initially conceived in 1965—was a remedy for the coverage formula's over-inclusiveness rather than a reward for statutory compliance. But that has not been the case since 1982, and today's bailout is therefore, at most, a "modest palliative" that in no way solves the massive problems with the current coverage formula. Pet. App. 101a (Williams, J.). If bailout were sufficient to save an ill-fitting coverage formula, Congress could just randomly select jurisdictions for coverage so long as any unlucky jurisdiction could obtain relief from a federal court. The "fundamental principle" of equal sovereignty requires far more. *Nw. Austin,* 557 U.S. at 203.

Finally, the VRA's judicial bail-in provision further undermines the formula's constitutionality. *See* 42 U.S.C. §1973a(c). This provision is a nationwide, targeted, and far more appropriate means of imposing preclearance based on a specific judicial finding of unconstitutional voting discrimination. Unlike the outdated coverage formula, Section 3's bail-in mechanism does not depart from equal sovereignty by treating some States differently from others based on pre-enactment history that bears no rational connection to modern voting problems. A non-covered State may become covered through bail-in only by virtue of a judicial finding of unconstitutional voting discrimination. Under current conditions, that remedy coupled with Section 2 fully safeguards minority voting rights.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

ADDENDUM — RELEVANT STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Fifteenth Amendment to the United States Constitution

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Addendum

42 U.S.C. § 1973
Voting Rights Act § 2

§ 1973 – Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Addendum

42 U.S.C. § 1973a
Voting Rights Act § 3

§ 1973a – Proceeding to enforce the right to vote

(a) Authorization by court for appointment of Federal observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) Suspension of use of tests and devices which deny or abridge the right to vote

If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) Retention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

42 U.S.C. § 1973b
Voting Rights Act § 4

§ 1973b – Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

> (1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any

State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees

of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on

account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William

C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973f or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons

educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive

and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating

to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. § 1973c
Voting Rights Act § 5

§ 1973c – Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the

Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 25 2013
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No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR.,
ATTORNEY GENERAL, et al.,
Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

BRIEF FOR RESPONDENT-INTERVENOR BOBBY LEE HARRIS

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

- I. Section 5 And Related Provisions 3
  - A. The Section 5 Preclearance Requirement 3
  - B. Other Voting Rights Act Provisions 8
- II. This Court's Prior Decisions Upholding Section 5 9
- III. Congress' 2006 Reauthorization Of Section 5 12
- IV. *Nw. Austin v. Holder* 13

SUMMARY OF ARGUMENT 15

ARGUMENT 16

- I. The Reconstruction Amendments Grant Congress Broad Authority To Remedy Racial Discrimination In Voting 16
  - A. Congress Acts at the Zenith of Its Authority When Enacting Voting Rights Legislation 16

B. The Boerne "Congruence and Proportionality" Standard Likewise Recognizes Congress' Central Role in Safeguarding Fundamental Constitutional Rights....................18

C. Facial Challenges Are Disfavored.......24

II. The Post-1982 Record Shows Continuing Pervasive Voting Discrimination In The Covered States..........25

A. Congress Properly Focused Its 2005-2006 Review Upon The Post-1982 Record of Discrimination....................26

B. Congress Appropriately Relied on Extensive Evidence of Vote Dilution in the Covered Areas.............27

C. Pervasive Voting Discrimination Has Continued in the Covered Areas....................30

1. Congress relied upon appropriate categories of evidence. 31

2. Congress legislated based on a record of widespread, substantial, and ongoing voting discrimination. 34

III. Section 5's Disparate Geographic Coverage Is Appropriately Related To The Problem Of Discriminatory Voting Changes 43

  A. The Section 5 Coverage Model Remains Appropriate to the Legislative Objectives 44

  B. The Coverage Provisions Reflect Where Voting Discrimination Currently Is Prevalent 51

IV. Congress' 2006 Amendments To The Preclearance Standards Are Not Challenged In This Case, And Do Not Support The Claim That Congress Acted Beyond Its Constitutional Authority In Reauthorizing Section 5 64

CONCLUSION 66

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Holder, No. 1:12-cv-01376-RLW (D.D.C.) 59

Allen v. State Board of Elections, 393 U.S. 544 (1969) 4, 26, 29, 51

Arizona v. Holder, No. 1:11-cv-01559-JDB (D.D.C. Apr. 10, 2012) 59

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) .... *passim*

Beer v. United States, 425 U.S. 130 (1976) 4

Briscoe v. Bell, 432 U.S. 404 (1977) 27

City of Boerne v. Flores, 521 U.S. 507 (1997) ... *passim*

City of Rome v. United States, 446 U.S. 156 (1980) .... *passim*

Clark v. Roemer, 500 U.S. 646 (1991) 4

Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012) 23

Crawford v. Marion County Election Board, 553 U.S. 181 (2008) 24, 62

Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986) 40

Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) 23

Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 20, 43

Florida v. United States, 2012 U.S. Dist. LEXIS 115647 (Aug. 16, 2012) 37

Georgia v. Ashcroft, 539 U.S. 461 (2003) 64, 65

Georgia v. United States, 411 U.S. 526 (1973) 10

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 17, 30

Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990) 58

Johnson v. California, 543 U.S. 499 (2005) 16

Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) 23, 43

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 62

Lopez v. Monterey County, 525 U.S. 266 (1999) 11, 17, 18, 32

Louisiana v. United States, 380 U.S. 145 (1965) 30

Miller v. Johnson, 515 U.S. 900 (1995) 36

Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 48

Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) 22, 23, 25, 31

New Hampshire v. Holder, 1:12-cv-1854 (D.D.C.) 7

Nick v. Bethel, No. 3:07-cv-0098 (D. Alaska July 30, 2008) 59

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) .... *passim*

Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221 (2008) 14

Oregon v. Mitchell, 400 U.S. 112 (1970) 18, 19, 20, 21

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 4

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) 64, 65

Riley v. Kennedy, 553 U.S. 406 (2008) 3, 4

Rogers v. Lodge, 458 U.S. 613 (1982) 17, 33, 49

Shaw v. Hunt, 517 U.S. 899 (1996) 36

Shaw v. Reno, 509 U.S. 630 (1993) 63, 64

Smith v. Allright, 321 U.S. 649 (1944) 30

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .... *passim*

South Carolina v. United States, 2012 U.S. Dist. LEXIS 146187 (Oct. 10, 2012) 38, 39

Tennessee v. Lane, 541 U.S. 509 (2004) ....*passim*

Texas v. Holder, 2012 U.S. Dist. LEXIS 127119 (Aug. 30, 2012)..................................37, 62

Texas v. United States, 2012 U.S. Dist. LEXIS 121685 (Aug. 28, 2012)..................................37, 63

Thornburg v. Gingles, 478 U.S. 30 (1986) 9, 33, 41

United States v. Salerno, 481 U.S. 739 (1987) ...24, 25

Village of Arl. Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977) 49, 50

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 24

Whitcomb v. Chavis, 403 U.S. 124 (1971).................62

White v. Regester, 412 U.S. 755 (1973) 17, 30, 62

Yick Wo v. Hopkins, 118 U.S. 356 (1886)..................16

Young v. Fordice, 520 U.S. 273 (1997).......................60

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. Const. amend. XIV ....*passim*

U.S. Const. amend. XV...*passim*

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) .... *passim*

National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* 60

Pub. L. No. 89-110, 79 Stat. 437 (1965) 6

Pub. L. No. 91-285, 84 Stat. 314 (1970) 6

Pub. L. No. 94-73, 89 Stat. 400 (1975) 6, 8

Pub. L. No. 97-205, 96 Stat. 131 (1982) 6

Voting Rights Act
  Section 2, 42 U.S.C. § 1973 .... *passim*
  Section 3, 42 U.S.C. § 1973a 8, 44, 58
  Section 4, 42 U.S.C. § 1973b .... *passim*
  Section 5, 42 U.S.C. § 1973c .... *passim*
  Section 8, 42 U.S.C. § 1973f 8, 33
  Section 14, 42 U.S.C. § 1973*l* 4
  Section 201, 42 U.S.C. § 1973aa 8

Section 5 Regulations
  28 C.F.R. pt. 51 33
  28 C.F.R. § 51.10 4

LEGISLATIVE MATERIALS

H.R. Rep. No. 91-397 (1969) 28

H.R. Rep. No. 94-196 (1975) 11

S. Rep. No. 97-417 (1982) 47

H.R. Rep. No. 109-478 (2006) .... *passim*

S. Rep. No. 109-295 (2006) 12

152 Cong. Rec. H 5143 (daily ed. July 13, 2006) 46

Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Comm. on the Judiciary, 109th Cong. 2d Sess. (2006) 40

Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 2d Sess. (2006) .... *passim*

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INTRODUCTION

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, requires federal review before any change affecting voting may be implemented by covered States and political subdivisions. As a result, thousands of voting changes determined as having the purpose and/or effect of denying or abridging the right to vote on account of race have been blocked before they could be implemented. In this manner, Section 5 has played – and is continuing to play – an indispensable role in promoting and protecting political participation by racial minorities. This Court four times has upheld this unique exercise of congressional power against constitutional challenge, first after Section 5 originally was enacted and then following Congress' reauthorization of Section 5 in 1970, 1975, and 1982. In so doing, this Court has recognized that Congress' legislative determinations are owed substantial deference when Congress exercises its enforcement powers under the Reconstruction Amendments to combat racial discrimination in voting. Accordingly, this Court has not disturbed Congress' judgment that the ongoing risk of discrimination in the covered areas required reauthorization of Section 5.

During the most recent reauthorization process, Congress engaged in an exhaustive fact-finding mission. It held twenty-one hearings and compiled more than 15,000 pages of record. This record revealed extensive contemporary discrimination in the areas subject to Section 5 review (*i.e.*, discrimination which occurred after the most recent preceding reauthorization in 1982), including more than 600 objections by the Attorney General. This contemporary discrimination reflects an unbroken pattern of discrimination in the covered jurisdictions that both existed prior to the enactment of Section 5 and continued from 1965 through 1982. At the same time, the record compiled by Congress in 2006 did not indicate a remotely comparable pattern of discrimination in the non-covered jurisdictions. For these reasons, Congress reauthorized Section 5 and retained the existing coverage provisions.

There has been undeniable progress since 1965 in terms of minority registration and turnout in the covered areas. From the start, however, that progress has been met with the adoption of dilutive voting practices that sought to negate the gains. That pattern continued after 1982 and, as a consequence, the evidence of contemporary discrimination is extensive in the great majority of the covered areas (Alabama, Georgia, Louisiana, Mississippi, the 40 covered counties of North Carolina, South Carolina, and Texas), and negates the instant facial challenge to the statute. Moreover, the opportunity for "clean" jurisdictions to bail out of coverage and for courts to "bail in" other jurisdictions provides even closer tailoring. To the extent that any constitutional issues remain that cannot be addressed via those statutory provisions, covered jurisdictions also may file "as applied" challenges, as two covered States recently have done.

For these reasons, this Court should once again uphold the constitutionality of Section 5 and the Act's geographic coverage provisions.

STATEMENT OF THE CASE

I. Section 5 And Related Provisions

The Voting Rights Act of 1965, as amended, enforces the constitutional prohibitions on racial discrimination in voting contained in the Fourteenth and Fifteenth Amendments. The statute "reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Congress adopted the Voting Rights Act after nearly a century of state-enforced disenfranchisement of African-Americans and other racial minorities, principally in the former Confederate States, and the failure of case-by-case litigation to dismantle the discriminatory regimes. *Id.* at 328. Congress designed the Act to provide "stringent . . . remedies for voting discrimination where it persists on a pervasive scale, and [to] strengthen[] existing remedies for pockets of voting discrimination elsewhere in the country." *Id.* at 308.

A. The Section 5 Preclearance Requirement

Section 5 of the Act requires certain States, and political subdivisions of other States, to obtain federal preclearance whenever they "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" which differs from the prior provision that was in effect, or which differs from the provision in effect on the jurisdiction's coverage date (November 1, 1964; November 1, 1968; or November 1, 1972). 42 U.S.C. § 1973c(a). *See Riley v. Kennedy*, 553 U.S. 406, 421 (2008). Without preclearance, voting changes in the covered jurisdictions are unenforceable. *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991); 28 C.F.R. § 51.10.

To obtain preclearance, a jurisdiction may file a *de novo* declaratory judgment action in the United States District Court for the District of Columbia, or an administrative request to the United States Attorney General. In either forum, the jurisdiction must show that its voting change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or [language minority status]." 42 U.S.C. § 1973(a).[1] The Section 5 "purpose" standard applies to "any discriminatory purpose." 42 U.S.C. § 1973c(c). The "effect" standard prohibits backsliding, *i.e.*, it bars any change "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Section 5 limits the preclearance obligation to changes affecting voting, 42 U.S.C. § 1973c(a), *Presley v. Etowah County Comm'n,* 502 U.S. 491, 509 (1992), but is comprehensive within that sphere. *Id.* at 502-03, 509; *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969).

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[1] The Act defines "language minority group" to include "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973*l*(c)(3).

Section 4 of the Act, 42 U.S.C. § 1973b, establishes two prerequisites for jurisdictions to be covered by Section 5 today, and includes a third coverage factor. First, it is necessary, but not sufficient, that the jurisdictions satisfy the coverage criteria set forth in Section 4(b), 42 U.S.C. § 1973b(b). These criteria are that a jurisdiction must have maintained a "test or device" for registration or voting at the time of the 1964, 1968, or 1972 presidential election, and less than 50 percent of the eligible voters registered or voted in the same election.[2] These criteria identify the areas where, historically, "voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 315.

Second, coverage exists today based on Congress having conducted several periodic reviews of the preclearance remedy, and its decision in each instance that electoral conditions in the covered areas merited an extension of coverage for an additional period of years. Section 4, as originally enacted and subsequently reauthorized, has continuously included a sunset provision, which stipulated that coverage would terminate on a date certain, subject to Congress enacting extension legislation. Coverage originally was to sunset in 1970, and then in 1975, 1982, and 2007; Congress reauthorized coverage for additional periods of years in 1970, 1975, 1982, and 2006.[3] Under the 2006 Amendments, Section 4 coverage will expire in 2031. 42 U.S.C. § 1973b(a)(8).

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[2] The statute defines "test or device" to include literacy tests, "understanding" tests, "moral character" tests, and similar procedures. 42 U.S.C. § 1973b(c). The term also includes the use of English-only election procedures in the 1972 presidential election where a language minority citizen group constituted more than five percent of the citizen voting age population. 42 U.S.C. § 1973b(f)(3).

Third, Section 4 allows qualifying covered jurisdictions to exempt themselves from coverage ("bail out"), by means of a declaratory judgment action filed in the District Court for the District of Columbia, naming the Attorney General as the defendant. The current bailout provisions (which were enacted in 1982, and became effective in 1984[4]) require a showing that an individual jurisdiction's electoral processes have been free of discrimination for a period of ten years. 42 U.S.C. § 1973b(a)(1)-(6). Bailout may be sought by an entire State, an individual county or parish, or an individual city or other political subjurisdiction. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009). Congress must "reconsider" coverage and bailout provisions in 2021. 42 U.S.C. § 1973b(a)(7).

Pursuant to these coverage provisions, nine States currently are subject to the Section 5 preclearance requirement – Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Six of these States

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[3] Pub. L. No. 89-110, 79 Stat. 437, 438, § 4(a) (1965); Pub. L. No. 91-285, 84 Stat. 314 § 3 (1970); Pub. L. No. 94-73, 89 Stat. 400, §§ 101, 201 (1975) ("1975 Amendments"); Pub. L. No. 97-205, 96 Stat. 131, § 2(b) (1982) ("1982 Amendments"); Pub. L. No. 109-246, 120 Stat. 577, 580, § 4 (2006) (2006 Amendments").

[4] 1982 Amendments, § 2(b).

(Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) are covered today pursuant to the 1965 coverage criteria, and the four subsequent reauthorizations. The other three States (Alaska, Arizona, and Texas) are covered today pursuant to the 1975 coverage criteria, and the two subsequent reauthorizations.[5]

Portions of seven other States also currently are covered – California (three counties), Florida (five counties), Michigan (two townships), New Hampshire (ten towns), New York (three counties), North Carolina (40 counties), and South Dakota (two counties).[6] Thus, only North Carolina, among the partially covered States, has a substantial portion of the State covered geographically.

To date, a total of 236 individual jurisdictions have bailed out under the current procedure, in 38 separate actions.[7] All of these bailouts were granted with the Attorney General's consent.[8]

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[5] Section 5 Covered Jurisdictions, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Jan. 24, 2013).

[6] Note 5, *supra*, and note 7, *infra*. New Hampshire has filed for bailout on behalf of its covered towns, and a proposed consent decree is pending review by the district court. *New Hampshire v. Holder*, 1:12-cv-1854 (D.D.C.).

[7] Jurisdictions currently bailed out, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 24, 2013). See also App. 136a-139a. Several jurisdictions also bailed out under the previous bailout standards. App. 133a-136a.

[8] Note 7, *supra*.

B. Other Voting Rights Act Provisions

The Act currently includes one other remedy whose coverage is limited to the areas specified by Section 4. That provision, in Section 8, 42 U.S.C. § 1973f, authorizes the Attorney General to monitor the administration of elections by sending polling place observers.

The Act originally included two other such remedies: a five-year suspension of the use of any "test or device" for registration or voting (*i.e.*, the procedures which, combined with a low participation rate, also triggered coverage); and authority granted to the Attorney General to assign federal examiners to conduct voter registration. *Katzenbach*, 383 U.S. at 315-16. In 1975, Congress permanently banned the "test or device" procedures nationwide. 42 U.S.C. § 1973aa.[9] Congress repealed the examiner procedure as part of the 2006 Amendments.[10]

Section 3(a) of the Act, 42 U.S.C. § 1973a(a), provides that a court, in a voting discrimination lawsuit, may extend observer coverage to a jurisdiction not covered by Section 4 "for such period of time . . . as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment." Section 3(c) provides similar authority to a court to order a preclearance remedy "for such period as it may deem appropriate" to remedy "violations of the fourteenth or fifteenth amendment."

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[9] 1975 Amendments, § 102.

[10] 2006 Amendments, § 3(c).

Section 2 of the Act, 42 U.S.C. § 1973, provides for a right of action, on behalf of the Attorney General or private litigants, to challenge a voting practice on the ground that it has a discriminatory purpose, or in certain circumstances, has a discriminatory "result[]." *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986).

II. This Court's Prior Decisions Upholding Section 5

This Court has upheld the constitutionality of Section 5 in four separate decisions preceding Congress' 2006 reauthorization of the statute. These decisions both have affirmed that Congress appropriately may "shift the advantage of time and inertia from the perpetrators of the evil [voting discrimination] to its victims," *Katzenbach*, 383 U.S. at 328, by requiring that a specified subset of jurisdictions obtain Federal preclearance for their voting changes, and that Congress appropriately may supersede a prior decision to sunset the remedy by reauthorizing coverage based on a finding of an ongoing, current need.

First, in *South Carolina v. Katzenbach*, the Court upheld the remedies Congress chose to "aim[] at areas where voting discrimination has been most flagrant." *Id.* at 315. This included the preclearance provision, the then-temporary suspension of "tests" and "devices," and the use of federal registration examiners. The Court also upheld the Section 4 coverage criteria. *Id.* at 337.

As to Section 5 preclearance, the Court affirmed Congress' predictive judgment that the remedy was needed because the "States [identified by the Section 4 coverage formula] might try . . . maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.* at 335. That judgment, in turn, was based on Congress' considered determination that "some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.*

The Court held that the Section 4 "coverage formula is rational in both practice and theory," and therefore is permissible. *Id.* at 330. In "theory," the coverage criteria appropriately identify jurisdictions with a history of "flagrant" voting discrimination, since the criteria involve past use of a discriminatory "test or device," and low minority political participation associated with that use. The formula "is rational in . . . practice" since Congress identified "actual voting discrimination in a great majority" of the areas to be covered before adopting the criteria. *Id.* at 329-30.

Following Congress' 1970 reauthorization of Section 5, the Court summarily rejected a second challenge, "for the reasons stated at length" in *Katzenbach*. *Georgia v. United States*, 411 U.S. 526, 535 (1973).

The third challenge arose in *City of Rome v. United States*, 446 U.S. 156 (1980), after Congress reauthorized Section 5 in 1975, and also extended the coverage formula to the 1972 presidential election and to certain jurisdictions' use of English-only elections. The Court rejected Rome's claim that Congress lacked the authority to reauthorize Section 5, *id.* at 180-82; the city's challenge to the constitutionality of the Section 5 effect standard; *id.* at 177, and the city's claim that Section 5 violates principles of federalism. *Id.* at 179-80.

As to reauthorization, the Court observed that Congress had given "careful consideration to the propriety of readopting § 5's preclearance requirement." *Id.* at 181. The Court then highlighted Congress' "ringing endorsement" of the "'continuing need for [the] preclearance mechanism'" based on Congress' finding that, "'[a]s [minority] registration and voting . . . increase[],'" the covered areas may adopt "'other measures'" to "'dilute increasing minority voting strength.'" *Id.* (quoting H.R. Rep. No. 94-196 (1975)). The Court also noted that Congress found some continuing problems with disparities between minority and white registration rates, and the limited success of minority candidates. *Id.* at 180.

Most recently, the Court upheld the constitutionality of Section 5 in *Lopez v. Monterey County*, 525 U.S. 266 (1999). The Court rejected a challenge by the State of California, which is not covered by Section 5, that Congress had violated principles of federalism by requiring preclearance of voting changes enacted by the State insofar as changes are implemented by a covered county in that State. *Lopez*, 525 U.S. at 282.

III. Congress' 2006 Reauthorization Of Section 5

In 2006, Congress voted overwhelmingly to supplant the 2007 sunset date for Section 4 coverage established by the 1982 Amendments, and to thus reauthorize Section 5. On July 27, 2006, President Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 into law. Congress enacted the reauthorization to effectuate its authority under both the Fourteenth and Fifteenth Amendments. H.R. Rep. No. 109-478, at 53, 90 (2006) ("House Report").

Prior to enacting the reauthorization, the House and Senate conducted extensive hearings to evaluate the current status of voting discrimination in the country. The House held 12 hearings, received live testimony from 46 witnesses, and received written testimony from the Justice Department and other organizations and witnesses. The House also received two comprehensive reports from private organizations which documented ongoing voting discrimination in the covered areas, and separate reports for 11 of the 16 wholly or partially covered States which documented ongoing discrimination on a state-specific basis. *Id.* at 5. The Senate held nine hearings encompassing the testimony of 46 witnesses. S. Rep. No. 109-295, at 10 (2006). In total, Congress compiled a record of "over 15,000 pages." Pet. App. 131a.

Based on this record, Congress made the predictive judgment that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minorities citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Amendments, § 2(b)(9).

In particular, Congress found that, subsequent to Section 5's 1982 reauthorization, the Attorney General interposed "hundreds of objections" to block discriminatory voting changes. *Id.* § 2(b)(4)(A). "[S]uch objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." House Report at 21.

Congress also relied upon multiple other categories of evidence. These included further evidence relating to Section 5 submissions and the enforcement of Section 5; information relating to Section 2 litigation; information regarding repeated dispatches of federal observers to monitor elections in covered jurisdictions; and information relating to the current electoral conditions in the covered areas. 2006 Amendments § 2(b)(3), (4), & (5). Congress also found that Section 5 has been a "vital prophylactic tool[]" that has "deterred covered jurisdictions from even attempting to enact discriminatory voting changes." House Report at 21, 24.

IV. *Nw. Austin v. Holder*

Following Congress' 2006 reauthorization of Section 5, a municipal utility district in Texas challenged the constitutionality of Section 5 and, in the alternative, sought to bail out. The United States District Court for the District of Columbia, sitting as a three-judge court, upheld the statute and, as to bailout, held that only counties, parishes, and other political subunits which conduct voter registration are the types of subjurisdictions eligible to bail out under Section 4. Since the utility district did not conduct voter registration, the court denied the bailout request as well. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (2008).

On appeal, this Court held that Section 4 allows all types of covered subjurisdictions to seek bailout, and thus found that the utility district was eligible. 557 U.S. 193, 211 (2009). Since the district had pled its two claims in the alternative, the Court did not reach the constitutional question. *Id.* at 206.

Although the Court did not resolve the constitutional issue, it identified two principal questions for consideration in a future challenge to the constitutionality of the 2006 reauthorization. First, the Court stated that Section 5 "imposes current burdens and must be justified by current needs." *Id.* at 203. In this regard, the Court noted that, on the one hand, "[s]ome of the conditions that we relied upon in upholding this statutory scheme . . . have unquestionably improved. Things have changed in the South." *Id.* at 202. On the other hand, however, "[t]hese improvements are no doubt due in significant part to the Voting Rights Act itself" and "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.* at 202-03.

Second, the Court stated that "the fundamental principle of equal sovereignty requires a showing that [Section 5's] disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. The Court noted the possibility that voting discrimination "may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.* The disparate coverage implicates "federalism concerns," including "an argument that the preclearance requirements in one State would be unconstitutional in another," and potential "tension between §§ 2 and 5" of the Act limited to the covered States. *Id.*

SUMMARY OF ARGUMENT

The Fourteenth and Fifteenth Amendments grant Congress broad authority, as against the States, to remedy racial discrimination in voting. This authority, in turn, merits substantial deference by this Court to Congress' factual determinations regarding the continuing need for the preclearance remedy, and Congress' determinations regarding the areas of the country where this remedy still is needed.

Prior to reauthorization, Congress compiled a massive record evidencing a substantial and ongoing pattern of voting discrimination in the covered areas. This record, on the other hand, revealed only fragmentary evidence of discrimination elsewhere in the country.

The 2006 reauthorization fully satisfies the two principal inquiries this Court identified in *Nw.*

Austin. Congress based reauthorization on a proper finding of "current needs," and Section 5's limited geographic coverage remains "sufficiently related to the problem that it targets." 557 U.S. at 203.

ARGUMENT

I. The Reconstruction Amendments Grant Congress Broad Authority To Remedy Racial Discrimination In Voting

Under this Court's decisions in *Katzenbach* and *Rome*, and also under this Court's construction of Congress' Fourteenth Amendment authority in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and subsequent cases, Congress' exercise of its Fourteenth and Fifteenth Amendment authority to remedy racial discrimination in voting is subject to a highly deferential standard of review.

A. Congress Acts at the Zenith of Its Authority When Enacting Voting Rights Legislation

In enacting the Voting Rights Act to "rid the country of racial discrimination in voting," *Katzenbach*, 383 U.S. at 315, Congress legislated at the zenith of its constitutional authority. The Voting Rights Act addresses both the quintessential suspect classification (race), *Johnson* v. *California*, 543 U.S. 499, 509 (2005), and the quintessential civil right (the right to vote), *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). Two separate amendments to the Constitution, moreover, grant Congress the power to legislate in this sphere. The Fifteenth Amendment expressly prohibits racial discrimination in voting. The Fourteenth Amendment's Equal Protection Clause also has been construed for at least 40 years to prohibit racial discrimination in voting. *E.g. Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973).

As this Court held in *Katzenbach*, Congress' role is central in establishing remedies for discrimination in voting, and Congress has broad authority to legislate on this issue. As between Congress and the judiciary, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment]." *Katzenbach*, 383 U.S. at 326. And, "[a]s against the reserved powers of the States, Congress may use *any* rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324 (emphasis added). Although States generally exercise plenary authority over matters "'wholly within the domain of state interest,'" that authority must give way when state power is "'used as an instrument for circumventing a federally protected right.'" *Id.* at 325 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

In subsequent cases, this Court has reaffirmed the primacy of congressional authority to remedy racial discrimination in voting. In *Rome*, the Court rejected a federalism challenge to Section 5 because "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by 'appropriate legislation.'" 446 U.S. at 179. Then, in *Lopez v. Monterey County*, the Court again ruled that Congress' power to remedy racial discrimination in voting trumps the federalism concern: "In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however . . . ." 525 U.S. at 284-85.

In addition, the Court in *Rome* reaffirmed that, as between federal and state authority in this area, Congress' power is extensive in that the Reconstruction Amendments authorize Congress to employ "any rational means" to remedy voting discrimination. Thus, the Court upheld the Section 5 "effect" standard because Congress "could rationally have concluded" that this is an appropriate remedy to address "the risk of purposeful discrimination" by jurisdictions with a history of voting discrimination. 446 U.S. at 177. The Court further explained that it had relied upon the same standard in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in unanimously upholding Congress' nationwide suspension of literacy tests in 1970. 446 U.S. at 176-77.

B. The *Boerne* "Congruence and Proportionality" Standard Likewise Recognizes Congress' Central Role in Safeguarding Fundamental Constitutional Rights

In *City of Boerne v. Flores*, this Court held that when Congress legislates pursuant to the Fourteenth Amendment, "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. Previously, it has been posited that, in ruling on Section 5, this Court would need to choose between that standard and *Katzenbach's* "any rational means" formulation. *Nw. Austin*, 557 U.S. at 204.

A review of this Court's decisions demonstrates, however, that the *Katzenbach* and *Boerne* formulations are part of a single framework for evaluating congressional authority to enact civil rights remedies. As the district court stated, there is "one standard of review that has always been employed to assess legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments," Pet. App. 161a, and "*Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*." Pet. App. 162a.

Moreover, when Congress acts to remedy racial discrimination in voting, *Boerne* and subsequent cases reaffirm the centrality of Congress' role, and its broad authority to enact voting discrimination remedies as against the reserved powers of the States. This is so because the *Boerne* standard was specifically built upon, and incorporates the holdings in, *Katzenbach*, *Rome*, and *Oregon v. Mitchell*. It also is so because the manner in which the "congruence and proportionality" standard functions is sensitive to the nature of the constitutional right Congress is seeking to enforce.

1. As applied by this Court in *Boerne* and subsequent decisions, the "congruence and proportionality" analysis involves three steps. The first "is to identify with some precision the scope of

the constitutional right at issue." *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *accord*, *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). The second is to examine the nature and scope of "injury to be prevented or remedied," *Boerne*, 521 U.S. at 520, to determine whether "Congress identified a history and pattern of unconstitutional . . . discrimination." *Garrett*, 531 U.S. at 368. *Accord*, *Lane*, 541 U.S. at 523. Third and finally, the "means adopted" by Congress are reviewed to determine whether they are "appropriate," *i.e.*, whether they are congruent and proportional to the identified discrimination. *Garrett*, 531 U.S. at 372; *accord*, *Lane*, 541 U.S. at 530.

In relying heavily on *Katzenbach*, *Rome*, and *Oregon v. Mitchell*, *Boerne* made no distinction between Congress' Fourteenth and Fifteenth Amendment authority. 521 U.S. at 518-19, 525-27. Moreover, in *Boerne* and subsequent "congruence and proportionality" cases the Court repeatedly has pointed to Section 5 of the Voting Rights Act as a model for how Congress may constitutionally exercise its enforcement authority under the Fourteenth Amendment. *See Garrett*, 531 U.S. at 373; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647 (1999); *Boerne*, 521 U.S. at 532-33.

In addition, *Boerne's* three steps essentially recapitulate the analytic framework the Court relied upon in *Katzenbach*. There, the Court premised its ruling on Congress' broad Fifteenth Amendment authority, 383 U.S. at 324-26 (*Boerne* step one); the "historical experience which [the Voting Rights Act] reflects," *id.* at 308 (*Boerne* step two); and the appropriateness of the remedies enacted by Congress in light of the discrimination Congress sought to remedy and prevent, *id. at* 333-37 (*Boerne* step three). *See also Lane*, 541 U.S. at 523 (identifying *Boerne* step two by quoting the *Katzenbach* "historical experience" formulation); *Garrett*, 531 U.S. at 373 (Congress appropriately exercised its Fifteenth Amendment authority in the Voting Rights Act because it both "documented a marked pattern of unconstitutional conduct by the States" and enacted "a detailed but limited remedial scheme").

Thus, *Boerne* and *Katzenbach* – and their "congruence and proportionality" and "any rational means" standards – are inextricably bound together. This Court neither set forth the *Boerne* standard as something separate and apart from *Katzenbach*, *Rome*, and *Oregon v. Mitchell*, nor did the Court praise these Fifteenth Amendment decisions only to bury them. It follows, therefore, that when Congress enacts voting discrimination remedies, including the 2006 reauthorization of Section 5, Congress exercises its constitutional authority subject to the "congruence and proportionality" standard. At the same time, the application of this standard to voting rights legislation is informed by this Court's rulings in *Katzenbach*, *Rome*, and *Oregon v. Mitchell*. Thus, as against the reserved powers of the States, Congress has broad authority to use "any rational means" in achieving a congruent and proportional remedy for racial discrimination in voting.

2. As a general matter, *Boerne* reaffirmed that Congress' legislative authority under the

Reconstruction Amendments has a wide scope, although it is also subject to important limitations. The Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." 521 U.S. at 518. Furthermore, "Congress must have wide latitude" in exercising its Fourteenth Amendment authority. *Id.* at 520. Congress remains within the scope of this enforcement power so long as it does not attempt "to decree the substance of the Fourteenth Amendment's restrictions on the States," *id.* at 519, since Congress "has been given the power 'to enforce' [the Fourteenth Amendment], not the power to determine what constitutes a constitutional violation." *Id.*

Congress possesses a particularly "wide latitude" of remedial authority as against the States when it enforces fundamental or significant rights, such as the right to be free from racial discrimination in voting, whereas greater judicial scrutiny of congressional action is merited when Congress seeks to enforce other equal protection rights. As the Court explained in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-36 (2003), and reaffirmed in *Lane*, 541 U.S. at 528-29, this Court's decisions upholding congressional enactments as "congruent and proportional" under the Fourteenth Amendment involved legislation where the constitutional right is substantial and where state authority therefore is limited, as reflected in the heightened level of judicial review applicable to state action.[11] Contrastingly, this Court's decisions holding that Congress had exceeded its Fourteenth Amendment authority involved legislation where the Constitution allows the States a much wider range of authority, as reflected in the use of rational-basis review.[12]

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[11] In *Lane*, the Court upheld the provisions of the Americans With Disabilities Act as applied to the "fundamental [due process] right of access to the courts." 541 U.S. at 533-34, In *Hibbs*, the Court upheld provisions of the Family and Medical Leave Act dealing with gender discrimination. 538 U.S. at 736. In *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012), the Court found that a different provision of the Family and Medical Leave Act was not properly enacted pursuant to the Fourteenth Amendment, but that provision, the Court found, did not concern gender discrimination.

[12] *Garrett* held that the employment discrimination provisions of the Americans With Disabilities Act were not properly enacted pursuant to the Fourteenth Amendment, emphasizing the limited scope of the equal protection right involved. 531 U.S. at 367. In *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000), the Court ruled that the Age Discrimination in Employment Act was outside Congress' Fourteenth Amendment authority, and also highlighted the discretion accorded the States in this area.

This Court's decision in *Boerne* is not to the contrary. Although the Court was reviewing a statute (the Religious Freedom Restoration Act) that sought to enforce a fundamental right (religious freedom), Congress had explicitly sought to redefine the substance of that right by imposing a standard on the States which this Court, in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), had previously rejected as not being the proper construction of the First Amendment.

The Fourteenth Amendment – unlike the Fifteenth Amendment – is the vehicle through which numerous rights may be applied against the States. Accordingly, it is important in defining the overall scope of Congress' Fourteenth Amendment authority to distinguish statutes which seek to enforce rights at the core of the Amendments from those which may only minimally be tethered to actual constitutional protections or problems.

C. Facial Challenges Are Disfavored

Shelby County has an especially heavy burden here given its claim that Sections 5 and 4(b) are facially invalid. This Court recently has emphasized that facial challenges to voting legislation are disfavored. In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), the Court rejected a facial challenge to the State of Washington's new primary system, emphasizing that "a plaintiff can only succeed in a facial challenge by 'establishing that no set of circumstances exists under which [the statute] would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Likewise, in *Crawford v. Marion County Election Board*, 553 U.S. 181, 200 (2008), the Court rejected a facial challenge to Indiana's voter identification law, explaining that "[g]iven the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statue in all its applications, they bear a heavy burden of persuasion."

This principle also applies to the review of federal legislation enacted pursuant to the Reconstruction Amendments. As Justice Scalia noted in his dissenting opinion in *Hibbs*, *Salerno* stands for the proposition that the State of Nevada could not successfully challenge Congress' decision to apply a provision of the Family and Medical Leave Act to all States if it were shown that that provision "was *facially* valid – *i.e.*, that it could constitutionally be applied to *some* jurisdictions." 538 U.S. at 743 (emphasis in original).

II. The Post-1982 Record Shows Continuing Pervasive Voting Discrimination In The Covered States

The second step in the *Katzenbach/Boerne* analysis (following examination of the constitutional rights at issue) requires consideration of the "historical experience which [the challenged statute] reflects." *Katzenbach*, 383 U.S. at 308. Here, this requires an examination of the enforcement history of the Voting Rights Act following the 1982 reauthorization of Section 5.

In 2005 and 2006, the House and Senate conducted multiple hearings related to Section 5 reauthorization and amassed a substantial record. This record demonstrates that racial discrimination in voting continues to "persist[] on a pervasive scale," *Katzenbach*, 383 U.S. at 308, in the areas subject to the Section 4 coverage criteria.

A. Congress Properly Focused Its 2005-2006 Review Upon The Post-1982 Record of Discrimination

While the "constitutional questions" presented by Congress' reauthorization of Section 5 are "serious," *Nw. Austin*, 557 U.S. at 204, the reauthorization question which Congress confronted in 2006 also was a limited one given that this Court broadly has upheld the Section 5 remedy in its prior decisions. This Court has affirmed the preclearance remedy's basic constitutional underpinnings, first in *Katzenbach*, 383 U.S. at 329-31, 334-35 and then in *Rome*, 446 U.S. at 180-82. The Court likewise has upheld the various means by which the preclearance remedy operates. *Katzenbach*, 383 U.S. at 335; *Rome*, 446 U.S. at 177-78; and *Allen v. State Board of Elections*, 393 U.S. at 566.

In these circumstances, Congress appropriately focused its review on the enforcement of the Act's nondiscrimination remedies (particularly Section 5) during the period following the then most recent Section 5 reauthorization in 1982, and on current electoral conditions, to evaluate the ongoing need for Section 5. This was the logical and straightforward approach to determining whether Section 5 continues to be needed, since a valuable predictor of an ongoing special risk of voting discrimination in the Section 4 jurisdictions is the nature and extent of such discrimination in the recent past. Moreover, this was exactly the approach

Congress followed in 1975, which this Court upheld in *Rome*.[13]

B. Congress Appropriately Relied on Extensive Evidence of Vote Dilution in the Covered Areas

In 2006, Congress also appropriately relied on extensive evidence that covered jurisdictions are continuing to adopt voting changes which discriminatorily dilute minority voting strength, *i.e.*, discrimination affecting minority voters' opportunity to elect their preferred candidates to office, notwithstanding their ability to register and vote. 2006 Amendments, § 2(b)(2); House Report at 36-40. In the presence of racially polarized voting, dilutive devices include at-large elections and gerrymandered election districts.

Congress' focus on vote dilution was a continuation of a longstanding concern dating back to shortly after the Act first was adopted. By 1969, as a result of the Act's prohibition of discriminatory tests and devices for voter registration and voting, and use of the authority in the Act to deploy federal examiners to register voters, Congress found that minority participation rates had increased substantially and covered jurisdictions were now instituting dilutive practices. H.R. Rep. No. 91-397, at 7 (1969). Congress acknowledged the progress in minority participation rates in reconsidering the preclearance remedy in 1975. *Rome*, 446 U.S. at 180. Congress again found at that time, however, that notwithstanding this progress, and indeed specifically because of it, Section 5 still was needed to prevent covered areas from implementing changes that would dilute minority voters' increasing voting strength. *Id.* at 181.

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[13] One distinction between what occurred in 2005-2006 and 1975 is that, in 1975, Congress found that the evidence supported expanding coverage to additional areas. *See Briscoe v. Bell*, 432 U.S. 404, 405-06 (1977) (noting that Congress extended coverage based on its finding of substantial discrimination against language minority citizens, including use of dilutive devices).

Shelby County disputes Congress' continuing reliance in 2006 on evidence of vote dilution. According to the County, Congress was constitutionally permitted to reauthorize Section 5 only if the evidence showed that covered areas are denying minority voters access to the ballot to the same extent as when Section 5 was enacted in 1965. County Br. 19-20, 27-29, 41.

The County claims that the Section 4 coverage criteria support its position. The County notes that the criteria involve ballot access factors, and argues that "there is a serious mismatch between the problem that Congress targeted [in 2006, *i.e.*, vote dilution] and the triggers for coverage under Section 4(b)'s coverage formula." County Br. 41. The County further argues that Congress could not rely on vote dilution in reauthorizing Section 5 because this Court previously has upheld Section 5 under the Fifteenth Amendment, and vote dilution assertedly violates the Fourteenth, but not the Fifteenth, Amendment. County Br. 19-20, 32.

The County's position is plainly at odds with the provisions of the Voting Rights Act, and with this Court's Section 5 decisions and Fourteenth Amendment jurisprudence. As this Court explained in *Rome*, the problems Congress targeted through Section 5 go well beyond issues of ballot access, to include the electoral circumstances in the covered areas *after* minority voters largely have obtained access to the ballot. Thus, as this Court held in *Allen v. State Board of Elections*, Section 5 "reach[es] any state enactment which alter[s] the election law of a covered State in even a minor way." 393 U.S. at 566. The Court in *Allen* specifically rejected the notion that Section 5 only was meant to address issues of voter registration, *id.* at 564-65, and held that Section 5 covers changes involving at-large voting because "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569.

The County offers no reason why Congress should now be constitutionally precluded from relying on vote dilution of the type prohibited by the Fourteenth Amendment. The Amendment grants extensive authority to Congress to "enforce" its provisions through "appropriate legislation." *Boerne*, 521 U.S. at 517-18. This extensive authority is sufficient to permit Congress to rely on that Amendment, and consequently evidence of vote dilution, in reauthorizing Section 5.[14]

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[14] This Court's prior reliance only on the Fifteenth Amendment in upholding Section 5 may best be understood as merely reflecting the historical development of this Court's voting discrimination jurisprudence. At the time *Katzenbach*

At bottom, Shelby County's argument is both nonsensical and directly contrary to *Rome*. The County essentially contends that Congress had the authority to reauthorize Section 5 in 2006 only if it found that the Act had been a failure. In *Rome*, the Court specifically upheld Congress' reliance – indeed, primary reliance – on vote dilution discrimination in deciding to reauthorize Section 5 in 1975.

C. Pervasive Voting Discrimination Has Continued in the Covered Areas

Congress relied upon a broad and extensive array of post-1982 evidence to conclude that voting discrimination is continuing in the Section 4 areas (*i.e.*, those portions of the country which also have a history of pervasive discrimination), and that these areas, accordingly, continue to present a special risk of enacting discriminatory voting changes in the future. This evidence included: 1) Section 5 objections interposed by the Attorney General in response to administrative preclearance submissions; 2) Section 5 submissions withdrawn or modified after

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was decided, that jurisprudence generally was grounded upon the Fifteenth Amendment. *E.g., Louisiana v. United States*, 380 U.S. 145, 153 (1965); *Gomillion v. Lightfoot*, 364 U.S. at 346; *Smith v. Allright*, 321 U.S. 649, 666 (1944). Beginning in the 1970s, the Court established that the Fourteenth Amendment also establishes an important bar to voting discrimination, when the Court extended that Amendment's one-person, one-vote rulings to vote-dilution discrimination. *E.g., White v. Regester, supra.*

the Attorney General sent a written request for additional information to the submitting jurisdiction; 3) denials of requests for Section 5 declaratory judgments; 4) successful actions to enforce Section 5 where covered jurisdictions sought to implement a voting change without preclearance; 5) Section 5's deterrent effects; 6) successful cases brought in the covered areas under Section 2 of the Act; 7) observer coverages; and 8) the electoral conditions in the covered areas, including racially polarized voting, and continuing problems in some areas with low minority voter registration rates and the extent to which minorities are elected to office. 2006 Amendments, § 2(b); House Report at 25-45, 52-53.

1. Congress relied upon appropriate categories of evidence.

Congress must premise the exercise of its Reconstruction Amendments authority upon evidence of a pattern of unconstitutional conduct by the States. *Hibbs*, 538 U.S. at 728; *Garrett*, 531 U.S. at 368. This evidence, however, may take a variety of forms, may broadly identify the relevant problems, and is not limited to court decisions which directly find instances of constitutional violations. *Lane*, 541 U.S. at 529 (holding that Congress properly relied upon "judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services."); *Hibbs*, 538 U.S. at 729-32 (holding that Congress properly relied on an older history of court-sanctioned gender discrimination, and more current evidence, including surveys of private-employer and public-employer leave practices, and testimony of individual experts regarding leave practices). *See also Katzenbach*, 383 U.S. at 330 ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

The post-1982 evidence upon which Congress relied, without exception, was probative of the need to prevent and deter violations of the Fourteenth and Fifteenth Amendments. The Voting Rights Act, in Section 5 and its other remedial provisions, endeavors to stop or prevent discriminatory conduct before it ripens to the extent that a court would find that intentional discrimination is occurring. As this Court held in *Katzenbach* and *Rome*, and reaffirmed in *Lopez*, the Voting Rights Act properly may "guard against [practices] that give rise to a discriminatory effect in [the Section 4] jurisdictions," *Lopez*, 525 U.S. at 283, as one method of addressing "the risk of purposeful discrimination" by those "jurisdictions with a demonstrable history of intentional racial discrimination in voting." *Rome*, 446 U.S. at 177.

In particular, the evidence relating to the operation of the preclearance requirement after the 1982 reauthorization – especially, the Section 5 objections, but also the "more information" withdrawals and modifications, Section 5's deterrent effect, the district court preclearance denials, and the Section 5 enforcement actions – provided Congress with significant information regarding a continuing need for Section 5. Section 5 directly addresses discriminatory intent, and appropriately also prohibits changes that will have a discriminatory effect. Indeed, in *Rome* this Court upheld Congress' substantial reliance on Section 5 objections in the 1975 reauthorization. 446 U.S. at 181.[15]

Successful Section 2 suits similarly are probative of unconstitutional conduct even when they do not involve a judicial finding of intentional discrimination. Much of the evidence relevant to finding Section 2 liability also is probative of unconstitutional conduct, although the Section 2 "results" standard does not require such a finding. *Compare Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (Section 2) *with Rogers*, 458 U.S. at 616-28 (constitutional test).

Lastly, the assignment of federal observers also is relevant. Section 8 of the Act authorizes the Attorney General to send observers based on his receipt of "written meritorious complaints . . . that efforts to [discriminatorily] deny or abridge the right to vote under the color of law . . . are likely to occur," or that in his "judgment . . . the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment." 42 U.S.C. § 1973f(a).

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[15] Judge Williams, in his dissenting opinion, suggested that objections may have little probative value because covered jurisdictions have the burden of proof, and because the Attorney General assertedly may object "almost costlessly." Pet. App. 94a. But this is contrary to *Rome*. Moreover, it ignores that the Attorney General's exercise of authority is constrained by a detailed set of procedural rules and substantive requirements, 28 C.F.R. pt. 51, and, as a practical matter, the availability of judicial preclearance review.

2. Congress legislated based on a record of widespread, substantial, and ongoing voting discrimination.

The 2005-06 legislative record unquestionably showed a massive amount of ongoing voting discrimination in the covered areas, involving repeated, varied, and widespread patterns of voting discrimination.

Each individual instance of voting discrimination in the covered areas since 1982 tells a story of a denial or abridgment of the franchise which was prevented or remedied by the Voting Rights Act. In this regard, the court of appeals and district court discussed numerous examples of discriminatory voting practices since 1982. Pet. App. 29a-31a (court of appeals) & 213a-245a (district court). *See also Nw. Austin*, 573 F. Supp. 2d at 258-62, 289-301.

On a categorical basis, the evidence of ongoing discrimination presented to Congress may be summarized as follows:

a. *Section 5 Objections*. The Attorney General interposed at least 626 Section 5 objections between 1982 and 2006. Pet. App. 32a (at least 626); House Report at 36 (more than 700); *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong., vol. 1, at 259 (Mar. 8, 2006)

("March 8, 2006 Hearing") (listing number of objections by State).[16] An individual objection may affect thousands of minority voters, Pet. App. 208a-209a, and hundreds of thousands of minority voters benefitted from objections interposed to statewide voting changes. March 8, 2006 Hearing at 260 (listing statewide objections).

In evaluating the significance of the post-1982 objections, their "number and nature" is what is relevant. *Rome*, 446 U.S. at 181. *See also Lane*, 541 U.S. at 528 (citing "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities"). Over 600 objections, involving a greater number of voting changes, plainly is very substantial in light of the tremendous investment of public and private resources which would have been required to replicate that result through the filing of individual lawsuits.[17]

Approximately two-thirds of the post-1982 objections were based in whole or in part on discriminatory intent. Pet. App. 33a. The district court discussed several of the "countless examples" (Pet. App. 213a) of intent objections, Pet. App. 213a-220a, and concluded that these objections provided "ample support" for the House Judiciary Committee's "conclusion in 2006 that the voting changes being sought by covered jurisdictions 'were calculated to keep minority voters from fully participating in the political process.'" Pet. App. 213a (quoting House Report at 21).[18]

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[16] That information is set forth in a report submitted to Congress during the reauthorization hearings by the National Commission on the Voting Rights Act. The full report appears at 104-290 of the March 8, 2006 Hearing.

[17] It follows, therefore, that the fact that the rate of objections is low is of minimal significance. Shelby County argues otherwise, but provides no support for its claim that the rate is the relevant metric. County Br. 29-30. Furthermore the objection rate "has always been low," Pet. App. 34a (internal quotation marks omitted), and "the most dramatic decline in the objection rate . . . occurred in the 1970s, before [this] Court upheld the Act . . . in *City of Rome*." *Id.*

b. *Other sources of information regarding Section 5 enforcement*:

i. *More Information Requests*. Congress found that covered jurisdictions withdrew from review or modified hundreds of proposed voting changes following a written "more information request" by the Attorney General. House Report at 40-41. Congress found that these actions were "often illustrative of a jurisdiction's motives," *id.* at 40, and provided additional probative information of "[e]fforts to discriminate" by covered jurisdictions. *Id. See also id.* at 41 (discussing an example of a withdrawal of polling place consolidations by Monterey County,

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[18] In *Miller v. Johnson*, 515 U.S. 900, 927 (1995), this Court found that, in objecting to Georgia's post-1990 congressional redistricting plan, the Attorney General had misapplied the Section 5 "purpose" standard. This conclusion also was reached as to a handful of other redistricting objections. *E.g.*, *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996) (North Carolina congressional plan). The County notes *Miller*, but provides no basis to conclude that the problem extended beyond those specific cases. County Br. 30.

California).[19] Both the district court, Pet. App. 220a-223a, and the court of appeals, Pet. App. 32a, 35a-36a, agreed that Congress reasonably relied, in part, on this evidence, although these more information requests "are less probative of discrimination than objections." Pet. App. 35a.

ii. *Judicial Preclearance Suits*. Between 1982 and 2005, there were 25 declaratory judgment actions in which preclearance was denied by three-judge panels of the District of Columbia District Court or the jurisdiction withdrew the request. Pet. App. 41a-42a.

Most recently, in August 2012, three additional declaratory judgment actions – involving statewide voting changes of substantial consequence – resulted in preclearance denials. *Texas v. Holder*, 2012 U.S. Dist. LEXIS 127119 (Aug. 30, 2012) (Texas voter ID law had a retrogressive effect) (appeal filed); *Texas v. United States*, 2012 U.S. Dist. LEXIS 121685 (Aug. 28, 2012) (Texas' post-2010 congressional redistricting plan had a discriminatory purpose and a retrogressive effect; its post-2010 state House plan was retrogressive; and its post-2010 state Senate plan had a discriminatory purpose) (jurisdictional statement filed on appeal); *Florida v. United States*, 2012 U.S. Dist. LEXIS 115647 (Aug.

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[19] As the court of appeals further explained, "Congress had evidence indicating that the Attorney General sometimes uses [more information requests] to send signals to a submitting jurisdiction about the assessment of their proposed voting change and to promote compliance by covered jurisdictions." Pet. App. 33a.

16, 2012) (Florida law reducing the number of days of early voting was retrogressive). Preclearance was obtained in a fourth case last year, *South Carolina v. United States*, 2012 U.S. Dist. LEXIS (Oct. 10, 2012) (South Carolina voter ID law), but only after the State significantly liberalized its construction of the statute during the litigation (see discussion *infra*).

iii. *Section 5 Enforcement Suits*. Congress found that "many defiant covered jurisdictions . . . continue to enact and enforce changes to voting procedures without the Federal Government's knowledge." House Report at 41. Specifically, 105 successful suits were brought against covered jurisdictions for failing to seek preclearance for post-coverage voting changes. Pet. App. 41a. While some of these suits may have involved innocent error, the record also reflects that some involved efforts by covered areas to implement discriminatory changes, notwithstanding the preclearance requirement.[20]

iv. *Section 5's Deterrent Effect*. Congress determined that "Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes. . . . 'Once officials . . . become aware of logic of preclearance, they tend to understand that submitting discriminatory changes is [pointless], because the chances are good that an objection will result.'" House Report at 24 (quoting report of the National Commission on the Voting Rights Act).

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[20] The district court discussed two examples of enforcement suits where the underlying voting change was, or appeared to be, discriminatory. In Waller County, Texas, county officials sought to reduce the availability of early voting for local African American university students, without preclearance, after two of the students announced their candidacies for local office. An enforcement suit was filed, and the county then agreed to abandon the change. Pet. App. 229a-230a. The second example concerned a Mississippi statewide registration change, and is discussed *infra*, note 38.

The important role that deterrence can play is well illustrated by the recent district court decision granting preclearance to South Carolina's voter ID provision. As explained by the district court, its decision rested heavily on certain provisions that were amended into the law, and state officials' subsequent liberal construction of those provisions. 2012 U.S. Dist. LEXIS 146187, at *21-22. As two of the three judges further explained in a concurring opinion, testimony at trial showed that "key ameliorative provisions were added during th[e] legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions . . . subsequently presented to this Court were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act." *Id.* at *71. Accordingly, this process "demonstrates the continuing utility of Section 5 . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* at *72.

c. *Section 2 litigation.* "The record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from discriminatory voting changes in at least 825 counties." Pet. App. 36a. These included more than 60 decisions in favor of plaintiffs identified in a study submitted to Congress by Michigan law professor Ellen Katz, of all Section 2 decisions (throughout the country) between 1982 and 2004 available on Westlaw or Lexis ("Katz Study"). Pet. App. 49a. The other nearly 600 successful Section 2 lawsuits involved unreported cases which were compiled in a report prepared by the National Commission on the Voting Rights Act. Pet. App. 54a.[21] This large number of successful Section 2 suits is especially notable given that the Section 2 results test involves consideration of evidence which also may be strongly indicative of discriminatory intent.

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[21] Both the reported and unreported plaintiff-favorable cases included court decisions and settlements. While settlements typically do not include findings of discrimination, all the cases required jurisdictions to alter some aspect of their electoral system in a manner favorable to minority voters, and thus were indicative of ongoing problems relating to discrimination in voting. *See Lane*, 541 U.S. at 529 (survey and anecdotal information supports Congress' exercise of its Fourteenth Amendment authority).

Moreover, it is reasonable to infer that defendants decided to settle in a number of cases in large part because they were likely to lose. For example, a federal district court in Alabama, in *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986), found that the State purposefully had changed to at-large elections for local officials in order to dilute minority voting strength. After this finding, over 140 suits were filed against Alabama localities, most of whom entered into consent decrees. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry*, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary, 109th Cong. 373-74, 392-97 (2006).

d. *Federal observers.* Congress found that, between 1982 and 2006, "tens of thousands of Federal observers [were] dispatched to observe elections in covered jurisdictions." 2006 Amendments, § 2(b)(5). This involved a total of more than 600 separate dispatches. Pet. App. 38a. Congress concluded that the use of federal observers provided further "indicia of discrimination" in the covered areas. House Report at 44. Indeed, the evidence gathered by observers sometimes formed the basis for subsequent Justice Department enforcement efforts, including two successful suits to remedy discriminatory polling procedures. Pet. App. 39a.

e. *Electoral conditions in the covered areas.* Congress found that a significant circumstance in the covered areas' current electoral conditions is the ongoing prevalence of racially polarized voting. House Report at 35. Polarized voting is a necessary element of vote dilution, *Thornburg*, 478 U.S. at 47, and thus "affect[s]" the ability of "minority citizens to elect their candidates of choice" and "effectively [imposes] an election ceiling" on minority voters. House Report at 34. Accordingly, Congress concluded that "[t]he continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable." 2006 Amendments, § 2(b)(3).[22]

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[22] Thus, while the election of minority candidates has continued to increase (particularly African Americans, but not

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In *Katzenbach*, this Court explained that what fundamentally underlaid Congress' determination that there was a need for the preclearance remedy was its finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." 383 U.S. at 328. *See also Garrett*, 531 U.S. at 373 (noting this consideration); *Boerne*, 521 U.S. at 526 (same).

In 2006, Congress found that, "given the record established," reliance on case-by-case enforcement would continue to "leave minority citizens with [an] inadequate remedy." House Report at 57. In light of the volume of discrimination indicia Congress identified in the covered areas since 1982 – involving over 600 objections and, in addition, 25 unsuccessful judicial requests, over 800 changes withdrawn or modified following more information requests, over 100 successful enforcement suits, evidence of Section 5's deterrent effect, over 600

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so much Hispanics and Asian Americans), House Report at 18, 33-34, the continued prevalence of racially polarized voting has meant that increases have resulted, to a significant extent, from the establishment of majority-minority districts, *id.* at 34, and underrepresentation has continued at the state level. *Id.* at 33.

Congress found continuing progress in the registration and turnout rates for African Americans, House Report at 12, but that disparities between African Americans and whites remain in some covered States, such as Virginia. *Id.* at 25-27; Pet. App. 201a-202a. Very substantial disparities continue to exist for language minority citizens. *Id.* at 29; Pet. App. 202a-203a.

successful Section 2 suits, and over 600 observer dispatches – this determination by Congress was eminently reasonable.[23] Congress' determination, moreover, is further supported by the evidence it received that Section 2 litigation often is complex, costly, and time-consuming, and that minority voters may find it difficult to obtain the resources needed to support such litigation. Pet. App. 45a.

In sum, Congress reasonably found that, although Section 5 "imposes current burdens," those burdens are "justified by current needs." *Nw. Austin*, 557 U.S. at 203. As such, this is a finding to which this Court should defer under *Katzenbach*, *Rome*, and the *Boerne* decisions.

III. Section 5's Disparate Geographic Coverage Is Appropriately Related To The Problem Of Discriminatory Voting Changes

Congress' decision in 2006 to retain the existing Section 4(b) coverage provisions was a constitutionally appropriate exercise of its remedial powers. In reaching that decision Congress placed a heavy emphasis upon contemporary evidence of more than one thousand instances of voting discrimination by the covered jurisdictions. Congress' decision also was informed by pre-1982 discrimination by the covered jurisdictions, and by voter registration and turnout rates and the election of minority officials in the covered jurisdictions. Congress considered in detail the possibility that conditions in the covered jurisdictions might no longer warrant the Section 5 remedy, and arrived at an informed legislative judgment that the Section 5 remedy remained necessary for the covered jurisdictions. Congress nonetheless maintained the Section 4(a) "bailout" provisions and the Section 3(c) coverage procedure, to ensure a continued good fit between the record of voting discrimination and Section 4(b) coverage throughout the course of the reauthorization period.

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[23] The legislative records found wanting by this Court in recent cases were substantially smaller in scope. *Garrett*, 531 U.S. at 370; *Kimel*, 528 U.S. at 89; *Fla. Prepaid*, 527 U.S. at 645-46; *Boerne*, 521 U.S. at 530.

Because the statute's geographic coverage continues to closely track the bulk of the contemporary evidence of discrimination, and because all of the jurisdictions with the very worst records are captured for coverage, Congress did all that is constitutionally required to ensure that geographic coverage under the 2006 reauthorization remains appropriate remedial legislation.

A. The Section 5 Coverage Model Remains Appropriate to the Legislative Objectives

In *Nw. Austin v. Holder*, this Court stated that the "fundamental principle of equal sovereignty requires a showing that [Section 5's] disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203.[24] Congress appropriately structured its reauthorization review in 2005 and 2006 to determine whether geographic coverage under Section 4(b) continues to reflect contemporary voting discrimination. This Court's established standards for a "sufficient relation" require no more than a substantial overlap between the contemporary evidence of voting discrimination and Section 5 coverage, which readily is shown below.

1. Congress did not formally state a theory of coverage in 2006, but the essential elements of Congress' approach to the coverage question can be summarized as follows.

Congress concluded that there remained a special and heightened risk that jurisdictions in the Section 4 covered areas "might try . . . maneuvers in the future" to discriminate against minority voters. *Katzenbach*, 383 U.S. at 335. This predictive judgment was based upon a history of official and pervasive voting discrimination within these jurisdictions as of their date of coverage; a more recent history of discrimination as reflected in Congress' reauthorization determinations in 1970, 1975, and 1982; and a detailed and thorough evaluation of the modern-day conditions in these jurisdictions, which showed a marked and ongoing need for the preclearance remedy. If the reauthorized coverage is overinclusive, then jurisdictions may bail out by showing that their electoral processes are free of discrimination; if it is underinclusive, then federal courts may order temporary coverage as part of a remedy for a finding of voting discrimination. The congressional findings in Section 2 of the 2006 Amendments, which summarize the record of discrimination in the currently covered areas, reflect this approach to the Act's coverage provisions.

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[24] This question corresponds to the third part of the *Boerne* analysis: whether the statute at issue is an "appropriate" response to the constitutional problem that has been identified. *Lane*, 541 U.S. at 530.

House Judiciary Committee Chair James Sensenbrenner, speaking during floor debate in opposition to a proposed amendment to Section 4(b), went to the heart of Congress' coverage theory.[25] Rep. Sensenbrenner explained that Congress' decision to retain the existing coverage provision was "not predicated on [participation] statistics alone," but rather "on recent and proven instances of discrimination in voting rights compiled in the ... 12,000-page record." 152 Cong. Rec. H 5181-82 (daily ed. July 13, 2006) (internal quotation marks omitted). Rep. Sensenbrenner opposed the proposed amendment as "radically altering the coverage formula of the Voting Rights Act in a way that severs its connection to jurisdictions with proven discriminatory histories, [rendering] H.R. 9

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[25] The amendment, which would have based the Section 4(b) determinations exclusively upon voter participation data from the 1996, 2000, and 2004 presidential elections, was defeated.

unconstitutional and [leaving] minority voters without the essential protections of the preclearance and the Federal observer requirements central to the VRA." *Id.* at H 5181.

The "connection to jurisdictions with proven discriminatory histories" explains why Congress never has treated reauthorization of Section 4(b) as a clean slate. Congress had worked from the "inside out" in 1970, 1975 and 1982; that is, Congress began by evaluating the continued need for coverage in the existing covered jurisdictions, then added new coverage criteria where the evidence showed that this was needed. The 2006 reauthorization appropriately followed this historical practice. It would have been both illogical and "radical[]" had Congress "wiped the slate clean" in 2006.

2. Congress' approach to coverage in 2006 did not depart from this Court's long-settled principles. This Court never has required Congress to exactingly tailor the Section 4(b) geographic coverage provisions. Moreover, Congress' 2006 coverage theory was essentially the same as the theory Congress followed in the 1975 reauthorization of Section 5, which this Court upheld in *Rome*. 446 U.S. at 180-82.[26]

Rome incorporated the coverage principles adopted by this Court in *Katzenbach*, which concluded that "the specific States and political subdivisions within § 4(b) of the Act were an appropriate target for the new remedies." 383 U.S. at 329. *Katzenbach* found that "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions" to be covered pursuant to the designated criteria. *Id* at 329. This included, but was by no means limited to, differences in registration and turnout rates. The formula identified three States where there was "substantial voting discrimination," and two States and portions of a third State (North Carolina) where the discrimination was "more fragmentary." *Id.* That fact pattern was sufficient for this Court to find that the 1965 coverage formula was "rational in both practice and theory." *Id.* at 330.[27]

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[26] Shortly after *Rome* was decided, Congress followed the same approach to coverage for the 1982 reauthorization of Section 5. S. Rep. No. 97-417, at 9-15 (1982).

Other aspects of *Katzenbach* made clear that this Court has not insisted upon an exact calibration of the Section 5 remedy. Potential underinclusion was "irrelevant" because "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Id.* at 330-31. The Court also found that Congress properly "[a]cknowledged the possibility of overbreadth" through the Section 4(a) bailout procedure. *Id.* In sum, neither *Rome* nor *Katzenbach* required Congress to deploy a perfect or near-perfect coverage system.

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[27] The *Katzenbach* Court rejected South Carolina's argument that the coverage formula violated the "equality of States" doctrine. The Court held that: "The doctrine of the equality of States, invoked by South Carolina, does not bar [disparate geographic coverage], for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared " *Id.* at 328-29. This Court has continued to apply the doctrine since *Katzenbach,* under the name "equal footing doctrine," only to the terms upon which States are admitted to the Union. *See, e.g., Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04 (1999) ("As relevant here, [the doctrine] prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union.").

3. *Rome* further found that Congress appropriately concluded that a "century of obstruction" of the Fifteenth Amendment by the covered areas, ***combined with*** the post-Act record of discrimination in the covered areas (focusing in substantial part on Section 5 objections), showed that Section 5 reauthorization was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination." 446 U.S. at 182 (internal quotation marks omitted).

Rome thus recognized that post-enactment discrimination in the covered jurisdictions merits special attention and should not be considered in isolation from its historical arc. It follows, therefore, that Congress, in 2005 and 2006, had logical and powerful reasons to focus its review upon the covered jurisdictions, and to give especially close scrutiny and weight to indicia of ongoing discrimination in those jurisdictions. Indeed, this Court long has recognized that a history of discrimination is relevant to assessing current discrimination. *Rogers v. Lodge*, 458 U.S. 613, 625 (1982); *Village of*

Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 267 (1977).

Of course, the pre-1982 history of discrimination in the covered jurisdictions was not reason itself to extend Section 5 in 2006, but it provided Congress with an essential context for understanding the contemporary evidence of voting discrimination and gauging its implications for the future. Correspondingly, the absence of such a history in non-covered areas gave Congress a strong reason, absent compelling evidence to the contrary, to hold back from amending the coverage formula to extend coverage in those areas where some instances of contemporary discrimination occurred; this is especially so in light of the well-established statutory "bail-in" procedure.

4. Finally, in shaping its inquiry, Congress was aware that, in *Boerne,* this Court cited to the Section 5 termination dates, coverage formula, and bailout procedures as examples of limiting features that tend to make congressional legislation proportionate. *Boerne*, 521 U.S. at 532-33.

The Section 4 bailout procedure "reduce[s] the possibility of overbreadth," which, in turn, serves the important goal of "ensur[ing] Congress' means are proportionate to [its] ends." *Id.* at 533. Congress significantly liberalized the bailout procedure in 1982, when it amended the statutory standards to focus upon recent electoral conditions, and under *Nw. Austin*, any covered jurisdiction is eligible to pursue bailout.

Congress had strong logical and practical reasons to maintain a case-by-case approach to bailout, as opposed to enacting a blanket revision to Section 4(b). Because the right to vote free from racial discrimination is fundamental, Congress was justifiably cautious with regard to adopting any wholesale termination of Section 5 coverage that would likely excuse some undeserving jurisdictions from coverage. Because voting discrimination may take "subtle" forms, *Allen*, 393 U.S. at 565, Congress similarly had good reason to maintain an in-depth screening procedure for bailout, as set forth in Section 4.

B. The Coverage Provisions Reflect Where Voting Discrimination Currently Is Prevalent

The post-1982 record of voting discrimination in the covered and non-covered areas demonstrates that Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203.

1. First, Congress was fully justified in continuing coverage for the "great majority" of the previously covered States due to the large quantum of contemporaneous voting discrimination in each of these States. Of the nine fully-covered States and North Carolina (which is substantially covered), seven of the ten – Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas – have a very substantial, contemporary record of discrimination. In each, the Attorney General interposed more than 40 Section 5 objections after

1982. Furthermore, each has large numbers of the other types of enforcement actions Congress relied upon in 2006 to identify contemporary voting discrimination. Pet. App. 58a-60a (discussing combined numbers for Alabama, Georgia, Louisiana, Mississippi, and South Carolina); see Table below (setting forth combined objection and Section 2 data for the nine fully covered States and North Carolina's 40 covered counties).[28]

2. The relative prevalence of discrimination in the covered and non-covered areas may be compared using national data regarding the post-1982 Section 2 cases in which the plaintiff achieved favorable results.[29] These data are the primary evidence available to assess whether there is a pattern of discrimination in any non-covered State which approaches the discrimination shown in any of the seven covered States just discussed.

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[28] The other three fully covered States, Virginia, Arizona, and Alaska, are discussed *infra*.

[29] The data for this comparison are taken from a declaration prepared by Justice Department historian Dr. Peyton McCrary ("McCrary Study") filed in the district court. App. 144a-155a. Dr. McCrary, in turn, obtained much of his data from the reauthorization record: the number of reported plaintiff-favorable Section 2 cases are from the Katz Study; and the number of unreported cases for the covered areas are from the report of the National Commission on the Voting Rights Act. Dr. McCrary obtained the number of unreported cases for the non-covered areas from a compilation he prepared post-reauthorization.

These data show that there have been more successful Section 2 cases in the covered areas after 1982. Overall, about 55% of the successful reported Section 2 cases (66 out of 121) and over 80% (644 out of 798) of the total (reported plus unreported) successful Section 2 cases occurred in the covered areas.

Moreover, two considerations skew this comparison in a manner that undoubtedly understate the degree of discrimination in the covered areas compared to the noncovered areas. First, Section 5 precludes implementation of discriminatory voting changes in the covered areas, and thus sharply reduces the number of discriminatory actions which otherwise would likely be the subject of a successful Section 2 case.[30]

Second, there are far more non-covered than covered jurisdictions, and far greater percentages of the nation's total and minority populations live in the non-covered areas. There are 34 totally non-covered States and nine fully covered States. As of the 2000 Census (the most recent at the time of the 2006 reauthorization), more than three-quarters of the nation's total population lived in non-covered areas, as well as substantial majorities of the African American (61%), Hispanic (68%), and Native American (75%) populations. March 8, 2006 Hearing at 203. Based on these population distributions, the non-covered areas would need to have from two to four times as many successful cases in order to demonstrate that they have experienced a comparable amount of discrimination as the covered areas.

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[30] Put differently, there would have been fewer Section 2 suits in the non-covered areas if they were subject to the preclearance requirement. For example, in Illinois, the non-covered State with the most reported Section 2 cases that were resolved favorably to plaintiffs, more than half (5 of 9) involved challenges to redistricting plans. http://www.sitemaker.umich.edu/votingrights/files/masterlist.xls (underlying data for Katz Study). If Illinois were covered, presumably some, if not all, of these would have led to an objection, and thus no Section 2 case would have been filed.

The Table set forth on the next page displays data from 1982 to 2006 for Section 2 cases which were resolved favorably to plaintiffs, and data from 1982 to 2004 for Section 5 objections, for all fully covered States, the covered areas of North Carolina, and those non-covered States which had three or more reported successful Section 2 cases.[31]

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[31] The objection data are from the report of the National Commission on the Voting Rights Act. March 8, 2006 Hearing at 272.

State[32]	Section 2 Successful Cases (total)	Section 2 Successful Cases (reported only)	Objections
TX*	206	7	105
AL*	192	12	46
GA*	69	3	83
MS*	67	18	120
NC*	36	6	43
SC*	33	3	74
AR	28	4	-----
NC	19	4	-----
LA*	17	10	102
FL	17	6	-----
VA*	15	4	15
CA	15	3	-----
IL	11	9	-----
NY	7	4	-----
TN	6	4	-----
PA	4	3	-----
AZ*	2	0	19
AK*	0	0	2

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[32] States designated with an asterisk (*) are covered by Section 5, in whole or in part. Non-covered portions of New York, North Carolina and Florida are not asterisked.

When the data are examined on a State-by-State basis, the covered jurisdictions come out on top. Looking at the reported decisions alone, the three States with the most decisions (Mississippi, Alabama, and Louisiana) are covered, as well as four of the top five (Texas), and five of the top seven (the covered portions of North Carolina). The analysis tips even more to the covered areas when all successful cases (reported and unreported) are included. The top six States all are covered (Texas, Alabama, Georgia, Mississippi, North Carolina (covered), and South Carolina). Moreover, there have been more successful Section 2 cases in Texas (206) and Alabama (192) individually than in all of the non-covered jurisdictions combined (154). Table, *supra*.

The court of appeals noted that the data for unreported cases in the covered and uncovered areas came from two different sources. Pet. App. 54a. And not every unreported settlement necessarily represented a case which would have resulted in a judgment for the plaintiff. Still, the comparison of unreported cases shows a nearly six to one (574 to 99) difference in favor of the covered areas, which comprise only 25% of the nation's population. App. 147a-154a. This is too significant to simply dismiss the results as not probative or relevant.[33]

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[33] The court of appeals analyzed the successful Section 2 cases per million residents, comparing covered areas as a group and non-covered areas as a group regarding the numbers of reported cases. Pet. App. 50a. The court also did a State-by-State comparison for the reported and unreported cases, per

Given this record, Congress' judgment was reasonable as to the scope of Section 5 coverage.

4. Virginia is one of the three fully covered States where these various metrics show more fragmentary evidence of discrimination. Still, since 1982, the State has had 15 objections and 15 successful Section 2 cases (including four reported). Table *supra*.

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million residents. Pet. App. 53a. These analyses show more discrimination in the covered areas overall, and that seven of the top eight States are covered.

Judge Williams, instead, did a State-by-State comparison, per million residents, that was limited to the reported cases. Pet. App. 92a. The problem with this analysis is that the overall sample size is very small (121 cases, instead of 798 if he had looked at both reported and unreported decisions). As a result, when this small number is allocated to the individual States, each State has relatively few cases, which in turn means that very small absolute differences in the number of cases may be inflated into purportedly large ratio differences when each State number is converted into a "per million residents" metric. For example, Judge Williams' figure indicates that Delaware, with one successful case, ranks seventh among the States in most discrimination (based on its ratio), yet, if there instead had been one fewer case there (*i.e.*, zero), Delaware would have shifted to being among the very least discriminatory of the States (with a ratio of zero). As a result of this skewing, Judge Williams' analysis also suggests that Delaware has a greater Section 2 problem than Texas, which does not accord with experience. In any event, Judge Williams concedes that his figure still would support coverage of Mississippi, Alabama, and Louisiana, and the covered portions of South Dakota and North Carolina. Pet. App. 93a.

Virginia and Arkansas illustrate the tailoring features of the coverage provisions at work. Since 1984 (when the current bailout provisions became effective), Virginia's local jurisdictions have filed the most successful bailout actions, with a total of 105 local entities obtaining bailout.[34]

Arkansas, the one non-covered State which had more total Section 2 plaintiff-favorable decisions than Virginia (28 to 15, Table, *supra*), was bailed in under Section 3(c) of the Act for a time after a federal district court found intentional vote dilution in a statewide redistricting plan. *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990).

Only two fully-covered States compare unfavorably to a non-covered State in terms of Section 2 litigation: Arizona and Alaska. Nonetheless, Arizona has had 19 objections, including five statewide objections (March 8, 2006 Hearing, at 259-60); two successful Section 2 cases (Table *supra*); and 40 observer coverages (March 8, 2006 Hearing, at 274). In addition, as of the 2004 election, Hispanic registration and turnout rates in State were significantly lower than the corresponding rates for white citizens.[35] As for Alaska, Congress was presented with a report regarding contemporary vote discrimination in the State. March 8, 2006 Hearing at 1308-62. After reauthorization, private plaintiffs obtained a preliminary injunction entered against the State for failing to provide minority language assistance as required by the Voting Rights Act. *Nick v. Bethel*, No. 3:07-cv-0098 (D. Alaska July 30, 2008) (ECF No. 327).

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[34] See note 7 *supra*.

[35] U.S. Census Bureau, Voting and Registration in the Election of 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html at Table 4a (last visited Jan. 24, 2012).

Moreover, these States, and all subjurisdictions in these States, have the option of seeking bailout. Further, if they are ineligible for bailout under the Section 4 standards, any constitutional infirmity specific to the coverage of these States may be addressed via an as-applied challenge. Indeed, Alaska has an as-applied challenge pending, *Alaska v. Holder*, No. 1:12-cv-01376-RLW (D.D.C.), and Arizona recently filed, then withdrew, such a challenge. *Arizona v. Holder*, No. 1:11-cv-01559-JDB (D.D.C. Apr. 10, 2012) (stipulation of dismissal, ECF No. 41).

5. Judge Williams set forth four additional State-by-State analyses, concerning voter registration, turnout, black elected officials, and observer dispatches, in support of his conclusion that the coverage provisions are unconstitutional. None, however, do anything to undermine the evidence in favor of the current coverage provisions.

His first two figures show ratios between African American and white rates of registration and turnout. Pet. App. 81a-82a. This information, however, turns out to be a poor predictor of which jurisdictions are likely to implement discriminatory voting changes. That is not surprising given that, as discussed above, Congress found in 2006 that modern day discrimination mostly involves vote dilution, rather than the imposition of discriminatory barriers to balloting.[36]

Among the fully covered States shown in the figures,[37] the two with the greatest racial disparities in registration and turnout (Arizona and Virginia) are the fully covered States with the fewest objections since 1982 (Table *supra*). In contrast, Mississippi – the State where the rate of black participation was highest compared to white participation – was the State with the most objections and the most successful reported Section 2 cases. *Id.*[38] Moreover, the three non-covered States with the greatest disparities (Massachusetts, Washington, and Colorado) only had a total of three reported successful Section 2 cases. App. 149a-150a.

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[36] One likely contributing factor in this regard is that, during the last reauthorization period, Congress enacted the National Voter Registration Act of 1993, 42 U.S.C. §. 1973gg *et seq.*, to increase voter participation in federal elections nationally.

[37] Judge Williams did not include Alaska because that State has a very small black population.

[38] Section 5 undoubtedly played a role in Mississippi's relatively high African American participation rates. Mississippi attempted to introduce a dual registration system in the 1990s as part of its implementation of the National Voter Registration Act of 1993. First, Mississippi tried to implement its system without preclearance until this Court held unanimously that preclearance was required. *Young v. Fordice*, 520 U.S. 273 (1997). Subsequently, the Attorney General objected to the dual registration system on both purpose and effect grounds. Pet. App. 230a-231a.

Judge Williams' third figure shows State-by-State ratios of the number of black elected officials to the black percentages of the citizen voting age population ("BCVAP"). Pet. App. 84a. The figure shows that States with substantial BCVAP also have substantial numbers of black elected officials. Conversely, all of the five States listed as having the worst representation have BCVAP of less than 10%.[39] These results show very little regarding the levels of discrimination; rather, they simply reflect Congress' finding that African Americans generally obtain election from majority-minority districts, together with the demographic fact that more majority-minority districts may be drawn where the BCVAP is large. As of 2000, 92% of African American members of Congress, 84% of African American State Senators, and 82% of African American State Representatives were elected from majority-minority districts. March 8, 2006 Hearing at 248. Furthermore, the five States with the highest ratios of black elected officials had 47 successful reported Section 2 cases as compared to three in the five States with the lowest ratios. *Compare* Pet. App. 84a *with* J.A. 147a-154a.

Finally, Judge Williams ranks States by observer dispatches per million minority residents. Pet. App. 89a. This figure shows that more observers were sent to covered than to non-covered States, including six of the top eight according to Judge Williams' ranking system. *Id.*

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[39] Judge Williams also omitted 16 States where the black share of the citizen voting age population was less than 3 percent. The BCVAP for the top and bottom States were calculated from tables contained at http://www.census.gov/population/www/cen2000/briefs/phc-t31/index.html.

6. The recent controversies regarding the enactment of photo identification requirements for voting have prompted the assertion that these illustrate the purported illogic of Congress' reauthorization decision. Specifically, it is claimed that it is unfair that a covered State which adopts such a provision must obtain preclearance, whereas a non-covered State may proceed with implementation.

This, however, is merely a natural consequence of applying the Section 5 remedy to areas with a history of voting discrimination. For example, Indiana, a non-covered State, immediately implemented its provision, and also successfully defended a constitutional challenge. *Crawford v. Marion County Election Board, supra.* Indiana lacks a history of flagrant voting discrimination, and the record is sparse of any current discrimination (one reported Section 2 case and three unreported cases favorable to plaintiffs). App. 149a. *See also Whitcomb v. Chavis,* 403 U.S. 124, 149-50 (1971) (rejecting vote dilution challenge to Marion County's at-large election system).

On the other hand, Texas recently failed to obtain judicial preclearance for its photo ID law. *Supra* at 37. Texas, plainly, has a long history of pervasive voting discrimination, and litigation both before and after 2006 shows significant and continuing discrimination in the State. *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399 (2006), *White v. Regester, supra*; *Texas v. Holder,* *supra, Texas v. United States, supra.* There were 105 objections and over 200 successful Section 2 cases (7 reported) involving Texas jurisdictions since 1982 (Table *supra*).

* * * *

The bottom line is that the States with the worst records of voting discrimination are covered by Section 5. While there are a few covered States where the comparative evidence is less compelling, any overbreadth may be addressed through the bailout mechanism. And any covered jurisdiction that does not qualify for bailout because its record is not "clean" for the past ten years is not foreclosed from filing an as-applied constitutional challenge to its coverage. Under these circumstances, Shelby County's facial challenge to the coverage provisions must fail.

7. Other possible concerns identified in *Nw. Austin* regarding Section 5's disparate coverage relate to the possible existence only in the covered areas of tension between Section 2 and Section 5, and a concern about excessive reliance on race in drawing redistricting plans. As to the two statutes, it is conceivable that there could be some tension, such as if a jurisdiction were to redistrict in a certain way to avoid a Section 5 violation and that led to a Section 2 violation. However, respondent-intervenor Harris and his counsel are not aware of any such case. In the 1990s, there were instances of tension between the Court's Fourteenth Amendment jurisprudence as to the use of race in redistricting, *e.g.*, *Shaw v. Reno*, 509 U.S 630 (1993), and Section 5. But in the post-

2000 redistricting cycle, however, jurisdictions successfully balanced their obligations under the Fourteenth Amendment and Section 5 so that there were no *Shaw* violations in that cycle. Jocelyn Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 Neb. L. Rev. 124, 167-68 (2009). Respondent-intervenor and his counsel also are unaware of any such instances in the current redistricting cycle.

IV. Congress' 2006 Amendments To The Preclearance Standards Are Not Challenged In This Case, And Do Not Support The Claim That Congress Acted Beyond Its Constitutional Authority In Reauthorizing Section 5

Shelby County contends that Section 5's "current burdens" have been increased by two amendments to the Section 5 preclearance standards enacted by Congress in 2006. County Br. 25-27.[40] These amendments addressed two decisions by this Court following the 1982 reauthorization which construed these standards' scope. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000) (holding that the Section 5 "purpose" standard only prohibits retrogressive purpose); *Georgia v. Ashcroft*, 539 U.S. 461, 482-84 (2003) (holding that, as applied to redistricting plans, Section 5 requires consideration of minority voters' ability to elect their preferred candidates and other indicia of minority voters' electoral opportunity). Congress disagreed, and so amended Section 5 to provide that the statute prohibits "any discriminatory purpose," 42 U.S.C. § 1973c(c), and that reviews of redistricting plans and other potentially-dilutive devices should focus only on minority voters' ability to elect their preferred candidates.

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[40] The County does not challenge the constitutionality of these amendments.

The County offers this Court only speculation in support of its burdens argument. Since the County has asserted only a facial challenge, and did not seek preclearance for any voting changes, neither the district court nor the court of appeals had occasion to engage in any real-world analysis of how these revised standards operate, and whether in fact they present some unwarranted burden. Indeed, Congress' conclusion was that the revised standards actually reflect the manner in which Section 5 was long applied by the District of Columbia District Court and the Attorney General prior to the *Bossier* and *Ashcroft* decisions, and that they accordingly do not present any improper intrusion on State authority. House Report at 66-72.

In these circumstances, as the court of appeals concluded, the Court lacks the necessary concrete information to properly assess the revised standards and include them in any manner in the constitutional analysis. Accordingly, this Court should not undertake a review of the amendments in this case.

CONCLUSION

The judgment of the court of appeals and district court should be affirmed.

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT-INTERVENORS BOBBY PIERSON, WILLIE GOLDSMITH, SR., MARY PAXTON-LEE, KENNETH DUKES, AND ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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RULE 29.6 STATEMENT

The Alabama State Conference of the National Association for the Advancement of Colored People is a § 501(c)(4) affiliate of the National Association for the Advancement of Colored People, Inc., which is a not-for-profit corporation organized under the laws of New York. Neither entity issues shares to the public.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. The Statutory Framework 1

B. The Proceedings Below 7

SUMMARY OF ARGUMENT 9

ARGUMENT 13

I. CONGRESS PROPERLY EXERCISED ITS CONSTITUTIONAL AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS WHEN IT REAUTHORIZED THE VOTING RIGHTS ACT IN 2006 13

  A. The Standard Of Review 14

  B. The Legislative Record Convincingly Establishes That Voting Discrimination Is An Ongoing Problem In The Covered Jurisdictions 16

  C. The Constitutional Validity of the Voting Rights Act Is Not Undermined By Advances In Voting Equality Since 1965 33

  D. The Bailout and Bail-In Provisions of the Voting Rights Act Reinforce the Constitutionality of the Coverage Formula 40

E. An Unbroken Line of Cases From This Court And Lower Courts Have Upheld The Constitutionality Of Section 5 Over Many Decades. 43

II. RECENT SECTION 5 OBJECTIONS FURTHER DEMONSTRATE THE CONTINUING NEED FOR SECTION 5 48

CONCLUSION 54

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) 28

Allen v. State Board of Elections, 393 U.S. 544 (1969) 31

Bartnicki v. Vopper, 523 U.S. 514 (2001) 28

Beer v. United States, 425 U.S. 130 (1976) 5, 6. 51

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2011) 46

Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982) 19, 30

City of Boerne v. Flores, 521 U.S. 507 (1997)... *passim*

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 18

City of Port Arthur v. United States, 459 U.S. 159 (1982) 30

City of Rome v. United States, 446 U.S. 156 (1980) .... *passim*

Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) ... 28

County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694 (D.D.C. 1983) 47

Eldred v. Ashcroft, 537 U.S. 186 (2003) 32

Engineering Contractors Ass'n v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997) 28

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,
527 U.S. 627 (1999) 46

Florida v. United States,
820 F.Supp.2d 85 (D.D.C. 2011) 52

Florida v. United States,
2012 WL 3538298 (D.D.C. 2012) 52

Florida v. United States,
CA No. 11-01428 (D.D.C.) 53

Georgia v. Ashcroft, 539 U.S. 461 (2003) 5

Georgia v. United States,
411 U.S. 526 (1973) .... *passim*

Giles v. Ashcroft,
193 F.Supp.2d 258 (D.D.C. 2002) 47

Janis v. Nelson,
2009 WL 5216902 (D. S.D. 2009)........................... 47

Jeffers v. Clinton,
740 F.Supp. 585 (E.D. Ark. 1990)......................... 25

Katzenbach v. Morgan, 384 U.S. 641 (1966)............ 13

Large v. Fremont County, Wyo.,
709 F.Supp.2d 1176 (D. Wyo. 2010) 38

League of Women Voters v. Browning,
863 F.Supp.2d 1155 (N.D. Fla. 2012) 52, 53

Levy v. Lexington County, South Carolina,
589 F.3d 708 (4th Cir. 2009) 38

Lopez v. Monterey County,
525 U.S. 266 (1999) 3, 4, 43, 45

LULAC v. Perry, 548 U.S. 399 (2006) 45

Miller v. Johnson, 515 U.S. 900 (1995).................... 20

Nevada Dept. of Human Resources v. Hibbs,
538 U.S. 721 (2003) 31, 46

Northwest Austin Municipal Utility District Number One v. Mukasey,
573 F.Supp.2d 221 (D.D.C. 2008) 19

Nw. Austin Mun. Util. Dist No. One v. Holder,
557 U.S. 193 (2009) .... *passim*

Oregon v. Mitchell, 400 U.S. 112 (1970) 10, 13

Pruett v. Harris County Bail Bond Bd.,
499 F.3d 403 (5th Cir. 2007) 28

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) 4, 5, 21, 22

Singleton v. Wulff, 428 U.S. 106 (1976) 6

South Carolina v. Holder,
2012 WL 4814094 (D.D.C. Oct. 10, 2012) 50

South Carolina v. Katzenbach,
383 U.S. 301 (1966) .... *passim*

Tennessee v. Lane, 541 U.S. 509 (2004) 13, 27, 39

Texas v. Holder,
2012 WL 3743676 (D.D.C. Aug. 30, 2012) 51

Texas v. United States,
2012 WL 3671924 (D.D.C. Aug. 28, 2012) 48

The State of New Hampshire v. Holder,
Case No. 1:12-cv-01854
(D.D.C. filed Dec. 5, 2012) 41

Thornburg v. Gingles, 478 U.S. 30 (1986) 30

Turner Broadcasting System, Inc. v. F.C.C.,
520 U.S. 180 (1997) 32

United States Dept. of Labor v. Triplett, 494 U.S. 715 (1990) 32

United States v. Jones, 132 S.Ct. 945 (2012) 6

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 54

Youakim v. Miller, 425 U.S. 231 (1976) 6

STATUTES

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006) *et seq.* .... *passim*

120 Stat. 577, Sec. 2(a) 54

120 Stat. 577, Sec. 2(b) 8, 16

120 Stat. 577, Sec. 2(b)(3) 29

120 Stat. 577, Sec. 2(b)(4) 23, 26, 28

120 Stat. 577, Sec. 2(b)(4)(A) 16, 22, 23

120 Stat. 577, Sec. 2(b)(5) 26, 28

120 Stat. 577, Sec 2(b)(6) 22

120 Stat. 577, Sec. 2(b)(9) 36

120 Stat. 578, Sec. 2(b)(9) 12

120 Stat. 580, Sec. 2(b)(4)(B) 24

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) *et seq.* .... *passim*

42 U.S.C. § 1973 (Section 2) .... *passim*

42 U.S.C. § 1973a(c) 42

42 U.S.C. § 1973b(a) 41

42 U.S.C. § 1973b(b) (Section 4(b)) .... *passim*

42 U.S.C. § 1973c (Section 5) .... *passim*

42 U.S.C. §§ 1973c(b) 6

42 U.S.C. §§ 1973c(d) 6

Voting Rights Act Amendments of 1970,
Pub. L. No. 91-285, 84 Stat. 314 (1970).................. 3

Voting Rights Act Amendments of 1975,
Pub. L. No. 94-73, 89 Stat. 400 (1975).................... 3

Voting Rights Act Amendments of 1982,
Pub. L. No. 97-205, 96 Stat.131 (1982).................. 3

LEGISLATIVE HISTORY

152 Cong. Rec. H5143-5207
(daily ed. July 13, 2006) 4

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(daily ed. July 20, 2006) 4

H.R. Rep. No. 109-478 (2006) .... *passim*

S. Rep. No. 97-417 (1982) 30, 41

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To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcommittee on the Judiciary, House of Representatives, 109th Cong., 1st Sess. (October 18, 2005) 24, 25

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STATEMENT

This case presents a facial challenge to Section 5 of the Voting Rights Act, a critical provision of one of this Nation's landmark civil rights laws.

A. The Statutory Framework

After "enduring nearly a century of systematic resistance to the Fifteenth Amendment," Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). For nearly fifty years, the Voting Rights Act has played a pivotal role in helping to preserve the right to vote for all Americans

Opponents of the Voting Rights Act have challenged its constitutionality since the beginning. In response to those challenges, this Court has upheld the constitutionality of the Voting Rights Act on four occasions spanning more than three decades and involving three separate extensions enacted by Congress for periods ranging from five to twenty-five years.

Katzenbach was the first in that unbroken line of decisions holding that the Voting Rights Act is a constitutionally appropriate exercise of congressional power to remedy past voting discrimination and ensure future voting equality. Both Section 2 and Section 5 of the Voting Rights Act are critical elements of the congressional scheme. Section 2 prohibits discrimination in voting and can be enforced through federal enforcement actions or private suits. 42 U.S.C. § 1973. Section 5 requires "covered jurisdictions" to "preclear" proposed changes in their voting practices or procedures before they are implemented with either the Department of Justice or the federal district court in Washington, D.C. 42 U.S.C. § 1973c. Under Section 5, it is the State's burden to show that the proposed change has neither a retrogressive effect or a discriminatory purpose.

The preclearance requirement of Section 5 was adopted because Congress recognized that Section 2 alone was inadequate to address the ongoing pattern of voting discrimination in jurisdictions with a long history of denying racial minorities the right to vote. To carefully target the problem it meant to address, Congress created a coverage formula in Section 4(b), 42 U.S.C. § 1973b(b), to define those jurisdictions that were subject to Section 5's preclearance requirement. As originally enacted in 1965, Section 5 only applied to those jurisdictions than used a "test or device" for voting and where less that 50% of voting age residents were registered or voted in the 1964 presidential election. Congress also agreed that Section 5 would expire in five years unless renewed, assuring legislative re-examination of the ongoing need for a preclearance requirement.

In *Katzenbach*, this Court ruled that the Section 4(b) coverage formula was constitutional because it was designed "to describe these areas . . . relevant to the problem of voting discrimination." 383 U.S. at 329. The Court further observed that Congress was "entitled to infer a significant danger of the evil [of voting discrimination] in the few remaining States and political subdivisions covered by § 4(b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.*

Section 5 was extended for an additional five years in 1970, and the Section 4(b) coverage formula was expanded to include the 1968 presidential election. Pub. L. No. 91-285, 84 Stat. 314, 315 (1970). The 1970 extension was upheld in *Georgia v. United States*, 411 U.S. 526 (1973). "[F]or the reasons stated at length in *South Carolina v. Katzenbach*," the Court wrote, "we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Id.* at 535.

Congress again extended Section 5 in 1975 for seven years, and expanded the Section 4(b) coverage formula to include the 1972 presidential election. Pub. L. No. 94-73, 89 Stat. 400, 401 (1975). *City of Rome v. United States*, 446 U.S. 156, 182 (1980), held that the extension was "plainly a constitutional method of enforcing the Fifteenth Amendment." In doing so, it relied upon Congress' conclusions that Section 5 "has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions," that "recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism," and that Section 5 "serves to insure that progress not be destroyed through new procedures and techniques." *Id.* at 181.

Section 5 was extended once more in 1982, this time for 25 years and without altering the coverage formula. Pub. L. No. 97-205, 96 Stat. 131 (1982). Congress, did, however, relax the standards for bailout. *See* p. 41, *infra*. The constitutionality of the 1982 extension was affirmed in *Lopez v.*

Monterey County, 525 U.S. 266, 282 (1999), where the Court noted that "we have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States."

Most recently, in 2005 and 2006, Congress considered the need for the continuation of Section 5 and the appropriateness of the Section 4(b) coverage formula. It held 21 hearings, heard from more than 90 witnesses, and compiled a massive record of more than 15,000 pages of evidence. H.R. Rep. No. 109-478, 109th Cong., 2d Sess., at 5 (May 22, 2006); S. Rep. No. 109-295, 109th Cong., 2d Sess., at 2 (July 26, 2006). The House Committee on the Judiciary described the record it compiled as "one of the most extensive legislative records in the Committee on the Judiciary's history." H.R. Rep. No. 109-478, at 5 (2006). At the conclusion of its deliberations Congress, by a vote of 390 to 33 in the House and by a unanimous vote in the Senate, extended Section 5 and the Section 4(b) coverage formula for an additional 25 years. 152 Cong. Rec. S8012 (daily ed. July 20, 2006); 152 Cong. Rec. H5143-5207 (daily ed. July 13, 2006); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006). In doing so, Congress invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. H.R. Rep. No. 109-478, at 90 (2006).

Congress also amended Section 5 to restore the longstanding interpretation and application of Section 5 which had been abrogated by *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320 (2000)

("*Bossier II*"), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In *Bossier II*, the Court held for the first time that the "purpose" prong of Section 5 prohibited only voting changes that were enacted with a discriminatory *and* retrogressive purpose. 528 U.S. at 328. In 2006, Congress explained that *Bossier II's* limitation of the purpose prong was inconsistent with Congress's intent that Section 5 prevents "[v]oting changes that 'purposefully' keep minority groups 'in their place,'" as well as purposefully retrogressive voting changes. H.R. Rep. No. 109-478, at 68 (2006). *See* S. Rep. No. 109-295, at 16 (2006) (*Bossier II* gives "approval to practices that violate the Constitution"). Congress thus restored the pre-*Bossier II* definition of the purpose standard to include "any discriminatory purpose." 42 U.S.C. § 1973c(c).

In *Georgia v. Ashcroft*, the Court changed the preexisting standard for determining whether a voting change had a prohibited retrogressive effect under Section 5. Prior to *Ashcroft*, the effect standard was "'whether the ability of minority groups to participate in the political process and to elect their candidates to office is . . . diminished . . . by the change affecting voting.'" *Beer v. United States*, 425 U.S. 130, 141 (1976) (quoting H.R. Rep. No. 94-196, at 60). In *Ashcroft*, the Court approved a "totality of circumstances" analysis that included whether a minority group could "influence the election of candidates of its choice." 539 U.S. at 479. Congress concluded that the new standard introduced "substantial uncertainty" into the operation of Section 5, which was designed to protect "the effectiveness of minority political participation." H.R. Rep. No. 109-478, at 70 (2006). *See also id.*, at 68 & 70 (*Ashcroft* not only made Section 5 "unadministerable" but "would encourage States . . . to turn black and other minority voters into second class voters"); S. Rep. No. 109-295, at 18 (2006) ("the Georgia standard is unworkable. The concept of 'influence' is vague"). In order to restore the "ability to elect" standard articulated in *Beer*, Congress added the language that a voting change was objectionable under Section 5 if it diminished the ability of minorities "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b) & (d). *See* H.R. Rep. No. 109-478, at 70-1 (2006).[1]

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[1] The constitutionality of the 2006 Amendments is not before the Court. In the court of appeals, "Shelby County neither challenge[d] the constitutionality of the 2006 amendments or even argue[d] that they increase section 5's burdens." Pet. App. 66a. *See also* Pet. App. 76a ("Shelby did not argue that either of these amendments is unconstitutional") (Williams, Judge, dissenting). Thus, as the court of appeals explained, "[t]hese issues . . . are entirely unbriefed, and as we have repeatedly made clear, 'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" Pet. App. 66a-67a (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). Since Shelby County did not challenge the constitutionality of the 2006 amendments in the lower courts nor argue that they increased Section 5's burdens, they have waived any such arguments before this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below."); *United States v. Jones*, 132 S.Ct. 945, 954 (2012) ("We have no occasion to consider this argument. The Government did not raise it below, and the D.C. Circuit therefore did not address it. . .We consider the argument forfeited.").

B. The Proceedings Below

In April 2010, Shelby County sought a declaration that Sections 5 and 4(b) are facially unconstitutional and a permanent injunction against their enforcement. The district court granted summary judgment to the defendants, Pet. App. 111a-291a, and Shelby County appealed.

The court of appeals affirmed in a 2-1 opinion framed by this Court's observation in *Nw. Austin Mun. Util. Dist No. One v. Holder*, 557 U.S. 193, 203 (2009) that the constitutionality of the 2006 extension "must be justified by current needs," and that "a statute's disparate geographic coverage" requires a showing that it "is sufficiently related to the problem that it targets." Pet. App. 14a-15a. Applying the "congruence and proportionality standard" of *City of Boerne v. Flores* 521 U.S. 507 (1997), the court of appeals upheld the constitutionality of Sections 5 and 4(b).

Writing for the majority, Judge Tatel stressed that "the record contains numerous 'examples of modern' instances of racial discrimination in voting" in the covered jurisdictions relied upon by Congress in amending and extending the Act in 2006. Pet. App. 29a. That evidence included: (1) 626 DOJ objections from 1982 to 2004 to voting changes that had the purpose or effect of discriminating against minorities; (2) "more information requests" from DOJ regarding Section 5 submissions that resulted in the withdrawal or modification of over 800 potentially discriminatory voting changes; (3) 105 successful Section 5 enforcement actions brought against covered jurisdictions between 1982 and 2004; (4) 25 preclearance denials by the District Court for the

District of Columbia between 1982 and 2004; (5) 653 successful lawsuits under Section 2 of the Voting Rights Act between 1982 and 2005 providing relief from discriminatory practices in at least 825 covered counties; (6) tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions; (7) examples of "overt hostility to black voting power by those who control the electoral process;" (8) racially polarized voting; (9) evidence that Section 5 has a strong deterrent effect; (10) litigation by DOJ to enforce the minority language provision of the Act; and (11) evidence that Section 2 was an inadequate remedy for racial discrimination in voting in the covered jurisdictions. Pet. App. 24a, 29a-46a; 120 Stat. 577, Sec. 2(b).

The court of appeals then concluded: "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference." Pet. App. 48a. *See* 120 Stat. 577, Sec. 2(b) (summarizing the findings and evidence upon which Congress relied in amending and extending the Voting Rights Act).

In his dissenting opinion, Judge Williams did "not reach the constitutionality of § 5 itself." Pet. App. 104a. He also acknowledged that "[i]t goes without question that racism persists, as evidenced by the odious examples offered by the majority." *Id.* Instead, he believed the coverage formula was "obsolete in practice." *Id.*

SUMMARY OF ARGUMENT

The decision by Congress in 2006 to reauthorize Section 5 and the corresponding coverage provisions of the Voting Rights Act was nearly unanimous, amply supported by an extensive legislative record, and just as clearly within the constitutional power of Congress as previous extensions of the Voting Rights Act that this Court has repeatedly upheld.

The legislative record that Congress compiled before voting to reauthorize Section 5 in 2006 focused on two principal questions. First, does voting discrimination remain a significant problem in the United States, despite the undeniable progress that has been made in the years since the Voting Rights Act was initially adopted? Second, does the coverage formula that Congress has devised for Section 5, including the bail-in and bailout provisions of the Act, still effectively identify those jurisdictions where voting discrimination remains an ongoing issue? Congress concluded that the answer to both questions was yes. That factual determination, endorsed by overwhelming majorities in both the House and Senate, is plainly reasonable in light of the legislative record and entitled to deference under this Court's decisions. It is Petitioner's burden to show that the time has come to overturn one of the landmark civil rights laws of the last half-century. Congress clearly felt otherwise and Shelby County has failed to provide this Court with a basis for reversing that considered judgment.

By their express terms, the Fourteenth and Fifteenth Amendments give Congress the power to enforce their provisions "by appropriate legislation."

U.S. Const. Amend. XIV, Sec. 5; U.S. Const. Amend. XV, Sec. 2. Interpreting those provisions, this Court has emphasized that the Constitution "empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Nw. Austin*, 557 U.S. at 205. And, where "Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970).

Nw. Austin stated the question that is now before the Court but it did not answer it. On the one hand, the Court explained that the extension of Section 5 "must be justified by current needs," and that "a statute's disparate geographic coverage" requires a showing that it "is sufficiently related to the problem that it targets." 557 U.S. at 203-04. On the other hand, the Court carefully noted that while there had been improvements in voting rights since passage of the Voting Rights Act in 1965, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.*

That is precisely what the legislative record in this case demonstrates and the courts below found. Specifically, the record contains numerous examples of modern instances of racial discrimination in voting in the covered jurisdictions. Pet. App. 29a. Those examples are summarized above, *see* p. 7-8, *supra,* and more fully explained below, *see* pp. Point IB, *infra.* While there has been an increase in black elected officials in the covered jurisdictions over the last half-century, the overwhelming majority of black elected officials have been elected from majority black districts, most of which were created as a result of Section 5 objections and Section 2 litigation. Moreover, Congress found that "gains by minority candidates remain uneven, both geographically and by level of office." H.R. Rep. No. 109-478, at 33 (2006).

In *City of Rome*, 446 U.S. at 177, the Court held "the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." Here, the persistence of intentional discrimination in the covered jurisdictions does not have to be assumed; it is established by the legislative record. As the House Committee Report concluded regarding the 1982-2006 period, "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at large voting and implementing majority vote requirements." H.R. Rep. No. 109-478, at 36 (2006).

The 1960s-style discrimination is less common today, but that is because Section 5 has been effective in deterring overt discrimination in voting. *See* H.R. Rep. No. 109-478, at 57 (2006) ("[d]iscrimination today is more subtle than the visible methods used in 1965"). It would be ironic in the extreme if the effectiveness of Section 5 is now utilized as a rationale to overturn it. A fair reading of the legislative record fully supports the conclusion of Congress that without the continuation of Section 5 "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted," 120 Stat. 578, Sec. 2(b)(9), is amply supported by the legislative record. It is also reinforced by evidence of intentional racial discrimination in recent objections involving Texas, South Carolina, and Florida.

Finally, the bailout provision of Section 5 reduces the possibilities of over-inclusiveness and helps ensure that Congress' means are proportionate to its ends. As of May 9, 2012, 136 jurisdictions had bailed out under a liberalized bailout system by demonstrating that they no longer discriminated in voting. Pet. App. 62a. The bailed-out jurisdictions included 30 counties, 79 towns and cities, 21 school boards, and six utility or sanitary districts. In addition, the Attorney General is actively considering more than 100 additional jurisdictions for bailout. Pet. App. 63a.

Conversely, the availability of bail-in addresses the potential under-inclusiveness of the coverage formula and the possibility that jurisdictions that are in fact engaging in systemic voting discrimination may not be covered by the Section 4(b) formula. Two non-covered states, Arkansas and New Mexico, were subjected to partial preclearance under the bail-in provision, as well as jurisdictions in California, Colorado, Florida, Illinois, Nebraska, New Mexico, New York, South Dakota, and the city of Chattanooga. Pet. App. 61a-62a; J.A.

141a-143a. The legislative record shows that the Section 4(b) formula, together with the statute's provisions for bail-in and bailout, continues to single out the jurisdictions in which discrimination is concentrated. Pet. App. 65a.

ARGUMENT

I. CONGRESS PROPERLY EXERCISED ITS CONSTITUTIONAL AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS WHEN IT REAUTHORIZED THE VOTING RIGHTS ACT IN 2006.

The Fourteenth and Fifteenth Amendments expressly grant Congress the power to enforce their provisions "by appropriate legislation." U.S. Const. Amend. XIV, Sec. 5; U.S. Const. Amend. XV, Sec. 2. As this Court has emphasized, the Constitution "empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Nw. Austin*, 557 U.S. at 205. *See also Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (the "appropriate legislation" clause "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"); *Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004) ("measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States"); *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (where "Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments"); *City of Boerne*, 521 U.S. at 535 (when Congress exercises its enforcement authority under the Reconstruction Amendments its judgments about "what legislation is needed . . . are entitled to much deference").

"[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin*, 557 U.S. at 205 (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). In this instance, Congress acted well within its powers to enforce the Fourteenth and Fifteenth Amendments by reauthorizing Section 5 and the coverage formula in 2006 as a remedy for discrimination against racial and language minorities in voting. Its nearly unanimous decision to maintain the preclearance requirement for covered jurisdictions and those that might be bailed-in is fully supported by the extensive legislative record it compiled.

A. The Standard Of Review

In *Nw. Austin*, 557 U.S. at 204, this Court considered whether a challenge to the constitutionality of Section 5 should be resolved using: (1) the "rational means" standard applied in *South Carolina v. Katzenbach*, 383 U.S. at 324 ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting"); or (2) the "congruence and proportionality standard" applied in *City of Boerne*, 521 U.S. at 520, 530. The Court's holding that the municipal utility district was entitled to a statutory bailout from Section 5 coverage made it unnecessary to resolve which constitutional standard applied. The Court nonetheless observed that the constitutionality of Section 5 "must be justified by current needs" in any future inquiry, and that the Act's "disparate geographic coverage" requires a showing that it "is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203.

At the same time, the Court was careful not to prejudge the outcome of that inquiry. While noting the progress that has been made since 1965 in voting rights, the Court carefully cautioned: "It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.*

Indeed, that was the finding of the district court in *Nw. Austin*, which concluded that the legislative record before Congress in 2006 "document[ed] contemporary racial discrimination in covered states" and that section 5 prevents discriminatory voting changes by "quietly but effectively deterring discriminatory changes." *Id.* at 205. The lower courts in this case reached the same conclusion.

Section 5 is therefore constitutional under any of the standards of review that this Court has articulated for statutes enacted pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendment. Applying the standard announced by this Court in *Nw. Austin*, the extension of Section 5 in 2006 was plainly justified by current needs as set forth in the legislative record, and the statute's coverage formula targets those jurisdictions where minority voting strength remains most vulnerable in the present day.

B. The Legislative Record Convincingly Establishes That Voting Discrimination Is An Ongoing Problem In The Covered Jurisdictions

The legislative record that Congress compiled before voting to reauthorize Section 5 in 2006 was voluminous, to say the least. *See* p. 4, *supra*. As the court of appeals found, it is a record replete with "examples of modern" voting discrimination in the covered jurisdictions. Pet. App. 29a. It is also a record that documents the persistence of voting discrimination in multiple and reinforcing ways. 120 Stat. 577, Sec. 2(b).

i. Section 5 Objections

In considering whether to reauthorize the preclearance provisions of Section 5, Congress understandably looked to the number of Section 5 objections by the Department of Justice in covered jurisdictions. 120 Stat. 577, Sec. 2(b)(4)(A). The sheer number of Section 5 objections documented in the legislative record offers powerful evidence of the continued need for Section 5, whether measured absolutely or comparatively. Since 1982, the Department of Justice has objected to more than 700 voting changes that were determined to be discriminatory, thus preventing them from being enforced by the covered jurisdictions. H.R. Rep. 109-478, at 21 (2006). To place that number in historical perspective, there were more DOJ Section 5 objections between August 1982 and 2004 (626) than between 1965 and the 1982 reauthorization (490), and nine of the covered states received more objections after 1982 than before. Pet. App. 32a;

Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong., 2d Sess., Vol. 1, at 172, 259 (March 8, 2006) ("House Hearing, Evidence of Continued Need") (report of National Commission on the Voting Rights Act). The average number of objections per year has remained fairly constant. Pet. App. 34a. H.R. Rep. No. 109-478, at 22 (2006).

The basis for those objections also helps to illuminate the ongoing problem of voting discrimination revealed by the legislative fact-finding. Among the recent voting changes blocked by the statute that Congress reviewed were: state restrictions on registration and voting; discriminatory annexations and deannexations; discriminatory redistricting; voter purges; adoption of at-large elections; high school diploma requirements for holding office; consolidations; anti-single shot provisions; majority vote requirements; re-registration procedures; numbered post requirements; abolition of elected offices; residency requirements; staggered terms; the elimination or relocation of polling places; changing elections from single member districts to at-large voting; and dual registration requirements. H.R. Rep. 109-478, at 36 (2006); Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing before the Subcommittee on the Judiciary, House of Representatives, 109th Cong., 1st Sess., Vol. I, at 10104-224 (October 25, 2005) ("House Hearing, History, Scope, and Purpose") (complete list of Section 5 objections through October 17, 2005).[2]

Many of these objections were based on substantial evidence of purposeful discrimination. From 1980 to 2004, the Attorney General issued objection letters blocking 423 voting changes that appeared to be intentionally discriminatory. Voting Rights Act: Section 5 - Preclearance Standards, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, House of Representatives, 109th Cong.,

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[2] Since the extension of Section 5 in 1982, DOJ has objected to 46 Section 5 submissions from Alabama, seven from the state and 39 from local jurisdictions. Many of the objections were based upon evidence of purposeful discrimination. House Hearing, History, Scope, and Purpose, Vol. I, at 264, 267, 275, 333, 321, 350, 415, 435 (2005); Senate Hearing, Legislative Options, 109th Cong., 2d Sess., at 383-84 (2006) (Voting Rights in Alabama 1982-2006, report of RenewtheVRA.org). On March 27, 1992, for example, DOJ objected to the congressional redistricting plan enacted by the Alabama legislature on the grounds that the fragmentation of black population concentrations in the state was evidence of "a predisposition on the part of the state political leadership to limit black voting potential to a single district." Senate Hearing, Legislative Options, 109th Cong. 2d Sess., at 384 (2006); House Hearing, History. Scope, and Purpose, Vol. I, at 385 (2005). DOJ further found that: "In light of the prevailing pattern of racially polarized voting throughout the state, it does not appear that black voters are likely to have a realistic opportunity to elect a candidate of their choice in any of the [remaining] districts." *Id.* In *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), to cite another example, the Court affirmed the district court's denial of Section 5 preclearance to two annexations by the City of Pleasant Grove, Alabama, on the grounds that the city had engaged in a racially selective annexation policy. The Court found it "quite plausible to see appellant's annexation[s] . . . as motivated, in part, by the impermissible purpose of minimizing future black voting strength." *Id.* at 471-72.

1st Sess., at 180 tbl. 2 (November 1, 2005) ("House Hearing, Preclearance Standards") (Peyton McCrary, et al.); Pet. App. 33a. As recently as the 1990s, 43% of all objections were based on intent alone, while another 31% were based on a combination of intent and effect. House Hearing, Preclearance Standards, at 136 (2005). *See also Northwest Austin Municipal Utility District Number One v. Mukasey*, 573 F.Supp.2d 221, 252 (D.D.C. 2008), *rev'd and remanded on other grounds sub nom. Nw. Austin*, 557 U.S. at 211. Congress found that "such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21 (2006).

These Section 5 objections, coupled with findings in Section 2 litigation, document the existence of continued intentional discrimination in the covered jurisdictions. *See* House Hearing, Evidence of Continued Need, Vol. I, at 31-3 (2006) (statement of Nadine Strossen, President, American Civil Liberties Union). And, as the House Committee Report concluded regarding the 1982-2006 period, "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans;[3] switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and de-annexations; setting numbered posts; and changing elections from single member districts to at large voting and implementing majority vote requirements." H.R. Rep. No. 109-478, at 36 (2006).

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[3] In Georgia, for example, the Chairman of the House Reapportionment Committee told his colleagues on numerous occasions that "I don't want to draw nigger districts." H.R. Rep. No. 109-478, at 67 (2006) (quoting *Busbee v. Smith*, 549 F.Supp. 494, 501 (D.D.C. 1982)). The court in *Busbee* made a specific finding that the Chairman "is a racist." *Id.* at 500. In

Such 1960s-style discrimination may be less common today than it was in the past, but that is because Section 5 has been effective in deterring overt discrimination in voting. *See* H.R. Rep. No. 109-478, at 57 (2006) ("[d]iscrimination today is more subtle than the visible methods used in 1965"). Given Shelby County's logic, Congress could only reauthorize Sections 5 and 4(b) based upon findings that they had been ineffective. But the fact that Sections 5 and 4(b) have been effective supports, rather than undermines, their appropriateness as a remedy.

Citing *Miller v. Johnson*, 515 U.S. 900, 917 (1995), Shelby County attempts to undermine the relevance of Section 5 objections based upon discriminatory intent by claiming they could have been based on "the Attorney General's mistaken interpretation" of what constitutes a constitutional violation. Pet. Br. at 35. But since the decision in *Miller v. Johnson*, there have been no decisions of this Court invalidating an objection by the Department of Justice to a voting change on the grounds that it was based upon a mistaken interpretation of the Constitution. Section 5 is not

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Mississippi, a plan that would have increased the number of majority black districts was also referred to as the "nigger plan." Pet. App. 31a.

being administered in an unconstitutional manner by the Department of Justice.

Shelby County also argues that the decline in the "'number and nature' of Section 5 objections. . . further confirms that a prior restraint is unnecessary." Pet. Br. at 29. However, in making that claim, Shelby County fails to take into account the impact *Bossier II* had on Section 5 objections. Although there were in fact a significant number of Section 5 objections after 1982, *Bossier II* had the effect of allowing preclearance of changes that would have been objected to under the preexisting standard. *Bossier II* held that the purpose prong of Section 5 "covers only retrogressive dilution." 528 U.S. at 328. Thus, a voting change adopted with an admittedly discriminatory purpose would not be objectionable under Section 5 unless it was adopted with the purpose of making minority voters worse off than they were under the preexisting system.

The legislative history contains a comprehensive study of Section 5 objections, one of whose authors, Peyton McCrary, is an employee of the Voting Section of the Department of Justice. The "principal finding" of the study was:

> [B]y the 1990s, the purpose prong of Section 5 had become the dominant legal basis for objections. Almost half (45 percent) of all objections were based on purpose alone. If we include objections based both on purpose and retrogressive effect, and those based both on purpose and Section 2, the Department's finding of discriminatory purpose was present in 78 percent of all

> decisions to interpose objections in the decade preceding *Bossier II*.

House Hearing, Preclearance Standards, at 177 (2005) (McCrary, Seaman & Valelly "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act"). As Congress concluded, "[t]he effectiveness of the Voting Rights Act or 1965 has been significantly weakened by the United States Supreme Court decision[] in Reno v. Bossier Parish II." 120 Stat. 577, Sec 2(b)(6).

The McCrary report further concluded that "a purpose finding was present in an astonishing 89 percent of all redistricting objections" in the 1990s. House Hearing, Preclearance Standards, at 177 (2005). The decline in objections over the past decade can be laid in large measure to the limitation on objections imposed by *Bossier II*, rather than a decline in discriminatory behavior by covered jurisdictions or a decline in the need for Section 5.

ii. Requests for More Information

Congress also relied upon "more information requests" (MIRs) by the Department of Justice as evidence of the continued need for Section 5 in the covered jurisdictions. 120 Stat. 577, Sec. 2(b)(4)(A). MIRs resulted in the modification of more than 800 proposed voting changes or their withdrawal from consideration. H.R. Rep. No. 109-478, at 40-1 & n.92 (2006).

A study included in the legislative history found that MIRs advanced two significant goals. First, since MIRs "are issued at far higher rates than are letters of objection . . . they have the potential to affect a wider range and larger number of changes, relative to objections, submitted to the DOJ for review." House Hearing, Evidence of Continued Need, Vol. II, at 2555 (2006) (Luis Ricardo Fraga and Maria Lizet Ocampo, "More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act"). Second, "the impact of MIRs that were likely to serve as deterrents to the pursuit of procedures and practices that could have a discriminatory effect on African Americans and language minorities demonstrates that MIRs double the number of changes that did not have legal standing to be implemented under Section 5." *Id.* at 255-26.

iii. Section 5 Enforcement Actions

The number of Section 5 enforcement actions provided Congress with additional evidence of the continued need for Section 5 in the covered jurisdictions. 120 Stat. 577, Sec. 2(b)(4)(A). Section 5 enforcement actions have blocked implementation of an extraordinary array of devices that would otherwise have diluted minority voting strength. From 1982 to 2004, plaintiffs succeeded in 105 enforcement actions against jurisdictions that had failed to comply with Section 5. Twenty-two of these successful actions were filed in Alabama alone, the second highest state total. House Hearing, Evidence of Continued Need, Vol. I, at 250 tbl. 4 (2006) (data compiled by the National Commission on the Voting Rights Act). Congress properly cited enforcement actions as "[e]vidence of continued discrimination" in extending Section 5. 120 Stat. 577, Sec. 2(b)(4).

iv. Denials of Preclearance by the D.C. District Court

In addition to objections by DOJ, Congress found "[e]vidence of continued discrimination "based upon "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia." 120 Stat. 580, Sec. 2(b)(4)(B). During the post-1982 period, 25 requests for judicial preclearance of voting changes were either denied because the submitting jurisdiction failed to carry its burden of proof of no discriminatory purpose or effect, or were withdrawn. House Hearing, Evidence of Continued Need, Vol.1, at 197, 270 (2006) (report of National Commission on the Voting Rights Act). These judicial preclearance actions further document the current need for Section 5 and the important role it continues to play in the covered jurisdictions.

v. Section 2 Litigation

The evidence before Congress showed that of the 114 *published* Section 2 decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcommittee on the Judiciary, House of Representatives, 109th Cong., 1st Sess., at 974 (October 18, 2005) ("House Hearing, Impact and Effectiveness"); *see also* H.R. Rep. No. 109-478, at 53 (2006); Pet. App. 49a; J.A. 51a. While the covered jurisdictions contained less than 25% of the country's population, they accounted for 56% of successful Section 2 litigation since 1982. *Id.;* J.A. 48a, 51a. Aside from the number of favorable outcomes, there was a higher success rate for Section 2 litigation in the covered than in the non-covered jurisdictions. In the covered jurisdictions, 40.5% of published Section 2 decisions resulted in favorable outcomes for plaintiffs, compared to only 30% in non-covered jurisdictions. House Hearing, Impact and Effectiveness, at 974 (2005).

The differences in covered and non-covered jurisdictions is even more pronounced when *unpublished* Section 2 cases are taken into account. According to data compiled by the National Commission on the Voting Rights Act and Department of Justice historian Peyton McCrary, there have been at least 686 unpublished successful Section 2 cases since 1982, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. Of these, 651 (81%) were filed in covered jurisdictions. Pet. App. 51a; J.A. 51a. Of the eight states with the highest number of successful Section 2 cases per million residents (Alabama, Mississippi, Arkansas, Texas, South Carolina, Georgia, and the covered jurisdictions of South Dakota and North Carolina), all but one was covered in whole or in part. The only exception was Arkansas. Pet. App. 51a-52a. While it was not covered by Section 4(b), Arkansas was bailed-in to Section 5 coverage in 1990 by a court order requiring it to preclear its house and senate redistricting plans following the 1990 census. *See Jeffers v. Clinton*, 740 F.Supp. 585, 601-02 (E.D. Ark. 1990).

Alabama had 192 successful Section 2 cases, Georgia had 69, Louisiana had 17, Mississippi had 67, North Carolina had 52, South Carolina had 33, Texas had 206, and Virginia had 15. House Hearing, Evidence of Continued Need, at 251 tbl.5 (2006); J.A.147a-148a. Of the uncovered states, 13 had no successful Section 2 cases, six had only one, five had only two, two had only three, and two had only four. Other than Arkansas, the only state with more than 10 successful Section cases was Illinois, which had 11. J.A. 149a-150a. As Dr. McCrary concluded: "examining the pattern of outcomes in Section 2 litigation broken down by states - and by county within partially covered states reinforces the assessment that the coverage formula set forth in Section 4(b) of the Voting Rights Act targets those areas of the country where racial discrimination affecting voting is most concentrated." J.A. 155a.

As further appears from the legislative history, decisions since 1982 have found numerous and ongoing examples of intentional discrimination in Alabama at the state and local levels. Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry, Senate, 109th Cong., 2d Sess., at 372 (July 13, 2006) ("Legislative Options"), Congress concluded that the need for Section 5 was evident from "the continued filing of section 2 cases that originated in covered jurisdictions," many of which resulted in findings of intentional discrimination. 120 Stat. 577, Sec. 2(b)(4)&(5). The disproportionate number of successful Section 2 suits in covered jurisdictions is even more significant given that Section 5 blocks and deters discrimination in the covered jurisdictions, and one would expect to see fewer Section 2 cases there.

Shelby County argues that "the McCrary declaration should never have been accepted" because Section 5's "constitutionality must be measured against the legislative record alone." Pet. Br. at 53. The National Commission compiled data on unreported cases in the covered jurisdictions, which was included in the legislative record. The data on the unreported cases in the non-covered jurisdictions was compiled by Dr. McCrary. Pet. App. 54a. While Dr. McCrary's declaration was not included in the legislative record, evidence concerning 61 of the 99 settlements he "found in non-covered jurisdictions (62%) was on the record considered by Congress in adopting the 2006 Reauthorization Act." Pet. App. 54a; J.A. 46a-47a.

It was appropriate for the court of appeals to consider the McCrary data. First, as the court found, "a majority of the unpublished cases from non-covered jurisdictions (as well as all from covered jurisdictions) appears in the legislative record." Pet. App. 54a. Second, evidence developed after an act has been enacted and implemented, known as "post-enactment evidence," is admissible and relevant in determining the constitutionality of the act.

In *Tennessee v. Lane*, 541 U.S. at 524-25 nn. 6-9 &13, for example, the Court relied upon evidence consisting of articles and cases published ten or more years after the Act's enactment, as well as recent versions of statutes and regulations, in upholding the constitutionality of Title II of the Americans with Disabilities Act of 1990. The court of appeals in this case properly relied upon *Tennessee v. Lane* in taking into account the report prepared by Dr. McCrary of unpublished cases in non-covered jurisdictions because it "corroborates the disparities in the level of discrimination between covered and non-covered jurisdictions revealed by the published data." Pet. App. 54a-55a. *Also see Bartnicki v. Vopper*, 523 U.S. 514, 531 n.17 (2001) (relying upon "post-enactment evidence," *i.e.*, the disclosure of the identities of persons responsible for the interception of electronic communications, as undermining the argument that federal and state laws prohibiting disclosure of such communications promoted the purposes of the First Amendment).[4] Third, Shelby County itself relies upon post-enactment evidence to support its argument that preclearance is "difficult to secure." Pet. Br. at 26 (citing *Texas v. United States*, 831 F.Supp.2d 244 (D.D.C. 2011), which denied the state's motion for summary judgment seeking preclearance of its redistricting plans). Evidence compiled since the 2006 extension of Section 5 is relevant in determining its constitutionality.

vi. The Use Of Federal Observers

Congress concluded that the need for Section 5 was also evident from "the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." 120 Stat. 577, Sec. 2(b)(4)&(5). Since 1982, the Attorney General has assigned between 300 and 600 observers each year. H.R. Rep. No. 109-478, at 44 (2006).

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[4] Circuit court decisions are to the same effect. *See, e.g.*, *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 410-11 (5th Cir. 2007); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000); *Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 911 (11th Cir. 1997); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993).

Congress found that federal observers were certified by the Attorney General "only when there is a reasonable belief that minority citizens are at risk of being disenfranchised," often through "harassment and intimidation inside polling locations." *Id.* Five of the six states originally covered by Section 5 - Louisiana, Georgia, Alabama, South Carolina, and Mississippi - accounted for about 66% of all the observer coverages since 1982. *Id.* at 24-5. As Congress found, "[o]bservers have played a critical role preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory conduct for further investigation." H.R. Rep. No. 109-478, at 25 (2006).

vii. Continued Racial Bloc Voting

When it reauthorized Section 5 in 2006, Congress expressly found that "the continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." 120 Stat. 577, Sec. 2(b)(3). Indeed, the House Judiciary Committee concluded that racial bloc voting was "the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process." H.R. Rep. No. 109-478, at 34 (2006).

The courts, like Congress, have long recognized the relevance of racial bloc voting in making preclearance determinations under Section

5. In *City of Rome*, 446 U.S. at 183, for example, the Court affirmed the denial of preclearance to various voting changes after concluding that the lower court had correctly held "that the electoral changes . . . when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength." Other decisions are to the same effect. *See City of Port Arthur v. United States*, 459 U.S. 159, 163 (1982) (affirming a denial of preclearance on the grounds, *inter alia*, of "severe racial bloc voting" in the jurisdiction); *Busbee v. Smith*, 549 F.Supp. 494, 499 (D.D.C. 1982) (denying preclearance to Georgia's 1980 congressional redistricting after finding, *inter alia*, "racially polarized voting"), *judg. aff'd*, 459 U.S. 1166 (1983). Racial bloc voting is not itself a violation of Section 5, but the existence of racial bloc voting can be critical in determining whether a proposed voting change has the purpose or effect of abridging minority voting strength.

Similarly, racial bloc voting is one of the factors identified in the Senate Report that accompanied the 1982 amendment and extension of the Voting Rights Act as probative evidence of vote dilution under Section 2. *See* S. Rep. No. 97-417, 97th Cong. 2d Sess. at 28-9 (May 27, 1982) (listing the "Senate factors"). As the Court explained in *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." By the same token, in assessing the impact of a voting change under Section 5, it is entirely reasonable to take into account the conditions under which the change would be implemented and how it would interact with social and historical conditions, including racially polarized voting, in the covered jurisdictions.

The consideration of social and historic conditions in enacting legislation to enforce the Fourteenth and Fifteenth Amendments is not unique to Section 5 of the Voting Rights Act. In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730-31 (2003), the Court noted that Congress relied heavily upon evidence of employment practices in the private sector in sustaining the constitutionality of a challenged provision of the Family and Medical Leave Act..

Shelby County acknowledges that racially polarized voting may be relevant to proving vote dilution but argues that evidence of vote dilution cannot be used to justify Section 5. Pet. Br. at 19, 32. The distinction that Shelby County would like to draw between first-generation voting discrimination and second-generation voting discrimination is one that both this Court and Congress have properly rejected. For example, in *City of Rome*, this Court sustained the 1975 reauthorization of Section 5 based in part on Congress' finding that "[a]s registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength." 446 U.S. at 181. *See also Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969)("[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot);" *Georgia v. United States*, 411 U.S. at 534 (redistricting plans "have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5"). Although vote dilution may be a more subtle form of voting discrimination than vote denial, Congress has recognized that its "effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 6 (2006).

viii. The Deterrent Effect of Section 5

In reauthorizing Section 5, Congress described preclearance as a "vital prophylactic tool" and concluded that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21, 24 (2006). More specifically, Congress found that "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes is the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24. The court of appeals properly declined to "second guess" that congressional finding, which was based on abundant evidence in the legislative record that Section 5 had a strong deterrent effect. Pet. App. 44a. *See Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (courts "are not at liberty to second-guess congressional determinations and policy judgments"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("courts must accord substantial deference to the predictive judgments of Congress"); *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (noting "the heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of Government' is entitled").

The deterrent effect of Section 5 was not, of course, the only basis for its extension. Instead, and as noted above, Congress relied upon a variety of other factors, *e.g.*, Section 5 objections, Section 2 litigation, successful Section 5 enforcement actions, unsuccessful judicial preclearance actions, the use of MIRs, racially polarized voting, etc. Pet. App. 24a, 44a. Congress never took the position, as asserted by Shelby County, that the deterrent effect of Section 5 standing alone would justify its extension "to the crack of doom." Pet. Br. at 39 (quoting Williams, J., dissenting).

C. The Constitutional Validity of the Voting Rights Act Is Not Undermined By Advances In Voting Equality Since 1965.

Both sides in this case agree that the Voting Rights Act has been a success. Shelby County views that success as evidence that Section 5 has outlived its usefulness. Congress saw that success as evidence that Section 5 could continue to play a critical role in helping to address the ongoing problem of voter discrimination. Shelby County offers three arguments in response, none of which can withstand scrutiny

1. Shelby County argues that "Section 4(b)'s formula is no longer an 'appropriate' means of determining the jurisdictions that should be subject to coverage," Pet. Br. at 40, because the rates of minority registration and voting in the covered jurisdictions "now approach parity." *Id.* at 41. That

is, at best, a misleading picture.

Congress examined this question in 2006 and found significant disparities in registration and turnout between minorities and non-minorities in several jurisdictions covered by Section 5. In Virginia, for example, Congress reported that in 2004 the black voter registration rate was about 11% behind the rate for whites, with only 49% of blacks turning out to vote compared to 63% of whites. H.R. Rep. No. 109-478, at 25 (2006). In Texas, Congress found a 20% gap in registration between whites and Hispanics with a greater gap in voter registration. *Id.* at 29; S. Rep. No. 109-295, at 11 (2006). Moreover, these statistics understate the true disparities because in computing them Congress counted Hispanics as whites. Pet. App. 200a. Given the low registration and turnout rates of Hispanics, their inclusion in the "white" category reduced the actual disparity between black and white registration and turnout, as well as the disparity between Hispanic and white registration and turnout. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J.174, 197 (2007) ("once Hispanics are taken out of the white category the picture changes considerably").

Congress reported that in five of the 16 states covered in whole or part by § 4(b) - California, Georgia, Mississippi, North Carolina, and Texas - black voter registration and turnout was higher among blacks than whites. Pet. App. 200a-201a; S. Rep. No. 109-295, at 11 (2006). But when registration and turnout rates for blacks are compared to the rates for non-Hispanic whites, only one of these states (Mississippi) had higher registration and turnout rates for blacks. As the court of appeals held: "Aside from North Carolina, Alabama, and Mississippi, all of the remaining 14 states covered in whole or in part by Section 4(b) had lower voter registration *and* turnout rates for blacks. than for non-Hispanic whites." Pet. App. 201a n.12.

These disparities may be less today than they were in the past, but progress toward the goal of voting equality that Section 5 was meant to achieve is not the same as reaching that goal. It would be inconsistent with that purpose to conclude that the partial amelioration of voting discrimination in the covered jurisdictions now renders Section 4(b) unconstitutional. Sections 5 and 4(b) were designed to banish, not merely to ameliorate, the blight of racial discrimination in voting.

In addition, there is a correlation between inclusion in Section 4(b)'s coverage formula and numerous other factors showing the continuing need for Section 5 and justifying its extension in 2006. In reauthorizing Section 5 in 1975, "Congress acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965. H.R. Rep. 109-478 at 6; S. Rep. 109-295 at 13. Congress determined, however, that 'a bleaker side of the picture yet exists.'" *City of Rome,* 446 U.S. at 180. The legislative history of the 2006 extension of Section 5 demonstrates that "a bleaker side of the picture" continues to exist, *see* Point IB, *supra,* and that there was ample basis for Congress to conclude that that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 120 Stat. 577, Sec. 2(b)(9). As the court of appeals held, Section 4(b) "continues to identify the jurisdictions with the worst problems." Pet. App. 57a.

2. Next, Shelby County argues that the increase in black elected officials in the covered jurisdictions is further proof that the preclearance requirement is no longer needed. Just the opposite is true. The overwhelming majority of black officials have been elected from majority black districts, most of which were created as a result of Section 5 objections and Section 2 litigation. As Congress found, in 2000 only 8% of African Americans were elected from majority white districts. Language minority citizens fared much worse. As of 2000, no Native Americans or Hispanics had been elected to office from a majority white district. H.R. Rep. No. 109-478, at 34 (2006).

In Alabama, two African Americans who were initially appointed to the state Supreme Court were defeated in 2000 by white opponents. Every African American member of the Alabama Legislature was elected from a single member district with an effective black voter majority. House Hearing, History, Scope, and Purpose, Vol. II, at 3199 (2005) (statement of James U. Blacksher). *See also* James U. Blacksher, et al., *Voting Rights in Alabama:1982-2006*, 17 So. Cal. Rev. Law & Soc. Just. 249, at 249 (2008)("voting remains largely racially polarized, and black candidates rarely are elected in majority-white districts"). And most of the majority black districts had to be ordered by federal courts. *Id.* at 260. *et seq.*

Congress also found that "gains by minority candidates remain uneven, both geographically and by level of office." *Id.* at 33. In three of the six originally covered states - Mississippi, Louisiana, and South Carolina - no African American had ever been elected to state-wide office. *Id.*; Pet. App 23a. The House committee further reported that African Americans accounted for only 21% of state legislators in six southern states where the black population averaged 35% - Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina. H.R. Rep. No. 109-478, at 33 (2006). In addition, the committee found that the number of Latinos and Asian Americans elected to office nationwide "has failed to keep pace with [the] population growth" of those two communities. *Id.*

3. Finally, Shelby County argues that preclearance under Section 5 is no longer necessary because the ongoing problems of voting discrimination can now be adequately addressed through Section 2 litigation initiated after discriminatory voting changes have gone into effect. Congress found otherwise, stating in 2006 that the "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action." H.R. Rep. No. 109-478, at 57 (2006).

This conclusion was based on extensive testimony that Section 2 litigation places the burden of proof on the victims of discrimination rather than its perpetrators, imposes a heavy financial burden on minority plaintiffs, is heavily work-intensive, cannot prevent enactment of discriminatory voting measures, and allows discriminatorily elected officials to remain in office for years until litigation is concluded. Pet. App. 45a-46a. *See, e.g.*, House Hearing, History, Scope, and Purpose, Vol. I, at 92, 97, 101 (2005) (testimony of Nina Perales); *id.* at 79, 83-84 (testimony of Anita Earls); House Hearing, Evidence of Continued Need, Vol. 1, at 97 (2006) (testimony of Joe Rogers). A Federal Judicial Center study found that voting cases required nearly four times more work than the average district court case and ranked as the fifth most work-intensive of the 63 types of cases analyzed. Pet. App. 45a.[5]

In *Katzenbach*, the Court stressed that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." 383 U.S. at 328; *see also id.* at 313-15 (explaining why case-by-case litigation had "proved ineffective"). *City of Rome* also found that "[c]ase-by-case adjudication had proved too ponderous a method to remedy voting discrimination." 446 U.S. at 174. *Accord*, *Boerne*, 521 U.S. at 526 (Section 5 was "deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation"); *Georgia v. United States*, 411 U.S. at 538 n.9 ("[t]he very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting"). The Court relied on similar findings in *Tennessee v. Lane*, 541 U.S. at 531, to sustain the constitutionality of a challenged statute: "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" (alteration in original) (quoting *Hibbs*, 538 U.S. at 737).

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[5] In *Large v. Fremont County, Wyo.*, 709 F.Supp.2d 1176 (D. Wyo. 2010), for example, plaintiffs filed their Section 2 complaint in October 2005, but did not get a decision on the merits until April 2010, some five years later. In *Levy v. Lexington County, South Carolina*, 589 F.3d 708 (4th Cir. 2009), the plaintiffs filed their Section 2 complaint in September 2003, but did not get a decision on the merits until February 2009, which was subsequently vacated and remanded for consideration of two intervening election cycles.

Despite these legislative findings, Shelby County contends that Section 2 is an effective remedy because "'plaintiffs' costs for § 2 suits can in effect be assumed by' the Department of Justice." Pet. Br. at 15 (citing Williams, J., dissenting). The evidence shows, however, that the burdens and costs of Section 2 litigation have been borne primarily by private plaintiffs, and not the Department of Justice. According to one report: "The vast bulk of section 2 actions were brought by minority plaintiffs, often acting through civil rights or civil liberties organizations. Within the eight states covered by our study, section 2 litigation brought solely by the Department of Justice played only a minor role in effecting changes in local election systems." Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 81 (C. Davidson et al. eds., Princeton Univ. Press 1994). Another report shows that from 1977 through 2004 of the 5,348 voting rights cases filed in U.S. District Courts, 5,100 (95.4%) were filed by private parties, with only 248

(4.6%) filed by the Department of Justice. Daniel McCool, Susan M. Olson, & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 39 (Cambridge Univ. Press 2007). The role of the Department of Justice in bringing Section 2 suits in covered jurisdictions has not improved. Since the 2006 extension of Section 5, the Department of Justice has brought only one Section 2 suit in a covered jurisdiction, a school district in Georgetown County, South Carolina. *See* http://www.justice.gov/crt/about/vot/litigation/recent_sec2 (last visited January 23, 2012).

D. The Bailout and Bail-In Provisions of the Voting Rights Act Reinforce the Constitutionality of the Coverage Formula

Shelby County portrays the coverage formula as in inflexible rule that cannot adjust to changing circumstances. It is not. Jurisdictions initially subject to preclearance under Section 4(b) can "bailout" by demonstrating that they no longer engage in voting discrimination. Jurisdictions that were not initially subject to preclearance based on their history can be "bailed-in" by engaging in discriminatory behavior. These statutory adjustment mechanisms are designed to "ensure [that] Congress' means are proportionate to [its] ends," *Boerne,* 521 U.S. at 533, and must be considered in any constitutional evaluation of Section 5. The court of appeals did precisely that, explaining that "we look not just at the section 4(b) formula, but at the statutes as a whole, including its provisions for bail-in and bailout." Pet. App. 61a.

Bailout addresses the potential over-inclusiveness of the statute. A covered jurisdiction is entitled to bailout from Section 5 if it can show that it has not used a discriminatory test or device within the preceding ten years, has fully complied with the Voting Rights Act, and has engaged in constructive efforts to facilitate equal access to the electoral process. 42 U.S.C. § 1973b(a); S. Rep. No. 417, at 43-62 (1982). In 1982, Congress altered the bailout formula so that jurisdictions down to the county level could bail out independently. One of the main purposes of the new bailout provision was to provide local jurisdictions with an incentive to change their voting practices by eliminating structural and other barriers to minority political participation. *Nw. Austin* further liberalized bailout by ruling that "all political subdivisions," and not only those that conduct voter registration, are entitled to seek exemption from Section 5. 557 U.S. at 211.

As of May 9, 2012, 136 jurisdictions had bailed out after demonstrating that they no longer discriminated in voting. Pet. App. 62a. The jurisdictions included 30 counties, 79 towns and cities, 21 school boards, and six utility or sanitary districts. In addition, the Attorney General is actively considering more than 100 additional jurisdictions for bailout. Pet. App. 63a. Since 1984, the Attorney General has consented to every bailout action brought by a political subdivision. J.A. 84a. One of the jurisdictions that DOJ has consented to bailout is the state of New Hampshire, which has ten covered local jurisdictions. *See The State of New Hampshire v. Holder*, Case No. 1:12-cv-01854 (D.D.C. filed Dec. 5, 2012). Bailout is obviously not, as Shelby County contends, "a mirage." Pet. Br. at 54 (quoting

Nw. Austin, 557 U.S. at 215 (Thomas, J., concurring and dissenting).

The availability of bail-in addresses the potential under-inclusiveness of the coverage formula and the fact that some bad-acting jurisdictions may not be covered by the Section 4(b) formula. Pet. App. 65a. Pursuant to 42 U.S.C. § 1973a(c), a court that has found a violation of the Fourteenth or Fifteenth Amendment may retain jurisdiction for an appropriate period of time and subject a jurisdiction to the preclearance requirements of Section 5. Two non-covered states, Arkansas and New Mexico, were subjected to partial preclearance under the bail-in provision, as well as jurisdictions in California, Colorado, Florida, Illinois, Nebraska, New Mexico, New York, South Dakota, and the city of Chattanooga. Pet. App. 61a-62a; J.A. 141a-143a. As the court of appeals concluded, "the legislative record shows that [the Section 4(b) formula], together with the statute's provisions for bail-in and bailout . . . continues to single out the jurisdictions in which discrimination is concentrated." Pet. App. 65a. Accordingly, the court saw "no principled basis for setting aside the district court's conclusion that section 5 is 'sufficiently related to the problem that it targets,' *Nw. Austin*, 129 S.Ct. at 2512." Pet. App. 65a-66a.

In addition to allowing bailout and bail-in, Section 5 contains a number of other limitations on its coverage which further argue for the rationality as well as the congruence and proportionality of the statute: confinement to those regions of the country where voting discrimination had been most flagrant; limitation to a discrete class of state laws, *i.e.*, state voting laws; and, the existence of a coverage termination date. *Boerne* held that while legislation implementing the Fourteenth Amendment did not require "termination dates" or "geographic restrictions . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." 512 U.S. at 533.

E. An Unbroken Line of Cases From This Court And Lower Courts Have Upheld The Constitutionality Of Section 5 Over Many Decades.

Shelby County's argument that Section 5 can no longer be justified by current conditions is not a new one. Similar arguments were rejected in *South Carolina v. Katzenbach*, 383 U.S. at 303, *Georgia v. United States,* 411 U.S. at 535, *City of Rome v. United States*, 446 U.S. at 182, and *Lopez v. Monterey County*, 525 U.S. at 282. Of course, conditions can change. But the constitutional significance of any changes can and should be informed by how this Court has approached that question in the past.

The plaintiffs in *Katzenbach* challenged the coverage formula as being defective because it was "awkwardly designed . . . and . . . disregard[ed] various local conditions which have nothing to do with racial discrimination." 383 U.S. at 329. The Court held "[t]hese arguments . . . are largely beside the point" because Section 4(b) was designed "to describe these areas . . . relevant to the problem of voting discrimination." *Id.* Congress was "entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4(b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.* The Court further held that "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Id.* at 331.

In *Georgia v. United States*, 411 U.S. at 531, the state argued that Section 5 did not apply to reapportionment. The Court disagreed and held "for the reasons stated at length in *South Carolina v. Katzenbach* . . . we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Id.* at 535.

The City of Rome argued that even if the preclearance requirements were constitutional when enacted in 1965, "they had outlived their usefulness by 1975." *City of Rome*, 446 U.S. at 180. The Court noted that black voter registration "had improved dramatically since 1965," and "the number of Negro elected officials had increased since 1965." *Id.* at 180. But it upheld the extension of Section 5 as "plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.* at 182. In doing so, it relied upon Congress's conclusions that Section 5 "has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions," that "recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism," and that Section 5 "serves to insure that that progress not be destroyed through new procedures and techniques." *Id.* at 181.

In 1999, the State of California argued "§ 5 could not withstand constitutional scrutiny if it were interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere." *Lopez v. Monterey County*, 525 U.S. at 282. The Court disagreed:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.

Id. at 282-83 (quoting *Boerne*, 521 U.S. at 518).

And a month before the extension of Section 5 in 2006, this Court decided *LULAC v. Perry*, 548 U.S. 399 (2006), which found a Texas redistricting plan diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. In reaching its decision, all eight justices who addressed the issue agreed that compliance with the preclearance requirement was a "compelling state interest." *Id.* at 475 n.12, 485 n.2, 518.

In *City of Boerne*, moreover, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that was constitutional. It noted that the seven year extension of Section 5 in 1975 and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States." *Id.* And, it described Section 5 as an "appropriate" measure "'adapted to the mischief and wrong which the

[Fourteenth] [A]mendment was intended to provide against'." *Id.* at 532 (quoting *The Civil Rights Cases*, 109 U.S. 3, 13 (1883)).

The Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 639 (1999), another case involving Section 5 enforcement of the Fourteenth Amendment, expressly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race. *See also Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 373 (2011) (describing the Voting Rights Act as "a remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment"); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. at 738 (citing as "valid exercises of Congress' § 5 power [under the Fourteenth Amendment]" the "preclearance requirement for changes in State's voting procedures"). As the court of appeals held, citing *Hibbs*, 538 U.S. at 736, "[w]hen Congress seeks to combat racial discrimination in voting . . . it acts at the apex of its powers." Pet. App. 19a.

The *Boerne* line of cases confirms the constitutionality of Section 5 of the Voting Rights Act and the coverage formula. To the extent they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality.

Challenges to the constitutionality of Sections

5 and 4(b) have also been consistently rejected by lower courts. The District Court for the District of Columbia rejected a challenge to the constitutionality of Section 5 as reauthorized in 1982 in *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694 (D.D.C. 1983). The county claimed the 1982 extension was unconstitutional because the coverage formula was outdated. It pointed out that as of May 28, 1982, more than half of the age eligible population in South Carolina and Sumter County was registered, facts which it said "distinguish the 1982 extension as applied to them from the circumstances relied upon in *South Carolina v. Katzenbach*, *supra*, to uphold the 1965 Act." *Id.* at 707. The three-judge court rejected that argument, concluding that Section 5 "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent." *Id* at 707-08. In support of its conclusion, the court noted that "Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982." *Id.* at 707 n.13.

The same court rejected a challenge to the constitutionality of Section 5 in *Giles v. Ashcroft*, 193 F.Supp.2d 258, 261 (D.D.C. 2002). It declined to reexamine the coverage formula and concluded "[t]he Supreme Court's previous decisions upholding the Voting Rights Act have in effect foreclosed such challenges to Section 5." *Id.* at 263.

Likewise, in *Janis v. Nelson*, 2009 WL 5216902 at **7-8 (D. S.D. 2009), the District Court for the District of South Dakota rejected a challenge to the constitutionality of the 2006 extension of Section 5 as applied to Shannon County. The state argued that Section 5 was now outdated because Shannon County was experiencing high voter registration rates and above national average voter turnout rates. The court dismissed these arguments, concluding that "South Dakota's history of discriminating against Native Americans and the risk that such discrimination will increase in the absence of the preclearance requirement set forth in Section 5 of the Voting Rights Act compels the court to reject state defendants' argument that Section 5 of the Voting Rights Act is unconstitutional as applied to Shannon County." *Id.* at *8.

Nothing in the legislative history of the 2006 reauthorization provides a reason to depart from these precedents. To the contrary, the evidence considered by Congress in 2006 abundantly supports the extension of Section 5 as an appropriate tool to combat ongoing discrimination.

II. RECENT SECTION 5 OBJECTIONS FURTHER DEMONSTRATE THE CONTINUING NEED FOR SECTION 5.

The continued need for Section 5 and the appropriateness of Section 4(b)'s coverage are evident from recent objections involving Texas, South Carolina, and Florida.

1. In denying preclearance to Texas' 2011 Congressional plan, the court concluded it was both "retrogressive" and had been adopted "with discriminatory intent." *Texas v. United States*, 2012 WL 3671924 **14, 21 (D.D.C. Aug. 28, 2012). It based its finding of discriminatory intent upon numerous factors, including "Texas's history of failures to comply with the VRA," and the fact that

Black and Hispanic members of Congress "were excluded completely from the process of drafting new plans, while the preferences of Anglo members were frequently solicited and honored." *Id.* at **20-1.

The court denied preclearance to the Senate plan because it "was enacted with discriminatory purpose as to SD 10." *Id.* at *26. That purpose was evident from numerous factors, including that the "legislature departed from typical redistricting procedures and excluded minority voices from the process even as minority senators protested that section 5 was being run roughshod." *Id.*

The court denied preclearance to the House plan because it had a retrogressive effect. However, it concluded that "record evidence may support a finding of discriminatory purpose in enacting the State House Plan." *Id.* at *37. The evidence of discriminatory purpose included ignoring the dramatic growth in minority population, "a deliberate, race-conscious method to manipulate" the Hispanic vote, and the fact that "map drawers cracked VTDs [voter tabulation districts] along racial lines to dilute minority voting power." *Id.* at **36-7.

But for the presence of Section 5, these discriminatory plans would have gone into effect, confirming the judgment of Congress of the continuing need for preclearance in the covered jurisdictions.

2. In 2011, South Carolina enacted a new photo ID requirement for in-person voting. Following an objection by DOJ, the state filed an action for judicial preclearance. The experts for South Carolina and the defendants agreed that as of

April 2012, some 130,000 registered voters in the state lacked a photo ID acceptable under the new law, and those voters were disproportionately likely to be members of a racial minority. *South Carolina v. Holder*, 2012 WL 4814094 *20 (D.D.C. Oct. 10, 2012). The three-judge court denied preclearance of the photo ID requirement for the November 2012 election because there was not adequate time to implement it to ensure the law would not have a discriminatory effect on African American voters. It granted preclearance for subsequent elections but only because the state ultimately agreed during the protracted course of the litigation that the law "allows citizens with non-photo registration cards to still vote without a photo ID so long as they state the reason for not having obtained one." *Id.* at *1.

In a concurring opinion, Judge Bates underscored "the vital function that Section 5 of the Voting Rights Act has played [in the litigation]. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive." *Id.* at *21. The state's agreement to modify the ID law was driven by "South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act." *Id.* As Judge Bates concluded: "The Section 5 process here . . . demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* at *22.

3. Texas enacted a new photo ID requirement for in-person voting in 2011, and submitted it to the Department of Justice for preclearance under Section 5. While the submission was pending, and after an

objection by DOJ to South Carolina's photo ID law, Texas filed an action for judicial preclearance in the District Court for the District of Columbia. It subsequently added a claim that Section 5 as extended in 2006 was now unconstitutional. *Texas v. Holder*, 2012 WL 3743676 *4 (D.D.C. Aug. 30, 2012).

On August 30, 2012, the district court ruled that the photo ID requirement was in violation of Section 5. It concluded that Texas had failed to meet its burden of showing the law would not have a retrogressive effect upon minority voters (and thus found it unnecessary to reach the question of whether the law was also enacted with a discriminatory purpose). The court based its holding upon three basic facts: "(1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty. Accordingly, SB 14 will likely 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' *Beer*, 425 U.S. at 141." *Texas v. Holder*, 2012 WL 3743676 *26.

As in South Carolina, in the absence of Section 5, Texas' discriminatory photo ID requirement would have gone into effect, and the only way it could have been challenged was through costly and time-consuming litigation under Section 2 of the Voting Rights Act and the Constitution. The important role of Section 5 and its current needs are apparent.

4. Florida enacted HB 1355 in 2011 which, *inter alia*, reduced the number of days for early

voting from 14 days to eight days, required third-party voter registration organizations to submit voter registration applications within 48 hours of receipt instead of ten days and imposed a fine of $50 for each failure to comply with the deadline, and imposed fines up to $1,000 for failing to comply with other provisions. *Florida v. Unite States,* 820 F.Supp.2d 85, 88 (D.D.C. 2011); *Florida v. United States*, 2012 WL 3538298 *3 (D.D.C. 2012).

The proposed changes would have had a discriminatory impact on minorities in the five Florida counties covered by Section 5. In the 2008 election, for example, 52% of African American voters in the five covered counties cast an early in-person ballot, compared to only 28% of white voters. *Florida v. United States*, 2012 WL 3538298 *18. And according to the League of Women Voters, black and Hispanic voters registered with third party groups at twice the rate of other voters. *Voting Law's Sunday Punch*, Sarasota Herald-Tribune, June 15, 2011. available at http://www.heraldtribune.com/article/20110615/OPINION/110619722/-1/news?title=voting-law-s-sunday-punch. As a result of passage of HB 1355, it was reported that the League of Women Voters "has halted registration in Florida" because of the severe penalties imposed by the new law. *Id.*

Florida submitted the voting changes for judicial preclearance to the District Court for the District of Columbia. *Florida v. United States,* 2012 WL 3538298 *3. Florida filed an amended complaint on October 11, 2011, to include a claim that Section 5 as extended in 2006 was now unconstitutional. *Id.*

On May 31, 2012, the court in a related case, *League of Women Voters v. Browning*, 863 F.Supp.2d

1155, 1168 (N.D. Fla. 2012), issued a preliminary injunction against enforcement of the most controversial restrictions on third party voter registration activities. The court concluded that "the statute and rule impose burdensome record-keeping and updating requirements that serve little if any purpose, thus rendering them unconstitutional." *Id.* at 1158.

On August 16, 2012, the three-judge court issued a decision objecting to the reduction in days for early voting because "the State has failed to satisfy its burden of proving that these changes will not have a retrogressive effect on minority voters." *Id* *2. The state submitted a revised version of the third party voter registration provisions that responded to the objections made by the court in *League of Women Voters*, and on August 22, 2012, DOJ granted preclearance. *Florida v. United States*, CA No. 11-01428 (D.D.C.) (Doc. #162). The state also made changes to its early voting provisions, and on September 12, 2012, DOJ precleared 96 hours of early voting over an eight day period from 7:00 am to 7:00 pm. *Id.* Doc. #161.

The important role played by Section 5 in the adoption of new voting practices and procedures in Florida is apparent. Because of Section 5, the state was required to restructure its early voting procedures so that they would not have a retrogressive effect on minority voters. It was also required to abandon its discriminatory restrictions on third party voter registration activities. As Florida demonstrates, Section 5 continues to play an important and indispensable role in guarding against racial discrimination in voting in the covered jurisdictions.

The recent Section 5 objections involving Texas, South Carolina, and Florida have run the gamut from blatant discrimination to more subtle forms of minority voter suppression. But they all underscore the continuing need for Section 5.

CONCLUSION

Given the extensive record before it of continued discrimination in voting, Congress concluded with near unanimity that the extension of Section 5 of the Voting Rights Act was necessary "to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." 120 Stat. 577, Sec. 2(a). The right to vote is "a fundamental right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The considered judgment of Congress that this fundamental right should continue to be protected by Section 5 is supported by the legislative record and is entitled to deference by this Court. The decision of the court of appeals should be affirmed.

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT-INTERVENORS EARL CUNNINGHAM, HARRY JONES, ALBERT JONES, ERNEST MONTGOMERY, ANTHONY VINES, AND WILLIAM WALKER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the NAACP Legal Defense and Educational Fund, Inc. certifies that it is a non-profit corporation with no parent companies, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT.................................. 1

ARGUMENT 3

I. Congress carefully exercised its constitutional authority to remedy and deter racial discrimination in voting 3

II. Sections 4(b) and 5 remain justified by current needs 7

   A. The 2006 reauthorization record reveals widespread unconstitutional conduct in the covered jurisdictions 8

      1. Vote Dilution: old poison in new bottles 8

      2. Section 5 objections and Section 2 litigation are probative of unconstitutional conduct 10

   B. A state-by-state review of the evidence reveals substantial ongoing discrimination in the great majority of covered jurisdictions.. 12

      1. Alabama 13

         Circumvention and the *Dillard* litigation.. 16

        Shelby County 19
        Selma revisited 20
    2. Comparable persistent and adaptive discrimination in numerous covered States 23
        Texas 23
        Mississippi 26
        Louisiana 28
        Georgia 30
        South Carolina 33
    3. Significant voting discrimination also persists in additional jurisdictions 35
        North Carolina 35
        Arizona 37
        South Dakota 38
        Virginia 39
III. Section 5 is an "appropriate" response to the record of ongoing voting discrimination 41
    A. Case-by-case enforcement remains inadequate 41
    B. Current needs justify current burdens 43
IV. The geographic scope of preclearance is properly tailored to reach Alabama and the other covered jurisdictions 47
    A. The record of discrimination in Alabama forecloses Shelby County's facial challenge 47

B. Substantial differences persist between covered and non-covered jurisdictions........ 51
  1. Quantitative evidence........................... 51
    a. Successful Section 2 suits................. 52
    b. Racially polarized voting and racial appeals.................................. 54
  2. Shelby County's state-by-state argument is meritless........................... 56
  3. Qualitative evidence 58
C. The geographic scope remains rational in theory.. 60
CONCLUSION.. 63

TABLE OF AUTHORITIES

Cases

Page(s)

Allen v. State Board of Elections, 393 U.S. 544 (1969) 9, 42-43

Bartlett v. Strickland, 556 U.S. 1 (2009) 1

Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006) 39

Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976 (D.S.D. 2004) 39

Broadrick v. Oklahoma, 413 U.S. 601 (1973) .. 49-50

Brown v. Board of School Commissioners, 706 F.2d 1103 (11th Cir. 1983) 14-15

City of Boerne v. Flores, 521 U.S. 507 (1997) .... *passim*

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City of Rome v. United States, 446 U.S. 156 (1980) .... *passim*

County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983) 60

Dillard v. Baldwin County Board of Education, 686 F. Supp. 1459 (M.D. Ala. 1988) 17

Dillard v. City of Foley, 926 F. Supp. 1053 (M.D. Ala. 1995) 19

Dillard v. Crenshaw County, 748 F. Supp. 819 (M.D. Ala. 1990) 19

Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986) 16, 53

Dillard v. Town of North Johns, 717 F. Supp. 1471 (M.D. Ala. 1989) 17-18

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Gaston County v. United States, 395 U.S. 285 (1969) 62

Gunn v. Chickasaw County, 705 F. Supp. 315 (N.D. Miss. 1989) 27-28

Harris v. Siegelman, 695 F. Supp. 517 (M.D. Ala. 1988) 14

Heald v. District of Columbia, 259 U.S. 114 (1922) 48

Hunter v. Underwood, 471 U.S. 222 (1985) 14

Kowalski v. Tesmer, 543 U.S. 125 (2004) 48

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 9-10, 22, 24

Lopez v. Monterey County, 525 U.S. 266 (1999) .. 6, 7

Lucas v. Townsend, 486 U.S. 1301 (1988) 42

McCulloch v. Maryland, 17 U.S. 316 (1819) 5

Miller v. Johnson, 515 U.S. 900 (1995) 45, 46

Mississippi State Chapter, Operation PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991) 27

Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987) 27

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 46, 50-51, 57

New York v. Ferber, 458 U.S. 747 (1982) 48

Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) ....*passim*

Northwest Austin Municipal Utility District Number One v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008) 28, 40, 42, 54

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) 3

Reno v. Bossier Parish School Board, 528 U.S. 329 (2000) 9

Rogers v. Lodge, 458 U.S. 613 (1982) 10

Shaw v. Reno, 509 U.S. 630 (1993).................. 45, 46

South Carolina v. Katzenbach, 383 U.S. 301 (1966) ....*passim*

South Carolina v. United States, Civ. No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012)... 44

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Tennessee v. Lane, 541 U.S. 509 (2004) 5, 46, 49-50

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Texas v. United States, Civ. No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012).................. 24

United States v. Charleston County, 316 F. Supp. 2d 268 (D.S.C. 2003) 33, 34

United States v. Dallas County Commission, 850 F.2d 1433 (11th Cir. 1988) 20

United States v. Georgia, 546 U.S. 151 (2006) 51

United States v. McGregor, 824 F. Supp. 2d 1339 (M.D. Ala. 2011) 15

United States v. Raines, 362 U.S. 17 (1960).... 49, 50

United States v. Wurzbach, 280 U.S. 396 (1930) 50

Village of Arlington Heights v. Metropolitan Housing Corporation, 429 U.S. 252 (1977)........ 21

Warth v. Seldin, 422 U.S. 490 (1975) 48

White v. Regester, 412 U.S. 755 (1973) 55

Williams v. City of Dallas, 734 F. Supp. 1317 (N.D. Tex. 1990) 25

Young v. Fordice, 520 U.S. 273 (1997) 27

Docketed Cases, Court Filings, and Docket Entries

Alaska v. Holder, No. 1:12-cv-01376-RLW (D.D.C) 49

Order, *League of United Latin American Citizens v. Texas*, No. 06-cv-1046 (W.D. Tex. Dec. 5, 2006), ECF No. 8 24

Order, *League of United Latin American Citizens v. Texas*, No. 06-cv-1046 (W.D. Tex. Dec. 5, 2006), ECF No. 9 24

Plaintiffs' Motion to Dismiss, *League of United Latin American Citizens v. Texas*, No. 06-cv-1046 (W.D. Tex. Dec. 5, 2006), ECF No. 6 24

Proposed Consent Decree and Judgment, *New Hampshire v. Holder*, 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 21, 2012), ECF No. 10-1 61

Stipulation of Dismissal, *Arizona v. Holder*, No. 1:11-cv-01559-JDB (D.D.C. Apr. 10, 2012), ECF No. 41 49

Statutes

42 U.S.C. § 1973b(a)(7) 4

42 U.S.C. § 1973b(a)(8) 4

Pub. L. No. 109-246, 120 Stat. 578, § 2(b)(9) (2006) 4

Legislative Materials

H.R. Rep. No. 94-196 (1975) 10

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152 Cong. Rec. 14,217-14,321 (2006) .... *passim*

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25, 29, 30, 31, and Apr. 1, 1965) 57

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To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong. (Oct. 18, 2005) 45, 52, 55, 56

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The Continuing Need for Section 5 Pre-clearance: Hearing Before the Senate Committee on the Judiciary, 109th Cong. (May 16, 2006) 55, 59, 60, 63

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U.S. Department of Justice, *Section 4 of the VRA*, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Jan. 24, 2013)........ 61

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Voting Rights in the States, http://www.civilrights.org/voting-rights/vra/states.html (last visited Jan. 24, 2013) 59

SUMMARY OF ARGUMENT

No law better embodies our Constitution's aspiration for a "more perfect union" than the Voting Rights Act of 1965 ("VRA" or "Act"). This aspiration remains essential today because racial discrimination in voting is "not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes[.]" *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality opinion).

During its 2006 reauthorization review, Congress assembled a "virtually unprecedented legislative record," Pet'r Cert. Appendix ("PA") 114a, closely examining the evidence to determine whether Section 5 of the Act is still needed. This analysis was careful, detailed, and included a wide range of views. Congress received more testimony and information about the voting experience, both in and outside the jurisdictions covered by Section 5, than it had during any prior reauthorization.

This brief examines the 2006 Congressional record. That record establishes three key points, which make clear that Section 5's "current burdens" remain "justified by current needs." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

First, Section 5 remains essential to safeguard our democracy from racial discrimination. The record documents hundreds of examples of persistent unconstitutional efforts by covered States and localities to deny or abridge the right to vote on account of race, including widespread efforts to circumvent remedies imposed for prior VRA violations, which were only blocked by Section 5. *See* Part II, *infra*.

Second, case-by-case litigation under Section 2 of the VRA is time-consuming, costly, and permits racial discrimination to take root in the electoral process before it can be remedied. It was reasonable for Congress to conclude that Section 2 litigation is an inadequate response to the persistent and adaptive problem of racial discrimination in voting in certain parts of our country. *See* Part III, *infra*.

Third, racial discrimination in voting remains concentrated in the jurisdictions that have historically been covered by Section 5. The evidence of ongoing voting discrimination in Alabama specifically, and the covered jurisdictions generally, exceeds, by many orders of magnitude, that in the non-covered jurisdictions. Shelby County studiously avoids this evidence; instead, it selectively points to individual jurisdictions outside of Alabama that it asserts should not be covered. This argument fails for two reasons: (1) this Court's precedent makes clear that Congress need not act with surgical precision; and (2) settled rules of constitutional adjudication prohibit Shelby County from basing its challenge on the rights or interests of other jurisdictions that are not parties to this litigation. *See* Part IV, *infra*.

At its core, Shelby County's attack rests on the premise that, in reauthorizing Section 5, Congress presumed racial animus in voting persists even though it "has been hibernating for two generations." Br. 39. The record is to the contrary. It reveals that, notwithstanding undeniable progress, striking voting discrimination continues and is concentrated in the covered jurisdictions. Congress has power "to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain" in order to ensure "that opportunity is not denied on account of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

Our political freedoms are not self-sustaining; they must be maintained from one generation to the next. Section 5 makes this commitment tangible. Racial discrimination in voting poses a unique threat to our democracy. That threat can and must be met.

ARGUMENT

I. CONGRESS CAREFULLY EXERCISED ITS CONSTITUTIONAL AUTHORITY TO REMEDY AND DETER RACIAL DISCRIMINATION IN VOTING.

In evaluating whether (and, if so, where) the "blight of racial discrimination in voting" currently persists, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), Congress "approached its task seriously and with great care," PA13a (citations and internal quotation marks omitted). This assessment did not assume a need for Section 5's continuity but rather vigorously tested it. Over ten months in 2005-06, the House and Senate Judiciary Committees held a combined 21 hearings, receiving testimony from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—both for and against reauthorization, and compiled a 15,000 page record. PA291a.[1] Representative Sensenbrenner (R-WI), then-Chair of the House Judiciary Committee, described this record as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a Member of this body." 152 Cong. Rec. 14,230 (2006).

In the end, Congress determined—by the overwhelming vote of 390-33 in the House and 98-0 in the Senate[2]—that voting discrimination persists in the covered jurisdictions, and that without Section 5, "minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." Pub. L. No. 109-246, 120 Stat. 578, § 2(b)(9) (2006). Congress therefore extended Section 5 for 25 years. Sensitive to the possibility of changed circumstances, Congress further committed to reconsidering the continuing need for Section 5 in 15 years. 42 U.S.C. § 1973b(a)(7), (8).

As part of its review, Congress also concluded that other temporary provisions of the VRA—*i.e.*, Sections 6, 7, and 9, which authorized federal examiners to register voters in covered jurisdictions—were no longer necessary, given "[s]ubstantial progress" with respect to "minority citizens register[ing] to vote." H.R. Rep. 109-478, at 6 (2006).

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[1] Hearings for the 2006 reauthorization were held between October 18, 2005 and July 13, 2006. Specific hearings are cited herein by date.

[2] *See* 152 Cong. Rec. 14,303-304, 15,325 (2006).

We discuss the record of persistent voting discrimination in the covered jurisdictions, and its concentration in the covered compared to the non-covered jurisdictions, in Parts II.B and IV.B, *infra*. In light of this record, it was reasonable for Congress to determine that Section 5, and the provision in Section 4(b) defining Section 5's geographic scope, remain necessary to remedy and deter racial discrimination in voting. That is the end of the constitutional inquiry under this Court's precedents.

The Fourteenth and Fifteenth Amendments "empower[] 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce" them. *Nw. Austin*, 557 U.S. at 205 (citation omitted). Congress's "conclusions are entitled to much deference," *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), particularly with respect to measures addressing racial discrimination in voting. In enacting such measures, Congress acts "at the apex of its power" because voting discrimination implicates both the principal object of the Reconstruction Amendments—the prohibition against racial discrimination—and the need to protect the most fundamental right, the right to vote. PA19a; *see also Tennessee v. Lane*, 541 U.S. 509, 561, 564 (2004) (Scalia, J., dissenting) (recognizing that "racial discrimination by the States [is] distinctively violative of the principal purpose of the Fourteenth Amendment," and explaining, "I shall henceforth apply the permissive *McCulloch* [*v. Maryland*, 17 U.S. 316 (1819)] standard to congressional measures designed to remedy racial discrimination by the States").

This power to remedy racial discrimination in voting encompasses the authority to draw distinctions between States: "'The doctrine of the equality of States does not bar remedies for local evils,'" *Nw. Austin*, 557 U.S. at 203 (citation, alterations, and emphasis omitted), so long as the distinctions have "some basis in practical experience," *Katzenbach*, 383 U.S. at 331.

Therefore, although Section 5 "imposes substantial federalism costs," *Nw. Austin*, 557 U.S. at 202 (citations and internal quotation marks omitted), these costs are permissible because the Reconstruction Amendments are "grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). As this Court has stated, "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however[.]" *Lopez v. Monterey Cnty.*, 525 U.S. 266, 284-85 (1999); *see also id.* at 282 (citing *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

Of course, this Court must remain vigilant to ensure that Congress does not impermissibly interfere with state sovereignty by redefining the substance of the rights provided by the Reconstruction Amendments or by imposing unreasonable remedies. Here, Congress did neither. The 2006 reauthorization is valid enforcement legislation under *Northwest Austin*, *Boerne*, *Rome*, and *Katzenbach*. *See, e.g.*, *Boerne*, 521 U.S at 518 ("[M]easures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[] on the States.").

II. SECTIONS 4(B) AND 5 REMAIN JUSTIFIED BY CURRENT NEEDS.

This Court sustained the original enactment of Section 5 and its geographic scope because there was "evidence of actual voting discrimination in a great majority of the [covered jurisdictions]." *Katzenbach*, 383 U.S. at 329. "No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.* When the statute was reauthorized in 1970, 1975, and 1982, "[t]he coverage formula remained the same" (except for an expansion in 1975), and this Court upheld each reauthorization "against constitutional challenges, finding that circumstances continued to justify the provisions." *Nw. Austin*, 557 U.S. at 200 (citing, *inter alia*, *Rome*, 446 U.S. 156, and *Lopez*, 525 U.S. 266).

In 2006, Congress studied the problem of voting discrimination in the covered jurisdictions—as well as in the non-covered jurisdictions, *see* Part IV.B—more carefully than it had in 1965, or in any other reauthorization. As enacted in 1965, Section 5 covered three different categories of jurisdictions: three States (Alabama, Mississippi, and Louisiana), where courts had repeatedly found "substantial voting discrimination"; three others (Georgia, South Carolina, and portions of North Carolina), where there was "more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department"; and a "few remaining States and political subdivisions," where there was no clear evidence of discrimination in the record before Congress. *Katzenbach*, 383 U.S. at 329-30.

In 2006, as discussed below, Congress considered, in greater detail, the current conditions throughout the covered jurisdictions, and learned that substantial voting discrimination persists in the "great majority" of those areas. *Id.* at 329.

A. The 2006 reauthorization record reveals widespread unconstitutional conduct in the covered jurisdictions.

As the District Court explained, the "virtually unprecedented legislative record" reveals "extensive evidence of recent voting discrimination" in the covered jurisdictions. PA114a. Enforcement of the two core provisions of the VRA—(i) Section 5 objections or judicial preclearance denials, and (ii) Section 2 litigation—remedied or deterred nearly 1,300 discriminatory voting measures in the covered jurisdictions during the reauthorization period (1982 to 2006). *See* PA44a (noting over 620 objections, 25 judicial preclearance denials, and over 650 successful Section 2 suits). And voting discrimination, by its nature, reverberates broadly and deeply. A single invidious act can harm numerous citizens; therefore, a single Section 5 objection or Section 2 suit can vindicate the rights of "thousands of voters." PA208a.

Shelby County describes the voting discrimination in the record in misleading and sanitized terms, designed to minimize the gravity of this unique constitutional harm. Before turning to a state-by-state description of the record, we address Shelby County's key errors about the nature of the record.

1. Vote Dilution: old poison in new bottles

Most voting discrimination during the reauthorization period involved purposeful efforts to dilute the weight of minority citizens' votes. Shelby County maintains that Section 5 cannot be justified based on purposeful vote dilution evidence. *See* Br. 19-20. That position is contrary to the very purpose of the Reconstruction Amendments and the VRA.

When voting is polarized along racial lines, jurisdictions can implement electoral schemes, such as at-large elections, annexations, or racially gerrymandered districts, to discriminate against minority voters. This Court recognized over four decades ago that such "dilution of voting power" can "nullify [minority voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

Vote dilution has been described as "second-generation" discrimination to distinguish it from vote denial (*e.g.*, "first-generation" registration barriers). But there is nothing new about it. From Reconstruction to the present, covered jurisdictions have repeatedly turned to vote dilution to undermine minority gains in registration and turnout. *See* PA4a. These tactics "are in fact decades-old forms of gamesmanship," PA28a, a way of "pour[ing] old poison into new bottles," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 329, 366 (2000) (Souter, J., concurring in part, dissenting in part).

It is axiomatic that purposeful schemes to nullify votes cast by Black voters because they are Black (or of any other racial group) violate the Equal Protection Clause. *See, e.g.*, *League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 440

(2006); *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982).[3] As such, they are proper subjects of Congressional action to enforce the Reconstruction Amendments. Indeed, "Congress relied on evidence of these purposefully dilutive mechanisms in each of its prior reauthorizations of Section 5." PA252a. And this Court has expressly upheld the reauthorization of Section 5 on that basis. *See Rome*, 446 U.S. at 181 (sustaining the 1975 reauthorization because, although Black registration had risen dramatically since 1965, there remained a prevalence of "'measures [that] dilute increasing minority voting strength'") (quoting H.R. Rep. No. 94-196, at 10-11 (1975)).[4]

2. *Section 5 objections and Section 2 litigation are probative of unconstitutional conduct.*

The Court of Appeals recognized that "to sustain section 5, the record must contain evidence of a pattern of constitutional violations." PA33a (internal quotation marks and citation omitted). After "thoroughly scrutinizing the record," PA 48a, the Court of Appeals determined that, contrary to Shelby

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[3] The Fifteenth Amendment prohibits the denial or *abridgment* of the right to vote on account of race, making clear that purposeful vote dilution likewise violates the Fifteenth Amendment.

[4] Shelby County acknowledges that *Rome* considered the "'number and nature of [Section 5] objections'" to be "'reliable evidence of actual voting discrimination,'" Br. 27 (alteration in original) (citations omitted), but it ignores that "a substantial majority" of those Section 5 objections concerned vote dilution, *April 10, 1975 Hearing*, at 123-24 (Katzenbach).

County's assertions, Br. 35-36, the evidence from Section 5 objections and Section 2 litigation is highly probative of a widespread pattern of persistent unconstitutional conduct.[5]

At least 423 Section 5 objections between 1980 and 2004 were based, at least in part, on discriminatory intent. PA33a.[6] Congress's reliance on this evidence was entirely consistent with ***Katzenbach***, which held that Congress may properly rely on "evidence [of discrimination] adduced by the Justice Department," 383 U.S. at 330, and ***Rome***, which sustained the 1975 reauthorization based largely on evidence adduced through Section 5 objections, 446 U.S. at 181.

Successful Section 2 litigation is also probative of unconstitutional conduct. As the Court of Appeals explained, Section 2's "'results test' . . . requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence." PA37a (citations omitted). Moreover, "courts will avoid deciding constitutional questions if, as is the case in virtually all successful section 2 actions, the litigation can be resolved on narrower grounds." *Id.* (citations and internal quotation marks omitted).[7]

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[5] Shelby County mischaracterizes the decision below, claiming the Court of Appeals inappropriately deferred to Congress as to the probative value of this evidence. Br. 34. But Shelby County cites a section of the opinion addressing the deference owed Congress in the choice of remedies, not whether evidence is probative of unconstitutional conduct. *Id.*

[6] Such objections are almost always premised on affirmative evidence of discriminatory purpose, and not the failure by submitting jurisdictions to disprove intent. *See generally* Part II.B, *infra*. Although Shelby County contends that these objections were based on DOJ's improper "maximization" approach to minority representation, Br. 35, a review of the Section 5 objection letters since 1982 reveals that a very small number—almost exclusively from the early 1990s—were even arguably based on a maximization theory. *See October 25, 2005 (History) Hearing*, at 225-2595.

B. A state-by-state review of the evidence reveals substantial ongoing discrimination in the great majority of covered jurisdictions.

The record establishes that discrimination continues to infect the democratic process in the covered jurisdictions and that this discrimination resists case-by-case efforts at remediation. Shelby County's assertions that there is no evidence of covered jurisdictions attempting to circumvent a previous voting remedy by implementing a new discriminatory tactic, *see* Br. 20, 33, are false. The record is replete with such evidence, including over a dozen circumvention examples in Alabama alone. This discrimination by state and local actors demeans the liberty and equality rights of full citizenship, and, therefore, corrodes our democracy.

A representative, but not exhaustive, selection of the many "modern instances" of "substantial voting discrimination presently occur[ing] in certain sections of the country" follows. *Boerne*, 521 U.S. at

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[7] Congress also considered other sources of evidence that the Court of Appeals deemed probative of purposeful discrimination. *See* PA35a-36a (more information requests); *id.* at 38a-40a (federal observers); *id.* at 40a-41a (Section 5 enforcement litigation).

530; *Katzenbach*, 383 U.S. at 328. The overwhelming majority of these examples come from the Congressional record; we also include a sample of voting discrimination that has occurred since the Act's reauthorization. Because this case arises out of Alabama, and because the record of ongoing discrimination in that State is a sufficient basis for rejecting Shelby County's facial challenge to Section 5's geographic scope, *see* Part IV.A, *infra*, we begin there.

1. Alabama

Alabama undeniably "earned its spot on § 5's original coverage list." Br. of Alabama as Amicus Curiae in Supp. of Pet'r, at 2.

The record before Congress in 2006 makes clear that voting discrimination persists in Alabama. During the reauthorization period, nearly 240 discriminatory voting laws in Alabama were blocked by Section 5 objections (46) or remedied by Section 2 litigation (192). *July 13, 2006 Hearing*, at 367, 371; *March 8, 2006 Hearing*, at 251. Alabama had the highest rate of successful Section 2 suits per resident of any State in the country. PA53a. White polling officials used racial epithets to describe Black voters in the presence of federal observers, including a poll worker who said: "'[N]iggers don't have principle enough to vote and they shouldn't be allowed.'" PA243a (citation omitted); *see also* PA194-95a. African Americans constitute over a quarter of Alabama's population,[8] yet Alabama has no Black statewide elected officials. Nearly all Black officials are elected from majority-minority districts. *July 13, 2006 Hearing*, at 388-89.

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[8] *See* U.S. Census Bureau, *State Quick Facts*, *Alabama*, http://quickfacts.census.gov/qfd/states/01000.html.

This Court twice found purposeful racial discrimination in Alabama during the reauthorization period. In *City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987), the Court affirmed the district court's finding that Pleasant Grove engaged in "racially motivated" annexations—meaning the City annexed areas that had or were likely to have white voters, but refused to annex areas with Black voters. This was not an isolated incident but consistent with the City's "unambiguous opposition to racial integration." *Id.* at 465.

Two years earlier, this Court invalidated a provision of Alabama's Constitution, which disfranchised citizens for misdemeanors "involving moral turpitude," and had been applied to bar plaintiffs from voting for life because they had presented a bad check. *Hunter v. Underwood*, 471 U.S. 222, 224 (1985). Writing for the Court, then-Justice Rehnquist explained that the "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233.

Other courts found intentional discrimination in voting in Alabama during the reauthorization period. *See, e.g.*, *Harris v. Siegelman*, 695 F. Supp. 517, 525 & n.6 (M.D. Ala. 1988) (holding that Alabama's appointment of poll workers unconstitutionally discriminated against Blacks, and noting compelling evidence that "white poll officials continue to harass and intimidate black voters"); *Brown v. Bd. of*

Sch. Comm'rs, 706 F.2d 1103, 1106-07 (11th Cir. 1983) (finding the Alabama legislature intentionally discriminated against Black voters in Mobile County).

Purposeful discrimination by Alabama lawmakers persists to the present day. In *United States v. McGregor*, 824 F. Supp. 2d 1339, 1347 (M.D. Ala. 2011), the court found "compelling evidence that political exclusion through racism remains a real and enduring problem in [Alabama]," "entrenched in the high echelons of state government." The court rejected testimony by several white Alabama state legislators as lacking credibility, finding they were motivated by "pure racial bias" as they sought to "reduc[e] African-American voter turnout." *Id.* at 1345. Several white legislators and their interlocutors were caught on tape comparing Black voters to "illiterate[s]" and "Aborigines." *Id.*

Section 5 objections have revealed a similar pattern of discriminatory intent in Alabama. In 1991, the Department of Justice ("DOJ") objected to Alabama's Congressional redistricting plan. The State, which had also drawn a Section 5 objection during the previous redistricting cycle, failed to provide a plausible nonracial explanation for fragmenting concentrated Black populations. The evidence indicated that the "underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit black voting potential to a single district." *October 25, 2005 (History) Hearing*, at 385.

Many other Section 5 objections blocked racial gerrymanders and other measures designed to segregate voters along racial lines. *See, e.g.*, *id.*, at 319-20 ("racially based" deannexation promulgated by the Alabama legislature for the City of Prichard was "specially designed to restrict participation . . . to white voters"); *id.* at 330-31 (Roanoke's districting plan "essentially segregates the City into two parts by creating an overwhelmingly white three-member district and a heavily black two-member district"); *id.* at 341 (Mayor of Dothan acknowledged that a districting plan was rejected because there was a "'strong feeling in the white community'" that it "would allow blacks too much of an electoral opportunity").

Circumvention and the Dillard *litigation*

One of the most significant voting developments in Alabama during the reauthorization period was the *Dillard* litigation. That litigation, and the response to it, is a microcosm of the defiance that persists in Alabama, and in the covered jurisdictions more broadly.

In *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1357 (M.D. Ala. 1986), the court recognized that "[f]rom the late 1800s through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." These barriers included vote dilution schemes, which were enacted as early as the 1870s when Black men temporarily secured the right to vote. *See id.* at 1358. They became even more pervasive in the middle of the twentieth century, when, in the wake of this Court's ban on all-white primaries in 1944, and federal civil rights laws enacted in the 1950s and 1960s, many counties—working in conjunction with the Alabama legislature—adopted at-large elections intended to dilute Black enfranchisement. *Id.* at 1356-57.

When Black citizens brought suit in the 1980s, purposefully discriminatory at-large elections operated throughout Alabama, and "continue[d] . . . to have their intended racist effect." *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1468 (M.D. Ala. 1988). The *Dillard* litigation ultimately encompassed over 180 cities, counties, and school boards employing at-large election systems tainted by racially discriminatory purpose. *July 13, 2006 Hearing*, at 373; *see also Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. at 1461. Over 170 jurisdictions ultimately entered consent decrees agreeing to adopt new methods of election. *July 13, 2006 Hearing*, at 373-74.

Over the next twenty years, however, numerous jurisdictions, including Shelby County and one of its largest municipalities, attempted to circumvent these decrees.

In one notorious example, prior to the first election under the new voting system in North Johns, the Town's white mayor helped every candidate other than the two Black candidates comply with new filing requirements. *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1473-75 (M.D. Ala. 1989). In seeking assistance from the town clerk, one Black candidate was referred to an office that had no forms and whose staff suggested that he did not have to file. *Id.* at 1475. After the two Black candidates won, the mayor refused to swear them in, and the town clerk sued to prevent them from taking office. *Id.* The district court found that "North Johns . . . intentionally discriminated against [the Black candidates] because of their race." *Id.* at 1476.

Like North Johns, the City of Greensboro conceded that its at-large elections were unlawful as part of the *Dillard* litigation. *See July 13, 2006 Hearing*, at 263-64. While the implementation of a remedial plan was pending, and after the 1990 Census revealed that the City had become majority Black, Greensboro attempted to circumvent the federal decree with a new discriminatory plan. To ensure Black voters would be limited to electing only two of five council members, the City "fragmented black population concentrations in order to lower the black percentage in [the swing council district]." *October 25, 2005 (History) Hearing*, at 395; *July 13, 2006 Hearing*, at 264. Two separate objections in 1992 and 1994 were required to block this quota-based discrimination. *October 25, 2005 (History) Hearing*, at 394, 412. In a separate incident in 1992, poll officials in Greensboro attempted to close a polling place to prevent Black workers at a local fish plant from voting before polls closed. *July 13, 2006 Hearing*, at 264; *see also id.* at 379-80 (describing efforts by Chilton County, the home of an active Ku Klux Klan, to circumvent *Dillard* in 2003).

Other jurisdictions in Alabama attempted to circumvent *Dillard* through racially selective annexations. After *Dillard* litigation invalidated the City of Foley's at-large elections, the City drew objections in 1989 and 1993 for its "practice of annexing areas that can be expected to contain predominantly white population, while discouraging the annexation of areas of predominantly black population." *October 25, 2005 (History) Hearing*, at 406; *see also Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995) (approving new consent decree prohibiting racially selective annexations). Similarly, a combination of a *Dillard* consent decree and two Section 5 objections in the early 1990s remedied racially selective annexations promulgated by Valley, an "irregularly shaped" city which carved white residential areas out of Chambers County. *October 25, 2005 (History) Hearing*, at 358, 364-65, 367-68; *July 13, 2006 Hearing*, at 376-77; *see also id.* at 376 (similar racially selective annexations in the City of Camden).

Shelby County

For decades, Shelby County relied on at-large elections to minimize Black political influence, and it initially denied Section 2 liability in the face of *Dillard* litigation. After trial, it settled by instituting, among other things, single-member districts. *Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819, 821-22 (M.D. Ala. 1990). Shortly thereafter, the County Commission attempted to abandon the settlement agreement, but the court adopted a special master's recommendation approving it. *Id.* Six of the County's municipalities, including the City of Calera, likewise abandoned at-large elections as a result of *Dillard* consent decrees. Joint Appendix ("JA") 41a.

More recently, in 2008, Section 5 prevented Calera from circumventing *Dillard*. The City submitted a redistricting plan that eliminated the sole majority-Black district, and it also conceded that it had already adopted 177 annexations without seeking preclearance. PA147a. DOJ interposed an objection, but the City disregarded it and held an election based on the unprecleared changes. The election resulted in the defeat of the sole Black member of the City Council. PA148a. DOJ then brought a Section 5 enforcement action, which resulted in a consent decree that finally remedied Calera's circumvention of the *Dillard* decree. *Id.* Defendant-Intervenors are five Black ministers from Shelby County and an elected official who represents the district eliminated and ultimately restored by virtue of Section 5.

Another Shelby County jurisdiction, the City of Alabaster, also engaged in repeat violations, drawing an objection for its discriminatory annexations in 2000, after Section 5 blocked similar efforts in the 1970s. *July 13, 2006 Hearing*, at 386 n.98; *see also October 25, 2005 (History) Hearing*, at 435-37.

Selma revisited

Attempts to evade case-by-case remedies were not limited to *Dillard* jurisdictions. In separate litigation, federal courts found that the at-large election schemes in Dallas County violated Section 2. *United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433, 1435-37 (11th Cir. 1988) (referring to prior opinions). The Dallas County seat is Selma, which is recognized as the birthplace of the Voting Rights Act.

Dallas County repeatedly attempted to circumvent the court's rulings. First, in 1986, without an opportunity for public comment, the County promulgated a districting plan for its County Commission that fragmented cohesive Black neighborhoods and split an existing precinct. DOJ interposed an objection, explaining "the circumstances here suggest that the county commission's actions were motivated, at least in significant part, by racial considerations." *October 25, 2005 (History) Hearing*, at 311; *see also id.* at 328 (objection to County Board of Education redistricting plan, which "concentrate[d]" Black voters into one supermajority-minority district to "minimize[] the opportunity for blacks to participate equally in the political process").

Undeterred, the County next implemented a voter purge which, had it not been blocked by Section 5, would have allowed citizens to be disfranchised "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." *Id.* at 356. Citing the factors for intentional discrimination from *Village of Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), DOJ rejected this discriminatory purge. *October 25, 2005 (History) Hearing*, at 356.

Finally, after the 1990 Census revealed that the Black population of Dallas County increased from 54.5% to 57.8% and the Black population of Selma increased from 52.1% to 58.4%, the County and City attempted to impose racial quotas to prevent Blacks from electing candidates of choice to a majority of seats on governing bodies. *July 13, 2006 Hearing*, at 378-79. Between 1992 and 1993, DOJ interposed five objections, two for the City Council and three for the County School Board, to stop these quotas. *October 25, 2005 (History) Hearing*, at 388-93, 397-405. DOJ determined that the City was "motivated by the desire to confine black population concentrations into a predetermined number of districts, and thus ensure a continuation of the current white majority on the council." *Id.* at 392. This concerted effort to abridge the voting rights of the Black majority in Selma and Dallas County illustrates that voting discrimination is often particularly intense as minority voters are poised to make inroads in elected bodies. *See also*, *LULAC*, 548 U.S. at 440; *infra* at 27 (discussing Kilmichael, Mississippi).

Similar to Dallas County, Tallapoosa County repeatedly failed to comply "with legal requirements (constitutional, statutory, and court mandated) designed to protect the right to vote and to ensure minority voters . . . an equal electoral opportunity," prompting a Section 5 enforcement action, a Section 5 objection, and Section 2 litigation. *October 25, 2005 (History) Hearing*, at 429. These measures finally brought about, in 1994, a Section 2 consent decree that led to the election of the first Black County Commissioner in the twentieth century. *Id.* at 430. But in 1998, Tallapoosa County flouted the consent decree and adopted a new plan "calculated to minimize participation by the public in general, and the black community in particular." *Id.* at 431.

This pattern was repeated in other areas, including Marengo County, *id.* at 308 (Section 5 objection to attempts to circumvent a Section 2 remedy by adopting "contorted" districts), and Greene County, *id.* at 294-96 (objection to circumvention of a court-ordered remedy).

The experience in Alabama, and Shelby County itself, demonstrates that Section 5 has been a necessary engine of progress in the face of tangible and persisting threats to minority voting. Section 5 is not an anachronism, but an essential contemporary safeguard.

2. *Comparable persistent and adaptive discrimination in numerous covered States*

Beyond Alabama, the record before Congress demonstrates that voting discrimination remains an "insidious and pervasive evil" in other covered States. *Katzenbach*, 383 U.S. at 309. In five of the eight other wholly-covered States, Section 5 objections and Section 2 litigation blocked over 100 discriminatory voting laws per State. Much of the prohibited conduct involved a pattern of successive discriminatory acts, which, but for the Section 5 remedy, would have abridged the right to vote of hundreds of thousands of citizens at the state or local level.

Texas

Between the 1982 reauthorization and 2006, the VRA blocked more than 300 discriminatory voting laws in Texas (105 objections, *March 8, 2006 Hearing*, at 272; and 206 successful Section 2 actions, *id.* at 251). Violations occurred repeatedly at both the state and local level, with Texas and 28 of its counties drawing multiple Section 5 objections. *Voting Rights in Texas: 1982-2006* ("Texas Report"), at 16 (June 2006), *available at* http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf.

Texas has drawn an objection to each of its decennial State House redistricting plans, and in most cycles at least one additional statewide plan, since it became covered in 1975. *See October 25, 2005 (History) Hearing*, at 2177-80; Texas Report at 48. In 2003, Texas engaged in a mid-decade Congressional redistricting. Just as Latinos in one Congressional district "were poised to elect their candidate of choice," Texas "took away the Latinos' opportunity because Latinos were about to exercise it." *LULAC*, 548 U.S. at 438, 440. This Court noted that Texas's plan "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440.

Section 5 thwarted Texas's subsequent efforts to evade the Section 2 remedy adopted as a result of *LULAC*. In 2006, Texas attempted to curtail early voting in the *LULAC* remedial district, but it was blocked by a Section 5 enforcement action. *See* Orders and Pls.' Mot. to Dismiss, *LULAC v. Texas*, No. 06-cv-1046 (W.D. Tex. Dec. 5, 2006), ECF Nos. 6, 8, 9. Last year, a three-judge court unanimously concluded that Texas's latest Congressional redistricting plan and its State Senate plan were "enacted with discriminatory purpose," *Texas v. United States*, Civ. No. 11-1303, 2012 WL 3671924, at *18, *26 (D.D.C. Aug. 28, 2012), based on, *inter alia*, evidence that Texas once again sought to prevent Latino voters from electing a candidate of their choice in the *LULAC* remedial district. The court also found evidence that Black and Latino representatives were excluded from the decisionmaking process, and that majority-minority districts were stripped of their economic centers and district offices, whereas "[n]o such surgery was performed on" majority-white districts. *See id.* at *16, *19-*21.

Cities in Texas have frequently used racial gerrymanders and annexations to discriminate against minority voters. In *Williams v. City of Dallas*, 734 F. Supp. 1317, 1409 (N.D. Tex. 1990), for example, the court held that the City's districting plan "intentionally packs and cracks the African-American population with the effect of diluting their vote for the purpose of maintaining the political power of whites." In a 1997 objection, DOJ explained that the City of Webster's "annexation [policies] appear to have been tainted . . . by an invidious racial purpose": The City manager "actually stated that the reason Block 101B would not be annexed was because of its ethnic composition." *October 25, 2005 (History) Hearing*, at 2492, 2490.

The City of Seguin was more creative. It adopted an eight-member districting plan in response to three separate lawsuits between 1978 and 1993, which challenged its discriminatory methods of election. After the 2000 Census revealed that Latinos had become a majority in five of eight districts, the City proposed dismantling a Latino-majority district. When DOJ indicated preclearance was unlikely, the City withdrew its request but, without seeking preclearance, manipulated the filing period to prevent any Latino/a candidate from competing in the district. A Section 5 enforcement action was required to block this blatant discrimination. Texas Report at 30.

The City of Freeport and the Haskell Consolidated School District (covering three counties) provide additional examples of circumvention. DOJ interposed objections in 2002 and 2001 respectively when these jurisdictions attempted to return to at-large elections, which they had abandoned in settling Section 2 litigation. *October 25, 2005 (History) Hearing*, at 2528-30; *id.* at 2513-17; *see also id.* at 2300-03 (1991 objection where, shortly after a Section 2 suit forced a water district in Lubbock County to abandon at-large elections, the district enacted a polling place change requiring voters in predominately Black neighborhoods to travel to remote venues, and it proffered pretextual reasons for the change).

Mississippi

In Mississippi, more than 175 discriminatory voting laws were blocked between 1982 and 2006 (112 objections, *March 8, 2006 Hearing*, at 1711; and 67 successful Section 2 cases, *id.* at 251). No Black candidate has been elected to statewide office since Reconstruction in Mississippi, which has the highest Black population percentage in the country. *Id.* at 1711, 1717. Twenty-five Mississippi counties drew repeated Section 5 objections during the reauthorization period, including seven counties with four or more objections. *Id.* at 1714.

Discrimination and circumvention have been blatant at the state level. In 1991, Mississippi's House and Senate redistricting plans drew Section 5 objections, because, *inter alia*, the redistricting process was "characterized by overt racial appeals." *October 25, 2005 (History) Hearing*, at 1412. Legislators referred to one plan on the House floor as the "black plan" and, privately, the "nigger plan." *March 8, 2006 Hearing*, at 1718-19.

That same year, the Fifth Circuit affirmed a Section 2 remedy ending Mississippi's dual-registration requirement for municipal and non-municipal elections. The requirement had been adopted nearly 100 years earlier as part of the "Mississippi Plan" to deny Black people the right to vote; it was amended and reenacted in 1984. The law still had its intended effect. Many Blacks—who disproportionately lacked access to automobiles or telephones—were not registered because of the burdens of the dual registration system. *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1249-55 (N.D. Miss. 1987), *aff'd sub nom.*, *Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991). In 1995, Mississippi *again* tried to establish a dual registration system, and it refused to seek preclearance until ordered by this Court. *Young v. Fordice*, 520 U.S. 273 (1997). This effort to evade a Section 2 remedy, which had been "couched in racially charged terms," was blocked by Section 5. *October 25, 2005 (History) Hearing*, at 1603.

Intentional discrimination and circumvention have also been common at the local level in Mississippi. In Kilmichael, the white mayor and all-white Board of Aldermen sought to take the extraordinary step of cancelling elections in 2001, just as Blacks, who following the 2000 Census had become a majority of the City, were on the verge of electing a candidate of choice for the first time. A Section 5 objection prevented Kilmichael from doing so. *Id.* at 1616-19.

Elsewhere in Mississippi, a court determined that Chickasaw County's redistricting plan—which was drawn so that all districts were majority-white—

violated Section 2. *Gunn v. Chickasaw Cnty.*, 705 F. Supp. 315, 322, 324 (N.D. Miss. 1989). The County then attempted three separate times—in 1990, 1993, and 1995—to circumvent the Section 2 decree, with new discriminatory plans aimed at the same goal of minimizing Black political influence. Section 5 objections were necessary each time. *March 8, 2006 Hearing*, at 1715-16.

Similar events took place in Oxford, *October 25, 2005 (History) Hearing*, at 1609 (Section 5 objection blocking 1998 redistricting plan, annexation, and cancelation of an election, with the "purpose [of] maintain[ing] and strengthen[ing] white control of a City on the verge of becoming majority black"), and McComb, *id.* at 1613-14 (objection blocking a 1999 polling place change in this largely segregated City with no readily available public transportation, which would have forced minority voters to walk over four miles).

Louisiana

Over 110 discriminatory voting laws were blocked in Louisiana during the reauthorization period (96 objections, *March 8, 2006 Hearing*, at 1611; and 17 successful Section 2 cases, *id.* at 251). Section 5 blocked more than half (33) of Louisiana's 64 parishes from engaging in serial voting rights violations. *Id.* at 1612.

As of 2006, "not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 251 (D.D.C. 2008) (citation omitted). After the

2000 Census, Louisiana officials established a quota for white representation in their House plan, intentionally eliminating a majority-Black district on the theory that "white voters in Orleans Parish were entitled to proportional representation, though African Americans elsewhere were not." *March 8, 2006 Hearing*, at 1607-08, 1621-22. Ten years earlier, Louisiana's House redistricting plan selectively applied redistricting criteria with the same "purpose of minimiz[ing] the voting strength of a minority group." *Id.* at 1613.

Louisiana also discriminated against voters of color at the local level. For example, in 2001, Louisiana enacted legislation facilitating a redistricting plan for the St. Bernard Parish School Board. A court found that the plan, which eliminated the only district where Black voters had an opportunity to elect a candidate of choice, violated Section 2. *Id.* at 1618 (citing *St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd.*, No. 02-2209, 2002 U.S. Dist. LEXIS 16540 (E.D. La. Aug. 28, 2002)). In the course of the litigation, a white state senator, Lynn Dean, the highest ranking public official in the Parish who was involved in the voting change, testified that he uses the term "nigger," and "ha[d] done so recently." *Id.*, at 1618; *see also St. Bernard Citizens for Better Gov't*, 2002 U.S. Dist. LEXIS 16540, at *33. Louisiana also drew eight objections between 1988 and 1994 related to its efforts to implement at-large or multi-member elections for circuit court judges in numerous parishes, and it even held at-large elections for judgeships without seeking preclearance. *See October 25, 2005 (History) Hearing*, at 853-54, 897-98, 904-05, 911-916, 926-46, 953-55, 1000-02, 1037-40, 1086-89, 1095-97.

The reauthorization record likewise documents repeated attempts by local governments in Louisiana to employ racial gerrymanders and other measures designed to segregate voters on the basis of race. For example, in 2002, Section 5 objections prevented DeSoto Parish and the City of Minden from enacting redistricting plans that officials admitted were intentionally designed to limit or reduce Black political influence. *Id.* at 1157-60 (DeSoto Parish); *id.* at 1150-52 (Minden). In Shreveport, six objections between 1994 and 1997 were required to prevent racially selective annexations that would have ensured that the City remained majority-white. *Id.* at 1086-89, 1113-18, 1123-30. Similarly, four objections were required between 1991 and 1994 to block East Carroll Parish's attempts to pack African-American voters—who constituted a majority of the Parish—into a minority of school board districts. *Id.* at 985-86, 1013-1015, 1032-33, 1083-85.[9]

Georgia

More than 150 discriminatory voting laws in Georgia were blocked during the reauthorization period (including 91 objections, ***March 8, 2006 Hearing***, at 1502; and 69 successful Section 2 cases, *id.* at

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[9] For a fuller description of the extent and nature of voting discrimination in Louisiana, which was presented to Congress, see *Voting Rights in Louisiana: 1982-2006* (Mar. 2006), *available at* http://www.protectcivilrights.org/pdf/voting/LouisianaVRA.pdf. *See also* n.20, *infra.*

251). In addition, 11 counties were successfully sued multiple times under Section 2. *Id.* at 1524.

In Georgia, where the chair of the state legislature's redistricting committee infamously told his colleagues, "I don't want to draw nigger districts," PA31a (citations and internal quotation marks omitted), numerous counties sought to use racial quotas to dilute Black voting power; Section 5 stopped them. For example, in 2001, the City of Albany adopted "explicit redistricting criteria . . . 'maintain[ing] ethnic ratios,'" intended to "limit black political strength in the city." *October 25, 2005 (History) Hearing*, at 847 (citation omitted).

Similarly, Augusta drew a Section 5 objection in 1987, because its "annexation policy center[ed] on a racial quota system requiring that each time a black residential area [was] annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage." *Id.* at 642. Augusta went so far as to conduct door-to-door surveys to identify white residential areas for annexation. *See id.* The next year, the City settled Section 2 litigation and adopted a new method of election. *March 8, 2006 Hearing*, at 1516 n.78.

Two more Section 5 objections, however, were necessary to prevent the City from circumventing the settlement, through: (1) a consolidation with the majority-white surrounding county, where the "primary . . . motivation" was to respond to "the prospect that the City, which has a black population majority, finally would have an election system that fairly reflected black voting strength," *October 25, 2005 (His-*

tory) Hearing, at 662; and (2) a "calculated [effort] to take advantage of [a voting schedule] that would suppress the black turnout," *id.* at 655. In 2012, yet another attempt to reschedule elections in Augusta-Richmond to a date with expected low Black turnout led to a DOJ objection, because the "pretextual reasons" for the change suggested that it was "adopted, at least in part, with a discriminatory purpose." DOJ, Objection Ltr., Dec. 21, 2012, http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122112_ga.pdf.

Similar events transpired in the City of Millen. After litigation required Millen to abandon at-large elections, *March 8, 2006 Hearing*, at 1524 n.120, the City proposed delaying the election in a majority-Black City Council district, leaving that district unrepresented for two years, *October 25, 2005 (History) Hearing*, at 744. The City then proposed moving a polling place to an inaccessible location in a predominantly white neighborhood outside the City limits. DOJ concluded that the selection of the new polling location "appears to be designed, in part, to thwart recent black political participation." *Id.* at 816.

Section 5 prevented many other intentionally discriminatory measures throughout Georgia, in places such as Webster County, *id.* at 831 (2000 objection blocking school board's attempt to redraw districts, after an election in which voters elected a third Black board member for the first time, because the board's reasons were "merely pretexts for intentionally decreasing the opportunity of minority voters to participate in the electoral process"), and Effingham

County, *March 8, 2006 Hearing*, at 1508 (1992 objection blocking County from adding at-large seats to a single-member district plan, which previously had been adopted in response to a Section 2 lawsuit, where nonracial explanations were "tenuous"). And Georgia itself was blocked three times in 1990-1991 from switching to at-large elections for superior court judges, where "substantial information . . . suggest[ed a] racially discriminatory purpose." *October 25, 2005 (History) Hearing*, at 675; *see also id.* at 684-86, 695-97.

South Carolina

More than 100 discriminatory voting laws were blocked in South Carolina during the reauthorization period (74 objections, *March 8, 2006 Hearing*, at 272; and 33 successful Section 2 cases, *id.* at 251). Once again, Section 5 was needed to prevent repeated attempts to undermine Section 2 remedies.

In *United States v. Charleston County*, 316 F. Supp. 2d 268, 286-89 n.23 (D.S.C. 2003), the court found that Charleston County's at-large system for County Council elections violated Section 2, and it also made several findings of intentional discrimination concerning "intimidation and harassment" of Black voters by poll workers. The following year, DOJ objected under Section 5 when South Carolina enacted legislation for Charleston County School Board elections, which adopted "'an exact replica'" of the at-large system for the County Council that had been found to violate Section 2. PA237a (citation omitted). *March 8, 2006 Hearing*, at 175-76. This was the culmination of a series of efforts by the County's state legislative delegation to alter the method of election for, or reduce the powers of, the Charleston County School Board after the 2000 election resulted in Black people gaining a majority of seats on the Board for the first time in history. *Charleston Cnty.*, 316 F. Supp. 2d at 290 n.23. Notably, although the earlier Section 2 litigation lasted several years and cost millions of dollars, Section 5 brought a prompt end to this brazen effort at circumvention to again abridge the voting rights of Charleston County's Black citizens. *March 8, 2006 Hearing*, at 176.

Similarly, after a successful Section 2 action challenging at-large districts for the Spartanburg County Board of Education, and following the first-ever election of Black candidates to that body, the state legislature voted to disband the Board and devolve its powers to an appointed panel. DOJ objected, as "[t]he sequence of events . . . g[ave] rise to an obvious inference of discriminatory purpose." *October 25, 2005 (History) Hearing*, at 2042.

There were many other instances of intentional discrimination relating to local government bodies, including in: Union County, where the circumstances of a 2002 redistricting plan promulgated by the state legislature for the County "implie[d] an intent to retrogress," *id.* at 2086; the Town of North, where, in 2003, "race appear[ed] to be an overriding factor in how the town responds to annexation requests," *March 8, 2006 Hearing*, at 1954-55 (citation and internal quotation marks omitted); and Marion and Lee Counties, both of which placed quotas in 1993 on how many Black residents could be included in districts that would determine majority control of government bodies, *October 25, 2005 (History) Hearing*, at 1992-95, 1996-99.

Other South Carolina jurisdictions requiring a combination of Section 2 (or constitutional) litigation and at least one Section 5 objection or enforcement action to remedy discrimination, included: Hemingway (most recent objection in 1994); Orangeburg (1992); Town of Johnson (1992); and Richland County (1988). *See March 8, 2006 Hearing*, at 1970, 1033-39, 1015-17, 1963-64.

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In sum, the record demonstrates that hundreds of discriminatory acts took place during the reauthorization period—not only in Alabama but also in each of five other fully-covered States. A substantial number of these instances of discrimination reflected serial violations of minority voting rights—often at precisely the moment when minority voters were on the verge of exercising political power.

3. Significant voting discrimination also persists in additional jurisdictions.

Congress also received substantial evidence of ongoing discrimination in most of the remaining covered jurisdictions—indeed, significantly more than the "fragmentary" evidence of discrimination for several States reviewed by this Court in *Katzenbach*, 383 U.S. at 329-30. Again, the record in each of these States reveals serial efforts to prevent minority citizens from full participation in our democracy.

North Carolina

Over 75 discriminatory voting laws were blocked in North Carolina's covered counties between 1982 and 2006 (43 objections, *March 8, 2006 Hearing*, at 270-73, and 36 successful Section 2 cases, *id.* at 1762-65).

"As black voter registration increased [in North Carolina], other official forms of discrimination were enacted." *Id.* at 1756. Indeed, during the reauthorization period, DOJ interposed four separate discriminatory-purpose objections to method-of-election changes adopted by North Carolina for covered counties. *See October 25, 2005 (History) Hearing*, at 1711-13, 1736-40, 1772-73, 1787-90.

One of those counties, Pitt County, later entered a consent decree resolving a separate Section 2 challenge to its method of election. But just last year, DOJ interposed a discriminatory purpose objection to a new state law changing the method of election for the Board of the Pitt County School District, citing the "County's history of challenges . . . under the Voting Rights Act" and noting that the "manner in which the change was adopted was a complete departure from the normal procedure." DOJ, Objection Ltr., Apr. 30, 2012, http://www.justice.gov/crt/about/vot/sec_5/ltr/l_ 043012_nc.php.

Similar examples abound. In 2002, Harnett County attempted to eliminate its sole majority-Black district, which had been created as part of a Section 2 remedy. *October 25, 2005 (History) Hearing,* at 1837-40. In 1993, only two months after settling a Section 2 challenge to its at-large elections, the Mt. Olive Board of Commissioners abandoned a redistricting plan to which the parties had agreed, offering pretextual explanations and going so far as to "petition[a] court to prohibit [the board's sole Black member] from participating in board discussions or voting on the method of election issues raised by the Section 2 litigation." *Id.* at 1824. And in 1987, after previously agreeing to abandon at-large elections in response to a Section 2 suit, Bladen County took "extraordinary measures to adopt an election plan which minimizes minority voting strength." *Id.* at 1762. Section 5 prevented each of these attempts at circumvention.

Evidence of serial voting rights problems, which were only remedied by Section 2, Section 5, or a combination of the two, also exists for Beaufort County (2002), Anson County (1992), Onslow County (1987), Wilson County (1986), and Elizabeth City (1986). *See March 8, 2006 Hearing*, at 1746, 1783, 1746, 1749, 1748, 1775, 1733-34, and 1987; *see also id.* at 1747, 1750, 1763, 1769 (noting withdrawal of preclearance submissions between 1991 and 2001 by Edgecombe, Halifax, and Martin Counties, which had each been subject to a prior Section 5 objection).

Arizona

Twenty discriminatory voting laws were blocked in Arizona during the reauthorization period (18 objections, *id.*, at 1416; and two successful Section 2 cases, *id.* at 251). Since 1982, DOJ has also deployed more than 1,200 observers to Arizona to ensure and protect the ability of American Indian and Latino voters to participate in elections. *Id.* at 1412.

As of 2006, Arizona had drawn Section 5 objections to at least one of its statewide redistricting plans every decade since it became a fully covered

State. In 2002, DOJ concluded that Arizona's legislative redistricting plan not only dismantled three majority-Latino districts, but that circumstances "raised concerns [that one redistricting decision] may also have been taken, at least in part, with a retrogressive intent." *October 25, 2005 (History) Hearing*, at 500. Ten years earlier, DOJ similarly concluded that Arizona's redistricting plan discriminated against Latino voters and that the State offered "[i]nsufficient nonracial explanations" for rejecting non-discriminatory alternatives. *Id.* at 476-77.

The record also reflects that race and ethnicity continue to affect minority access to the polls in Arizona. In 2004, for example, Latino voters experienced widespread discrimination through intimidation and mass challenges, including poll workers asking minority voters (but not Anglo voters) for identification. *March 8, 2006 Hearing*, at 3979-80.

South Dakota

Following a 1975 proclamation from South Dakota's attorney general against complying with Section 5, the State implemented over 600 voting changes affecting covered counties without seeking preclearance, many of which impermissibly compromised Native American voters' rights. *Id.* at 1990-91, 2005. Native American voters were forced in 2002 to file a Section 5 enforcement lawsuit resulting in a consent decree, which finally ended 26 years of noncompliance. *Id.*

Two years later, a court held that South Dakota's 2001 legislative redistricting plan, which packed Native American voters into a single district where they constituted 90% of the voting-age population, violated Section 2. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 980, 1052 (D.S.D. 2004), *aff'd*, 461 F.3d 1011 (8th Cir. 2006). The court also noted hostile and intimidating treatment by poll workers, as well as discriminatory comments made by state legislators, including a 2002 statement by one legislator who, referring to Native Americans, stated, "I'm not sure we want that sort of person in the polling place." *Id.* at 1026 (citation and internal quotation marks omitted); *see also* PA237a-238a.

Virginia

Thirty discriminatory voting laws were blocked in Virginia during the reauthorization period (15 objections, *March 8, 2006 Hearing*, at 272; and 15 successful Section 2 cases, *id.* at 251).

This discrimination again included serial voting rights violations. In 2001, despite racially polarized voting, Northampton County sought to move from six single-member districts—three of which were majority-minority—to three majority-white dual-member districts. DOJ objected, concluding that the County's stated justification for the proposal was inaccurate and that it inexplicably abandoned consideration of non-retrogressive alternatives. *October 25, 2005 (History) Hearing*, at 2584-87. The County responded with two more retrogressive plans, which drew objections in May and October 2003. *See id.* at 224, 2592-95; *see also March 8, 2006 Hearing*, at 2040.

Similarly, in 1993, Newport News drew a discriminatory-purpose objection when it attempted to implement at-large elections for its school board—its second method-of-election objection in four years. *October 25, 2005 (History) Hearing*, at 2573-75. The next year, the City entered a consent decree wherein it "admitted that the at-large system violated section 2 as well as the Fourteenth and Fifteenth Amendments." *Nw. Austin*, 573 F. Supp. 2d at 261 (citation and internal quotation marks omitted).

In 1999, Dinwiddie County drew an objection to a proposal to move a polling station to an all-white church in a remote location because "[t]he sequence of events leading up to the decision to change the polling place . . . tend[ed] to show a discriminatory purpose." *October 25, 2005 (History) Hearing*, at 2581.[10]

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Shelby County asserts that there are only "isolated" instances of persistent discrimination in the covered jurisdictions and that circumvention of voting remedies has disappeared. Br. 38. These assertions ignore the "reliable evidence of actual voting discrimination" in the record. *Katzenbach*, 383 U.S. at 329. The record conclusively demonstrates that widespread intentional discrimination, and the evasion of prior remedial measures, persists in the vast majority of covered jurisdictions. Accordingly, notwithstanding significant progress, Congress reasonably concluded that the "improvements are insufficient and . . . conditions continue to warrant preclearance." *Nw. Austin*, 557 U.S. at 203.

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[10] There was also evidence of continuing discrimination in covered jurisdictions not discussed in the text. *See, e.g.*, *July 13, 2006 Hearing*, at 111 (2002 objection to intentionally retrogressive method-of-election change in Monterey County, California); *March 8, 2006 Hearing*, at 1466, 1497 (2002 objection to retrogressive statewide redistricting in Florida affecting Collier County); *id.* at 1348 (1993 objection to retrogressive statewide redistricting in Alaska).

III.SECTION 5 IS AN "APPROPRIATE" RESPONSE TO THE RECORD OF ONGOING VOTING DISCRIMINATION.

After reviewing all of the evidence before it, Congress reasonably determined that Section 5 remains "appropriate legislation" to prevent, redress, and deter unconstitutional misconduct.

A. Case-by-case enforcement remains inadequate.

Central to Congress's determination was its conclusion that "'case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy.'" PA45a (alterations in original; citation omitted). As demonstrated in Part II.B, *supra*, the Congressional record is replete with evidence of serial violations of voting rights, in which jurisdictions—after having resolved Section 2 claims, or having drawn a Section 5 objection—attempted to circumvent the prior voting remedy with a new discriminatory measure.

This circumvention is one significant reason why "case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328; *see also id.* at 313-15. But preclearance is also justified because of the "slow, costly character of case-by-case litigation" in the voting context. *Boerne*, 521 U.S. at 526.

Section 2 suits are among the most complex and resource-intensive of all actions brought in federal court, often taking five years or more to litigate, with costs running into the millions of dollars. *See, e.g.*, *May 10, 2006 Hearing*, at 96 (McDuff); *May 9, 2006 Hearing*, at 141 (McDonald); *May 17, 2006 Hearing*, at 20, 80 (Derfner). Especially at the local level, voters of color generally lack access to the resources and expertise necessary for successful Section 2 litigation. *October 25, 2005 (History) Hearing*, at 84 (Earls). During the reauthorization period, 86.2% of Section 5 objections (539 out of 625) were made to voting changes at the local level—where elections often are less about partisan debates and more about issues such as police protection and the distribution of educational resources. *See Nw. Austin*, 573 F. Supp. 2d at 284-85 (calculation based on Maps 5A and 5B).

In sum, "[p]ermitting [an unprecleared] election to go forward would place the burdens of inertia and litigation delay on those whom the [VRA] was intended to protect." *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers).

Nor is there anything in the "the record to support . . . speculation" that DOJ could scale up its Section 2 enforcement adequately to compensate for the loss of the effective preclearance remedy. PA46a. This Court has recognized that the VRA's "laudable goal[s] could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Al-*

len, 393 U.S. at 556. Indeed, during the reauthorization period, DOJ participated as a plaintiff or intervenor in only 91 Section 2 cases, *see October 25, 2005 (History) Hearing*, at 2835-39, 2846, a small fraction of the total number of Section 2 suits during that timeframe. *See* JA51a (noting there were 800 *successful* Section 2 cases).

B. Current needs justify current burdens.

Congress also carefully considered the burdens imposed by Section 5. Absolutely no evidence was presented to support one witness's conclusory assertion, which Shelby County cites, that preclearance has cost covered jurisdictions over $1 billion. *See* Br. 25 (citing *May 10, 2006 Hearing*, at 110). In fact, Congress learned that, "in most cases the preclearance process is routine and efficient[], resulting in prompt approval by the Attorney General and rarely if ever delaying elections." PA20a (citation and internal quotation marks omitted). Even in the "infrequent" cases where "more extensive" information is required, preclearance submissions generally take little "more than half an hour." *June 21, 2006 Hearing*, at 12 (testimony by Don Wright, General Counsel, North Carolina Board of Elections).

Indeed, many election officials in covered jurisdictions recognize that Section 5 enhances the integrity of the political process and helps avoid litigation. *Id.* at 12-13; *see also May 17, 2006 Hearing*, at 94 & n.1. A joint letter from the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of

Mayors noted that, notwithstanding substantial progress, voting discrimination persists; these organizations urged Congress to reauthorize Section 5. 152 Cong. Rec. 14,232-33 (2006). In *Northwest Austin*, six fully or partially-covered States (including Arizona, which has filed an amicus brief on behalf of Shelby County in this case) informed this Court: "'[T]he benefits of Section 5 greatly exceed the minimal burdens Section 5 may impose on States and their political subdivisions.'" PA276a-77a (citation omitted).

Recent events confirm that, rather than the blunt instrument Shelby County describes, preclearance is a flexible remedy that permits States to pursue nondiscriminatory policy objectives. Texas's voter identification law—"the most stringent in the country," which a three-judge court found "imposes strict, unforgiving burdens on the poor[] and racial minorities"—was denied preclearance. *Texas v. Holder*, Civ. No. 12-128, 2012 WL 3743676, at *33 (D.D.C. Aug. 30, 2012). By contrast, South Carolina's voter identification measure was precleared for elections after November 2012, due to ameliorative features—added during preclearance—that rendered it "significantly more friendly to voters" than Texas's. *South Carolina v. United States*, Civ. No. 12-203, 2012 WL 4814094, at *15 (D.D.C. Oct. 10, 2012); *see also id.* at *22 (Bates, J., concurring) ("The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the voter identification law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."). DOJ has also precleared photo identification laws in Arizona, Georgia, Louisiana, Michigan, and New Hampshire. Resp. Br. in Opp. to Cert. 32.

Finally, Congress learned that, contrary to the assertions of Shelby County's amici, Section 5 does not require excessive consideration of race in redistricting.[11] Section 5 does not maintain majority-minority districts reflexively or in perpetuity. The statute prevents the elimination of existing majority-minority districts only where substantial racially polarized voting exists, such that a majority-minority district remains necessary for minority voters to have an opportunity to elect a candidate of their choice. *See, e.g.*, *March 8, 2006 Hearing*, at 301-02; *October 18, 2005 Hearing*, at 177-79.

Moreover, although DOJ may have misinterpreted Section 5's standard in a small number of statewide redistricting objections in the early 1990s, *see* n.5, *supra*, DOJ has taken this Court's precedents in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), seriously; there has not been a single "maximization" objection since then. In the overwhelming majority of objections throughout the reauthorization period, DOJ applied the statute correctly: as a crucial tool to dismantle electoral structures long maintained to exclude too many of our fellow Americans from full enjoyment of their citizenship rights. *See generally* Part II, *supra.*[12]

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[11] Shelby County forfeited any argument concerning Congress's two amendments to the Section 5 standard by failing to raise it below. PA66a-67a. In any event, those amendments are not implicated in this case. PA66a-68a.

None of this is to deny the federalism costs imposed by Section 5. Shelby County is correct that preclearance would not be appropriate enforcement legislation to remedy the problem of disabled persons having access to judicial services, at issue in *Lane*, or the problem of gender disparities in leave policies, at issue in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). *See* Br. 38.

But racial discrimination in voting—which demeans our democratic freedoms—is different. The records at issue in *Hibbs* and *Lane* "'pale[] in comparison'" to the record of persistent racial discrimination in voting before Congress in 2006, PA263a (citation omitted)—a record "at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*," PA256a; *see also* PA260a.

Notwithstanding the powerful record demonstrating the current need for Section 5, Shelby County urges this Court to substitute its judgment for that of Congress about how best to remedy a uniquely grave and persisting constitutional problem, which long experience shows is particularly difficult to eradicate in covered jurisdictions. The text of the Constitution and this Court's precedents, however, do not permit Shelby County to do so. *See Nw. Austin*, 557 U.S. at 204-05.

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[12] Shelby County wrongly characterizes *Shaw* claims as involving "discrimination against white voters," which is the premise underlying its assertion that there were six instances of such discrimination in the record. Br. 32. *Shaw* claims are based on the injury caused to voters of all races when race is unnecessarily the predominant factor in districting. *See Miller*, 515 U.S. at 911-13.

IV. THE GEOGRAPHIC SCOPE OF PRECLEARANCE IS PROPERLY TAILORED TO REACH ALABAMA AND THE OTHER COVERED JURISDICTIONS.

Congress reasonably reauthorized the geographic coverage provision contained in Section 4(b) of the VRA. Contrary to Shelby County's assertions, persistent voting discrimination is far more prevalent in the covered than the non-covered jurisdictions. Shelby County's facial challenge to Section 4(b) also fails for an independent, threshold reason. The record of persistent and adaptive voting discrimination in Alabama and, indeed, Shelby County, establishes that the County is properly covered by Section 5; the County cannot challenge 4(b) by arguing that it should not cover other jurisdictions not before the Court.

A. The record of discrimination in Alabama forecloses Shelby County's facial challenge.

Shelby County is covered because Alabama is a fully-covered State, and the County has not bailed out. PA145a. As discussed in Part II.B.1, *supra*, despite substantial progress, racial discrimination in voting remains a problem both in Alabama generally and Shelby County particularly. There were over 235 discriminatory measures remedied by Section 2 suits or Section 5 objections during the reauthorization period. Alabama has the second highest rate of successful Section 2 litigation of any State in the country when considering published cases, and the highest rate in the country when considering all cases. *See* PA53a, PA92a. In light of the record, even Judge Williams, who dissented in the Court of Appeals, did not dispute that Alabama could be properly covered by Section 5. *See* PA93a.

Shelby County does not, and indeed cannot, argue otherwise. Instead, it contends that the record of discrimination in other jurisdictions, especially Alaska and Arizona, is insufficient to justify coverage of those jurisdictions. *See* Br. 47-48, 50. That argument, however, is not a valid basis for Shelby County to challenge Section 4(b). A party challenging the constitutionality of a state or federal statute "must show that [the party] is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures [it]." *Heald v. District of Columbia*, 259 U.S. 114, 123 (1922). Thus, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).[13]

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[13] The First Amendment overbreadth doctrine is an exception, grounded in the concern that third parties "'may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" *New York v. Ferber*, 458 U.S. 747, 768-69 (1982) (citation omitted). That concern is plainly not applicable here: Alaska has a constitutional challenge to its Section 5 coverage pending, and

Whether viewed as an issue of third-party standing, or an expression of the strong preference for as-applied challenges, the point is the same: Litigants may not challenge the constitutionality of a statute on the ground that it interferes with the rights or interests of third parties not before the Court. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); *United States v. Raines*, 362 U.S. 17, 21 (1960).

Under these settled rules of constitutional adjudication, that Alabama is properly subject to Section 5 coverage is fatal to Shelby County's facial challenge to Section 4(b). In *Raines*, this Court held that state election officials could not challenge a provision of the Civil Rights Act of 1957 on the ground that the statute impermissibly allowed the federal government to enjoin purely private conduct. 362 U.S. at 20-25. "[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Id.* at 24-25.

Reaffirming *Raines*, this Court in *Lane* sustained Title II of the Americans with Disabilities Act (ADA) as valid enforcement legislation in the context presented in that particular case (*i.e.*, as applied to court access for the disabled)—while declining to consider whether Title II was constitutional as applied to other contexts not before the Court. *See*

Arizona filed such a challenge but then withdrew it. *See Alaska v. Holder*, No. 1:12-cv-01376-RLW (D.D.C); Stipulation of Dismissal, *Arizona v. Holder*, No. 1:11-cv-01559-JDB (D.D.C. Apr. 10, 2012), ECF No. 41.

Lane, 541 U.S. at 530-31 & n.19 (citing *Raines*, 362 U.S. at 24-25).

Chief Justice Rehnquist dissented on this point in *Lane*, but his reasoning provides no support to Shelby County here. He contended that the *Lane* majority "artificially constrict[ed] the scope of the statute" to make it "mirror a recognized constitutional right" (court access), even though "Title II's indiscriminate substantive provisions" applied broadly to "all 'services,' 'programs,' or 'activities' of any 'public entity.'" *Id.* at 551, 552 n.11. In Chief Justice Rehnquist's view, the appropriate question was whether all of Title II's "substantive provisions can constitutionally be applied to the . . . State" challenging it. *Id.* at 552 n.11.

That concern is not present here. Section 5 is designed to remedy racial discrimination in voting, a "recognized constitutional right." *Id.* at 551. And the record of discrimination in Alabama establishes that Section 5's substantive provisions may properly be applied to Shelby County. If, as Shelby County claims, Section 5 should not be applied in other jurisdictions that are not parties to this case, there "'will be time enough to consider [that argument] when raised by someone whom it concerns.'" *Broadrick*, 413 U.S. at 609 (quoting *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (Holmes, J.)); *see generally Hibbs*, 538 U.S. at 743 (Scalia, J., dissenting) (arguing that, if Fourteenth Amendment enforcement legislation is facially constitutional because it can be validly applied to some jurisdictions, a State may still bring an as-applied challenge contending that the statute should not be applied to it because the State itself had not engaged in unconstitutional conduct).

This jurisprudential principle is confirmed by *United States v. Georgia*, 546 U.S. 151 (2006). In that case, the plaintiff-inmate alleged actual constitutional violations, and this Court unanimously held that Title II of the ADA was valid enforcement legislation with respect to violations of prisoners' constitutional rights, without considering whether the provision is valid in other cases. *Id.* at 158-59. *Georgia* thus reaffirms the rule that courts should only consider whether enforcement legislation is valid with respect to the parties before them. That rule is fatal to Shelby County's 4(b) challenge.

B. Substantial differences persist between covered and non-covered jurisdictions.

In any event, the evidence before Congress demonstrated that voting discrimination remains "concentrated in the jurisdictions singled out for preclearance," *Nw. Austin*, 557 U.S. at 203, which, in the aggregate, continue to have far worse problems of voting discrimination, and, individually, represent the worst voting rights offenders. As the District Court recognized, "the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement." PA12a.

1. Quantitative evidence

The best way to study voting discrimination in the non-covered jurisdictions is to consider suits filed under Section 2, which applies nationwide. In 2006, Congress considered a study (the "Katz Study") documenting every single reported case filed under Section 2 in both the covered and non-covered jurisdictions.[14] *See October 18, 2005 Hearing*, at 964-1124. In no prior reauthorization had Congress considered such a comparative study of conditions in the covered and non-covered jurisdictions.

a. Successful Section 2 suits

The Katz Study revealed that, "although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation." PA49a. It also indicated that Section 2 plaintiffs were approximately 33% more likely to succeed in suits filed in the covered jurisdictions as compared to the non-covered jurisdictions. PA51a.

Shelby County argues that the difference in the percentage of successful Section 2 suits originating from covered jurisdictions (56% of all cases) compared to non-covered jurisdictions (44%) demonstrates relative parity between them. Br. 51. But Shelby County ignores both the need to consider the relevant sizes of the covered and non-covered jurisdictions, as well as Section 5's prophylactic effect.

The non-covered jurisdictions have populations three times larger than the covered jurisdictions.[15]

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[14] By "reported" or "published" cases, we mean cases available on Westlaw or Lexis.

[15] The covered jurisdictions contain less than one quarter of the nation's total population, *October 18, 2005 Hearing*, at 974, and roughly 36% of the nation's minority population, *see May 9, 2006 Hearing*, at 43-44 (Davidson).

When controlling for the relative sizes of the covered and non-covered jurisdictions, "the rate of successful section 2 cases in covered jurisdictions (.94 per million residents) is nearly four times the rate in non-covered jurisdictions (.25 per million residents)." PA49a-50a. A study of unpublished cases ("McCrary Study")[16] reveals that this actually understates the true disparity: "[A]pproximately 81 percent [of all successful Section 2 cases] were filed in covered jurisdictions," PA51a, which means that there were in fact *12 times* as many successful Section 2 cases in the covered jurisdictions on a per capita basis.[17]

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[16] Almost all of the data in the McCrary Study is found in the Congressional record (*i.e.*, all unpublished cases from the covered jurisdictions, JA42a; and 61 out of 99 unpublished cases (62%) from the non-covered jurisdictions, JA46a). Shelby County has "identified no errors or inconsistencies in the data analyzed by McCrary." PA54a. The McCrary Study simply confirms what is already clear from the Katz Study: that the per capita rate of successful Section 2 suits is dramatically higher in the covered jurisdictions.

[17] These figures include cases resolved through settlements. As Shelby County points out, settlements happen for a variety of reasons. *See* Br. 52-53. But Shelby County fails to acknowledge that one of the most important reasons is the defendant's recognition that the plaintiff's claims have a likelihood of success. For example, the approximately 170 jurisdictions that reached settlements in the *Dillard* litigation did so after a court found that at-large elections throughout Alabama had been tainted by racially discriminatory purpose. *See Dillard*, 640 F. Supp. at 1360; *see also July 13, 2006 Hearing*, at 373-74. That there were 587 unreported cases in the covered jurisdictions, compared to 99 in the rest of the country, is strong evidence confirming that voting discrimination remains concentrated in the covered jurisdictions.

This disparity is particularly striking, as one "would expect to see fewer successful section 2 cases in covered jurisdictions," PA55a, because: (i) Section 5 "blocked hundreds of intentionally discriminatory changes," *Nw. Austin*, 573 F. Supp. 2d at 258; (ii) "the mere existence of section 5 encourage[s] the legislature to ensure that any voting changes would not have a discriminatory effect," PA42a (citation and internal quotation marks omitted); and (iii) covered-jurisdiction-status facilitates the dispatch of federal election observers, who "have played a critical role preventing and deterring 14th and 15th amendment violations." H.R. Rep. No. 109-478.

In sum, although Section 5 makes an apples-to-apples comparison of covered and non-covered jurisdictions impossible, the quantitative evidence demonstrates that voting discrimination is far more prevalent in the covered jurisdictions. During the reauthorization period, in the covered jurisdictions, there were over 650 successful Section 2 suits, 620 Section 5 objections, and 25 judicial preclearance denials; in the non-covered jurisdictions, there were fewer than 150 successful Section 2 suits. *See* PA44a; JA50a-51a. In the aggregate, any fair reading of the experience in covered jurisdictions describes a more entrenched and grave threat to voters of color.

b. Racially polarized voting and racial appeals

The Katz Study also revealed that racially polarized voting ("RPV") is much more pronounced in covered than in non-covered jurisdictions. RPV is important because it is a necessary precondition for vote dilution; as discussed, where voting in a jurisdiction is polarized along racial lines, government officials can intentionally discriminate against minority voters through racial gerrymanders or methods of election that "cancel out or minimize the voting strength of [minority voters]." *White v. Regester*, 412 U.S. 755, 765 (1973).

Adjusted for population, there are approximately three times as many Section 2 cases with RPV findings in the covered jurisdictions as in the non-covered jurisdictions.[18] Moreover, RPV was more severe in covered jurisdictions, with white bloc voting of 80% or more in nearly 90% of elections involving candidates of different races in covered jurisdictions; by contrast, only 40% of the elections involving candidates of different races in non-covered areas involved such extreme white bloc voting. *May 16, 2006 Hearing*, at 48. And Congress learned that RPV was generally increasing, not decreasing, in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 34; *May 17, 2006 Hearing*, at 132-33 (Persily). Two striking examples of RPV, "indicative of the racial cleavage that exists in Alabama to this day," were the 2003 and 2004 unsuccessful voter referenda to remove unconstitutional Jim Crow provisions of Alabama's Constitution, including poll tax language. *July 13, 2006 Hearing*, at 367, 372.

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[18] There were a roughly equal number of RPV findings in the covered and non-covered jurisdictions, *see October 18, 2005 Hearing*, at 981; given relative population size, such findings were three times more common per capita in the covered jurisdictions.

Given the much higher level of RPV in the covered jurisdictions, it is unsurprising that there were also more judicial findings of racial appeals by candidates in those jurisdictions, *see October 18, 2005 Hearing*, at 1003. Indeed, Congress learned that racial appeals—including candidates' emphasizing their opponent's race by disseminating literature with their opponent's picture, sometimes darkened—remain common in certain covered jurisdictions. *See, e.g.*, *May 17, 2006 Hearing*, at 17 (Derfner); *May 10, 2006 Hearing*, at 22 (McDuff); *May 9, 2006 Hearing*, at 44 (Davidson); *October 20, 2005 Hearing*, at 85 (Derfner).

2. Shelby County's state-by-state argument is meritless.

Likely recognizing that the aggregate data documents substantially more voting discrimination in the covered jurisdictions, Shelby County contends that the Section 2 data, when disaggregated by State, shows that, "[e]ven if preclearance might remain an appropriate response to ongoing discrimination in *some* jurisdictions," other covered jurisdictions (not including Alabama) have better records than some non-covered jurisdictions. Br. 40. But, as discussed in Part IV.A, *supra*, Shelby County may not argue Section 4(b) is facially unconstitutional because it should not cover third parties not before the Court.

Moreover, Shelby County's jurisdiction-by-jurisdiction approach is foreclosed by this Court's VRA precedents. As explained in *Northwest Austin*, at issue is whether the geographic scope is "sufficiently related" to the problem of persistent voting discrimination, not whether it is perfectly related to it or surgically precise. 557 U.S. at 203. Indeed, "the fit was hardly perfect in 1965." PA60a. *Katzenbach* sustained the coverage provision even though both Congress and the Court were aware that some non-covered areas, including Texas, Florida, Tennessee, and Kentucky, had documented histories of racial discrimination in voting, *March 19, 1965 (House) Hearing*, at 75, whereas some covered jurisdictions did not. *See Katzenbach*, 383 U.S. at 329-30. This Court explained that it is "irrelevant that the coverage formula excludes certain localities . . . for which there is evidence of voting discrimination." *Id.* at 330-31. Indeed, given that Congress may enact nationwide legislation in response to evidence of discrimination in only a minority of States, *see Hibbs*, 538 U.S. at 731, surely Congress may seek to confine remedial legislation to those jurisdictions where such legislation is especially needed, even if some level of arguable imprecision results.

In any event, Shelby County mischaracterizes the data, ranking States according to the total number of Section 2 filings or adjudicated violations in each State, Br. 47, but again failing to control for the different sizes of States. Controlling for population size, the Katz Study revealed that the four jurisdictions with the highest rates of successful Section 2 litigation were covered (South Dakota, Mississippi, Alabama, and Louisiana), as were five of the six highest. *See* PA91a-93a. When facts from the McCrary Study are included, the results are even more impressive: The eight jurisdictions with the highest per capita rates of successful Section 2 litigation, and 11 of the highest 14, are covered or have been bailed-in to coverage. *See* PA51a-53a. All of this with Section 5 in operation.

When limiting the comparative analysis to electronically-reported cases alone, the "middle-range covered States appear comparable to some non-covered jurisdictions," but this is "only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." PA59-60a. In fact, "these middle-range covered jurisdictions appear to be engaged in much more unconstitutional discrimination." PA59a. For example, as the Court of Appeals explained, Georgia and South Carolina each had only three successful electronically-reported Section 2 cases between 1982 and 2004, but they each had over 70 Section 5 objections (not to mention a respective 66 and 30 unpublished Section 2 cases) during that period. PA58a-59a.[19]

3. Qualitative evidence

Throughout Congress's nearly year-long deliberative process, the legislative record was "open and available for all groups of all opinions" to present their views, ***May 4, 2006 Hearing***, at 70. But there is no evidence indicating any non-covered areas experienced voting discrimination on par with the covered jurisdictions. Congress received state-by-state reports concerning current conditions in covered jurisdictions[20] and in several non-covered jurisdictions.[21] The difference is stark: Reports concerning the covered jurisdictions demonstrate substantial ongoing discrimination and dozens of repeat offenders; by contrast, the reports from non-covered jurisdictions do not reveal similar problems.

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[19] Although the Section 2 and 5 standards are not identical, *see* PA94a (Williams, J., dissenting), both prohibit intentional discrimination. As discussed, two-thirds of Section 5 objections in the reauthorization period involved such purposeful discrimination—often involving efforts to circumvent a Section 2 remedy.

Voting rights experts testified that "there is a clear differentiation between covered and non-covered jurisdictions." *See, e.g., May 16, 2006 Hearing*, at 55 (Earls). "Covered jurisdictions show a continuing pattern of enacting laws and procedures designed to suppress and dilute the voting strength of minority voters." *Id.* By contrast, "there is no evidence of significant and continuing violations of minority voting rights at the state and local level in non-covered jurisdictions." *Id.* at 48; *see also June 21, 2006 Hearing*, at 98 (Canon) ("[T]here is a clear difference between covered and non-covered states in terms of discrimination."). One political scientist, who served as an expert in dozens of redistricting cases, explained that, in his experience, it was far less common for non-covered jurisdictions intentionally to "change voting arrangements in such a fashion as to dilute minority votes in a context of [racially polarized voting]." *May 16, 2006 Hearing*, at 26, 29 (Arrington).

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[20] *See March 8, 2006 Hearing*, at 1308-2092 (Arizona, Alaska, Georgia, Louisiana, Mississippi, North Carolina, New York, South Carolina, South Dakota, Virginia); *July 13, 2006 Hearing*, at 103-19, 365-402 (California, Alabama); *id.* at 357-60, and *supra* at 23 (citing Texas Report). Links to these reports are available at the following website: *Voting Rights in the States*, http://www.civilrights.org/voting-rights/vra/states.html.

[21] *See May 4, 2006 Hearing*, at 132-152 (Arkansas), 153-76 (Oklahoma), 235-57 (Tennessee); *October 25, 2005 (History) Hearing*, at 3145-3148 (Milwaukee, Wisconsin).

C. The geographic scope remains rational in theory.

Finally, Shelby County argues that the Section 4(b) coverage provision "is no longer rational in theory," Br. 40, because it is triggered by historical low registration rates, rather than by directly incorporating metrics relating to the form of discrimination most prevalent today, *i.e.*, vote dilution.

This argument misunderstands the theory behind the coverage approach. In 1965, there were several "States and political subdivisions which in most instances were familiar to Congress by name" because of their long histories of voting discrimination, and Congress "eventually evolved" (*i.e.*, reverse-engineered) Section 4(b) to "describe these areas." *Katzenbach*, 383 U.S. at 328-29; *see also* PA124a. Congress adopted a coverage approach based largely on registration and turnout rates because, at that time, "depressed turnout and registration levels" were considered "an indicator of the larger problem of entrenched discrimination in voting," but improving registration and turnout was "not the end itself." *May 17, 2006 Hearing*, at 33 (Days).

Section 5 always "had a much larger purpose than to increase voter registration." *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983). Its goal is "to banish the blight of racial discrimination in voting"—in whatever form it appears—where it is most prevalent. *Katzenbach*, 383 U.S. at 308. For this reason, the Act permits jurisdictions to "bail out" and terminate coverage if they have clean records with respect to discrimination, not simply with respect to registration and turnout.[22]

In examining the "evidence of actual voting discrimination," *id.* at 330, Congress learned that, notwithstanding improvements, voting discrimination remains most severe in the same areas that historically have been subject to Section 5 coverage. Maintaining the preexisting scope of coverage was, therefore, a reasonable way of identifying those jurisdictions where voting discrimination is most prevalent today. As Representative Sensenbrenner explained, Congress's decision-making as to the scope of coverage was "'not' predicated on [registration] statistics," but on "recent and proven instances of discrimination in voting rights compiled in the . . . 12,000-page record." 152 Cong. Rec. 14,275 (2006).

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[22] Notably, since 1982, when the bailout criteria became "substantially more permissive," PA9a, *every* jurisdiction that has sought bailout has been approved, and no bailed-out jurisdiction has later been subjected to clawback. *See March 8, 2006 Hearing*, at 2684 (Hebert). Since this Court's decision in *Northwest Austin*, 19 cities and counties, including over 100 sub-jurisdictions, in Alabama, North Carolina, Georgia, Virginia, California, and Texas have been granted bailout. *See* DOJ, *Section 4 of the VRA*, http://www.justice.gov/crt/about/vot/misc/sec_4.php. A statewide bailout (New Hampshire) has been approved by DOJ and is pending. *See* Proposed Consent Decree and Judgment, *New Hampshire v. Holder*, 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 21, 2012), ECF No. 10-1.

It is irrelevant that the coverage trigger does not directly incorporate vote dilution metrics. This Court has held that, so long as the coverage provision identifies the correct jurisdictions in practice, it need not be based on the precise forms of discrimination necessitating coverage. In *Gaston County v. United States*, 395 U.S. 285, 291-92 (1969), the Court, speaking through Justice Harlan, explained that it was permissible for Congress to ban literacy tests in the covered jurisdictions because those areas suffered from racial disparities in education, even though the coverage triggers do not directly incorporate any measures of educational disparities. "It is of no consequence that Congress might have dealt with the effects of educational discrimination by employing a coverage formula different from the one it enacted." *Id.* at 291.

Thus, in 2006, after engaging in a lengthy debate, Congress rejected an amendment that purported to update the coverage triggers based on more recent comparative registration rates. H.R. Rep. No. 109-516, at 2 (2006). Congress determined that such efforts to "update" the coverage data would have been highly irrational. For instance, the only fully-covered State would have been Hawaii, a State without "any history of [voting] discrimination." 152 Cong. Rec. 14,277 (2006) (Rep. Case (D-HI)).

In the words of Representative Sensenbrenner, such a proposal would "sever[the coverage provision's] connection to jurisdictions with proven discriminatory histories," and "turn[] the Voting Rights Act into a farce." 152 Cong. Rec. 14,274 (2006). Over a dozen witnesses appearing before the Senate

Judiciary Committee agreed with Representative Sensenbrenner's assessment. *See, e.g.*, *May 9, 2006 Hearing*, at 76 (Issacharoff); *May 16, 2006 Hearing*, at 110 (Pildes); *May 17, 2006 Hearing*, at 135 (Persily). For these reasons, the House of Representatives voted 318 to 96 not to tie coverage to recent comparative registration rates and to maintain the preexisting coverage provision, ensuring that the worst ongoing offenders remain subject to Section 5. 152 Cong. Rec. 14,300-301 (2006).

CONCLUSION

The VRA reauthorization record contains evidence of undeniable progress, but, just as clearly, it documents persistent and adaptive voting discrimination, which remains concentrated in certain parts of the country. We do not dishonor our progress by demanding more of it. In reauthorizing the Voting Rights Act, Congress appropriately exercised its powers under the Reconstruction Amendments. The judgment of the Court of Appeals should be affirmed.

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January 25, 2013

RESPONDENT'S BRIEF

No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c, under the pre-existing coverage formula of Section 4(b) of the VRA, 42 U.S.C. 1973b(b), exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 9
Argument:
- The 2006 reauthorization of Sections 4(b) and 5 of the Voting Rights Act validly enforces the guarantees of the Fourteenth and Fifteenth Amendments 12
  - A. When Congress enacted Section 5, and in its previous reauthorizations, it determined both that Section 5's burdens were justified by then-current needs and that its geographic scope was tailored to the problem it targets 13
  - B. Section 5's preclearance requirement is justified by current needs 20
    - 1. Congress found substantial evidence of ongoing discrimination in covered jurisdictions 20
      - a. Evidence from the Section 5 process 21
      - b. Other evidence of ongoing discrimination 30
    - 2. Petitioner's attempts to minimize the legislative record are unavailing 34
    - 3. Section 5 is appropriately tailored to remedy the documented discrimination in covered jurisdictions 39
  - C. Section 5's geographic scope is tailored to the problem it seeks to remedy 47

Conclusion 57
Appendix A — Jurisdictions that have been ordered by a district court to comply with preclearance requirement pursuant to bail-in mechanism in Section 3(c) of the Voting Rights Act 1a

Table of Contents—Continued: Page

Appendix B — Covered jurisdictions that have successfully terminated Section 5 coverage pursuant to bailout mechanism in Section 4(a) of the Voting Rights Act 4a
Appendix C — Statutory provisions 12a

TABLE OF AUTHORITIES

Cases:

Abrams v. *Johnson*, 521 U.S. 74 (1997) 43
Allen v. *State Bd. of Elec.*, 393 U.S. 544 (1969) 37
Beer v. *United States*, 425 U.S. 130 (1976) 27
Blodgett v. *Holden*, 275 U.S. 142 (1927) 17
Briscoe v. *Bell*, 432 U.S. 404 (1977) 21, 48
Bush v. *Vera*, 517 U.S. 952 (1996) 47
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 18, 19, 34
City of Mobile v. *Bolden*, 446 U.S. 55 (1980) 36
City of Rome v. *United States*, 446 U.S. 156 (1980) .... *passim*
Crawford v. *Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) 44
Dillard v. *Baldwin Cnty. Comm'rs*, 376 F.3d 1260 (11th Cir. 2004) 40
Dillard v. *Crenshaw Cnty.*, 640 F. Supp. 1347 (M.D. Ala. 1986) 38
Georgia v. *Ashcroft*, 539 U.S. 461 (2003) 6, 45
Georgia v. *United States*, 411 U.S. 526 (1973) 4, 18
Harper v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) 12
League of United Latin Am. Citizens v. *Perry*, 548 U.S. 399 (2006) 32
Lopez v. *Monterey Cnty.*, 525 U.S. 266 (1999) 5, 13, 18

Cases—Continued: Page

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 18

Miller v. *Johnson*, 515 U.S. 900 (1995) 23, 42, 43

Nevada Dep't of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) 19, 25, 39

Northwest Austin Mun. Util. Dist. No. One v. *Holder*, 557 U.S. 193 (2009) .... *passim*

Northwest Austin Mun. Util. Dist. No. One v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) 6, 33

Perkins v. *Matthews*, 400 U.S. 379 (1971) 37

Reno v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) 6

Rogers v. *Lodge*, 458 U.S. 613 (1982) 36

Shaw v. *Reno*, 509 U.S. 630 (1993) 43

South Carolina v. *United States*, No. 12-cv-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) 29

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) .... *passim*

Tennessee v. *Lane*, 541 U.S. 509 (2004) 18, 19, 25

Texas v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), notice of appeal filed (D.D.C. Aug. 30, 2012) 44

Texas v. *United States*, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), appeal pending, No. 12-496 (S. Ct.) (filed Oct. 19, 2012) 25, 26, 29, 42, 43

Thornburg v. *Gingles*, 478 U.S. 30 (1986) 38

United States v. *Georgia*, 546 U.S. 151 (2006) 45

United States v. *Morrison*, 529 U.S. 598 (2000) 20

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 42

Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 26

Cases—Continued: Page

Virginia, Ex parte, 100 U.S. 339 (1880) 13, 18

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 12

Constitution, statutes and regulations:

U.S. Const.:

Art. IV 13

Amend. X 13

Amend. XIV 2, 9, 13, 18, 19

§ 1 (Equal Protection Clause) 36

Amend. XV .... *passim*

Act of Aug. 6, 1975, Pub. L. No. 94-73, Tit. I, 89 Stat. 400 .... 4, 15

§§ 201-208, 89 Stat. 400-402 16

§ 203, 89 Stat. 401-402 4

Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 5

§ 2(b), 120 Stat. 577-578 20

§ 2(b)(1), 120 Stat. 577 .... 5, 21, 34

§ 2(b)(2), 120 Stat. 577 .... 5, 21

§ 2(b)(3), 120 Stat. 577 39

§ 2(b)(4)(A), 120 Stat. 577 22

§ 2(b)(4)(C), 120 Stat. 578 .... 30, 31

§ 2(b)(7), 120 Stat. 578 .... 5, 30

§ 2(b)(8), 120 Stat. 578 .... 22, 30

§ 2(b)(9), 120 Stat. 578 .... 5, 34

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 2

§ 2, 79 Stat. 437 .... *passim*

§ 4(a), 79 Stat. 438 .... 4, 14, 17, 54

Statutes and regulations—Continued: Page

§ 4(b), 79 Stat. 438 ... *passim*
§ 5, 79 Stat. 439 ... *passim*
§ 8, 79 Stat. 441 ... 30
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* ... 2
42 U.S.C. 1973a(c) ... 3, 53
42 U.S.C. 1973b ... 8
42 U.S.C. 1973b(a) (2006 & Supp. II 2008) ... 53
42 U.S.C. 1973b(a)(3) ... 56
42 U.S.C. 1973b(a)(5) ... 56
42 U.S.C. 1973b(b) ... 3
42 U.S.C. 1973c ... 2
42 U.S.C. 1973c(a) ... 45
42 U.S.C. 1973c(b) ... 6, 46
42 U.S.C. 1973c(c) ... 6
42 U.S.C. 1973c(d) ... 6
42 U.S.C. 1973f(a)(2)(A) ... 31
Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 ... 4
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 ... 4
§ 2(b)(4), 96 Stat. 131-132 ... 4
§ 2(b)(5)(B), 96 Stat. 131-133 ... 17
§ 2(b)(6), 96 Stat. 133 ... 16
28 C.F.R.:
Section 51.54(a) ... 26
Section 51.56 ... 43

Miscellaneous:

116 Cong. Rec. (1970):
pp. 5517-5518 ... 14
pp. 5520-5521 ... 15

Miscellaneous—Continued: Page

p. 5521 ....14, 49

The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. 22-23 (2006) 29

Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. (2006) 30

30 Fed. Reg. 9897 (Aug. 7, 1965) 7

76 Fed. Reg. 7472 (Feb. 9, 2011) 42

H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) 15, 21, 22, 33, 37, 49

H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) 15, 16, 21, 37, 54

H.R. Rep. No. 397, 91st Cong., 1st Sess. (1969) 14, 21

H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 48

H.R. Rep. No. 478, 109th Cong., 2d Sess. (2006) ....*passim*

Joint View of 10 Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965 (116 Cong. Rec. 5517-5521) (Mar. 2, 1970) 14, 15, 49

Modern Enforcement of the Voting Rights Act: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. (2006) 25, 28, 54

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Comm., 109th Cong., 2d Sess. (2006) 41, 54

Miscellaneous—Continued: Page

Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. On the Constitution, Civil Rights and Property Rights, of the Senate Judiciary Comm., 109th Cong., 2d Sess. 23 (2006) 54

S. Rep. No. 295, 94th Cong., 1st Sess. (1975) 15, 16, 21, 33, 37

S. Rep. No. 417, 97th Cong., 2d Sess. (1982) .... *passim*

S. Rep. No. 295, 109th Cong., 2d Sess. (2006) 20

To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. (2005) 28, 29, 37, 40, 46, 50

U.S. Census Bureau:

- *Statistical Abstract of the United States, State Rankings, Black or African-American Population Alone, Number—July 2008*, http://www.census.gov/compendia/statab/2012/ranks/rank12.html 51
- *Statistical Abstract of the United States, State Rankings, Hispanic or Latino Population, Number—July 2008*, http://www.census.gov/compendia/statab/2012/ranks/rank16a.html 51

Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 2d Sess. (2006) .... *passim*

Miscellaneous—Continued: Page

Voting Rights Act: Section 5—Preclearance Standards: Hering Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. (2005)........23, 24, 29, 46, 50

Voting Rights Act: Section 5 of the Act— History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. (2005)............*passim*

Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. 12-13, 81 (2005) 38

Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. (2005)..................................46

In the Supreme Court of the United States

No. 12-96

SHELBY COUNTY, ALABAMA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-110a) is reported at 679 F.3d 848. The opinion of the district court (Pet. App. 111a-291a) is reported at 811 F. Supp. 2d 424.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2012. The petition for a writ of certiorari was filed on July 20, 2012, and was granted on November 9, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App. C, *infra*, 12a-28a.

STATEMENT

1. a. Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, is one of the most consequential, and amply justified, exercises of federal legislative power in our nation's history. Although the Fourteenth and Fifteenth Amendments have, since 1870, guaranteed citizens the right to vote free of discrimination on the basis of race, "the blight of racial discrimination in voting"—which manifested itself in the most blatant and virulent forms—continued to "infect[] the electoral process in parts of our country for nearly a century" thereafter. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Congress repeatedly tried to address the problem by enacting laws "facilitating case-by-case litigation against voting discrimination." *Id.* at 313. But voting litigation is "unusually onerous to prepare" and "exceedingly slow," and "some of the States affected" by federal decrees "merely switched to discriminatory devices not covered by" them. *Id.* at 313-314. Faced with obdurate and enduring resistance that undermined the proper functioning of our democracy, Congress enacted more aggressive and distinctive measures as part of the VRA, Pub. L. No. 89-110, 79 Stat. 437 (1965 Act).

Section 5 applies to specified jurisdictions, and prohibits them from adopting or implementing any change in a "standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c. To obtain preclearance, the jurisdiction must demonstrate that the proposed change does not have the purpose and will not have the effect of discriminating on the basis of race. *Ibid.* Section 5 sought to overcome the inefficacy of case-by-case adjudication by "prescrib[ing] remedies" that "go into effect without any need for prior adjudication" and would initially stay in place for five years. *South Carolina*, 383 U.S. at 327-328.

When Congress enacted Section 5, "[i]t knew precisely which states it sought to cover and crafted the criteria" set forth in the statutory coverage provision in order "to capture those jurisdictions." Pet. App. 6a-7a. Rather than identify particular States by name in the statute's text, Congress chose to describe (in Section 4(b) of the VRA, 42 U.S.C. 1973b(b)) the jurisdictions it wished to cover by listing two voting-related criteria that it knew were shared by each such jurisdiction: (1) the use of a defined voting test or device as of November 1, 1964, and (2) a voter registration or turnout rate that was below 50% in the 1964 presidential election. § 4(b), 79 Stat. 438. Those criteria—often referred to as the "coverage formula"—do not themselves identify the particular voting problems with which Congress was most concerned. Rather, the criteria were "reverse-engineer[ed]" to describe in objective, voting-related terms the jurisdictions Congress had already determined it wanted to cover based on "evidence of actual voting discrimination." Pet. App. 56a.

Because Congress used objective criteria to describe the covered jurisdictions rather than identify them by name, the scope of the coverage had the potential to be both over- and under-inclusive. Congress therefore included "bail-in" and "bailout" procedures. Under Section 3(c)'s bail-in standard, a federal court may order a jurisdiction found to have violated the Constitution's prohibition on voting discrimination to obtain preclearance for some or all future voting changes. 42 U.S.C.

1973a(c). Under Section 4(a)'s original bailout standard, a jurisdiction could terminate its coverage by demonstrating that it had not used a test or device for a discriminatory purpose (and therefore should never have been covered). 1965 Act § 4(a), 79 Stat. 438.

This Court upheld the provisions of the VRA, including Sections 4(b) and 5, as appropriate means of enforcing the guarantees of the Fifteenth Amendment. *South Carolina*, 383 U.S. at 323-337.

b. Congress reauthorized Sections 4(b) and 5 in 1970 (for five years), 1975 (for seven additional years), and 1982 (for 25 additional years). See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975 (1975 Amendment), Pub. L. No. 94-73, Tit. I, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendment), Pub. L. No. 97-205, 96 Stat. 131. In 1975, Congress also expanded Section 5's reach to cover jurisdictions that had engaged in widespread discrimination against minority voters, including members of identified racial groups described in the statute as "language minority" groups. 1975 Amendment, § 203, 89 Stat. 401-402; Pet. App. 8a. In 1982, Congress significantly eased the bailout standard: Whereas bailout originally extended only to jurisdictions that could show they should not have been covered in the first place, the amended standard allows jurisdictions and subjurisdictions to bail out if they can demonstrate that they have complied with enumerated nondiscrimination requirements for ten years. 1982 Amendment § 2(b)(4), 96 Stat. 131-132; see Pet. App. 9a, 128a-129a. This Court upheld the constitutionality of Sections 4(b) and 5 after each reauthorization. See *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999).

c. In 2006, Congress again reauthorized Section 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Amendment), Pub. L. No. 109-246, 120 Stat. 577. Congress held extensive hearings over many months to investigate both (i) whether ongoing problems of voting discrimination in covered jurisdictions justified extending the life of Section 5 and (ii) whether the most egregious voting discrimination remained largely concentrated in covered jurisdictions. Following that review, Congress enacted the 2006 Amendment by a unanimous (98-0) vote in the Senate and a nearly unanimous (390-33) vote in the House of Representatives.

Congress did so on the basis of statutory findings that, "without the continuation of the [VRA's] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), 120 Stat. 578. Congress further found that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the" Fifteenth Amendment. § 2(b)(7). Congress recognized that, as a "direct result" of the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters." § 2(b)(1). Congress determined, however, that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." § 2(b)(2).

In addition to reauthorizing Section 5 for an additional 25 years, Congress amended Section 5's substantive standard in two ways. First, Congress provided that an election change motivated by racially discriminatory purpose may not be precleared, whether or not the change is retrogressive. See 42 U.S.C. 1973c(c). That change supplanted this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*) that changes motivated by discrimination were not a basis for denying preclearance unless retrogressive. Second, Congress provided that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. 1973c(b) and (d). That change supplanted this Court's statutory holding in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), that a proposed redistricting plan was not retrogressive even though it reduced minority voters' ability to elect their candidates of choice because it created new districts in which minority voters could potentially influence the outcome of an election.

d. Immediately after the 2006 reauthorization, a jurisdiction in Texas filed suit seeking to bail out of coverage under Sections 4(b) and 5, and in the alternative challenging the constitutionality of the 2006 reauthorization of Section 5. A three-judge court held that the jurisdiction was ineligible to apply for bailout and rejected the constitutional challenge. *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 230-283 (D.D.C. 2008) (*Northwest Austin (D.D.C.)*).

This Court reversed the statutory bailout holding and declined to reach the constitutional question. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193 (2009) (*Northwest Austin*). The Court's resolution of the statutory question significantly expanded the number of jurisdictions eligible to apply for bailout compared to the Department of Justice's previous understanding of the scope of Section 4(a). *Id.* at 206-211. Although the Court did not decide the constitutional question, the Court (like Congress) acknowledged the progress minority voters had made in covered jurisdictions, in "significant" part because of "the Voting Rights Act itself." *Id.* at 202. Noting that "these improvements" may be "insufficient and that conditions [may] continue to warrant preclearance under the Act," the Court observed that "the Act imposes current burdens and must be justified by current needs." *Id.* at 203. The Court also noted Section 5's distinctive differentiation between covered and noncovered States, and explained that its "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Ibid.*

2. As a political subdivision of the fully covered State of Alabama, petitioner has been required to comply with Section 5 since 1965. 30 Fed. Reg. 9897 (Aug. 7, 1965). In April 2010, petitioner filed suit seeking a declaratory judgment that Sections 4(b) and 5 of the VRA are facially unconstitutional and a permanent injunction barring their enforcement. Pet. App. 145a, 149a.

The district court granted summary judgment to the Attorney General. Pet. App. 114a-115a, 291a. Based on a detailed review of the "extensive 15,000-page legislative record" supporting the 2006 reauthorization, the court concluded that Congress had found ample evidence of a history and ongoing pattern of voting discrimination in covered jurisdictions. *Id.* at 114a, 130a-132a, 189a-255a, 270a-290a. The court also credited Congress's conclusion that Section 2's nationwide prohibition against discriminatory voting practices and procedures, 42 U.S.C. 1973b, would be an "inadequate remedy" in covered jurisdictions. Pet. App. 269a-270a (quoting H.R. Rep. No. 478, 109th Cong., 2d Sess. 57 (2006)). Finally, the court rejected petitioner's challenge to the scope of Section 5's geographic coverage. *Id.* at 280a-290a.

3. The court of appeals affirmed. Pet. App. 1a-110a. Relying on this Court's decision in *Northwest Austin* to set the framework for its analysis, the court first concluded that Section 5's burdens are justified by current needs, as demonstrated by the extensive record Congress amassed of "widespread and persistent racial discrimination in voting in covered jurisdictions." *Id.* at 25-26a. The court also concluded that Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets," *id.* at 48a, relying on evidence before Congress comparing the degree of voting discrimination in covered and noncovered jurisdictions, *id.* at 49a-51a, 130a. The court rejected petitioner's argument that it was irrational for Congress to maintain the coverage criteria in Section 4(b), *id.* at 55a-61a, explaining that Congress first "identified the jurisdictions it sought to cover" based on evidence of voting discrimination in those areas and then "reverse-engineer[ed] a formula to cover those jurisdictions," *id.* at 56a-57a. The court concluded that the statute's bail-in and bailout provisions further ensure that Section 5 applies to jurisdictions with the worst recent records of voting discrimination. *Id.* at 61a-65a.

Judge Williams dissented, explaining that he would find Section 4(b)'s coverage provision unconstitutional even if Congress might be justified in continuing to impose Section 5's preclearance remedy in some covered jurisdictions. Pet. App. 70a, 78a, 104a.

SUMMARY OF ARGUMENT

The right to vote is essential to securing the fundamental rights embodied in our Constitution, and invidious racial discrimination is the most pernicious form of governmental discrimination prohibited by the Constitution. Congress therefore acts at the zenith of its constitutional authority when it enforces the guarantees of the Fourteenth and Fifteenth Amendments by enacting legislation to protect citizens from racial discrimination in voting, as it has with Section 5.

When it originally enacted Section 5, and in connection with each prior reauthorization, Congress made the considered judgment that the statute's distinctive preclearance regime and focused geographic coverage were justified by then-current needs that were of pronounced significance in the covered jurisdictions. This Court upheld Section 5 after its initial enactment and each of its prior reauthorizations. Congress's 2006 reauthorization is entitled to the same respect from this Court because it is grounded in the same analysis, and is fully justified on the basis of the legislative record and the congressional findings. The decision to reauthorize Section 5 ultimately rests on empirical assessments of social conditions and predictive judgments that the Constitution entrusts to Congress, and those judgments should receive great deference.

Congress examined the treatment of minority voters in covered jurisdictions and throughout the country. Congress learned that, since 1982, approximately 2400 discriminatory voting changes had been blocked by more than 750 Section 5 objections. Without Section 5, the only way to challenge those voting changes would have been through case-by-case litigation, a system that would have resulted in years of discriminatory treatment of minority voters and required an enormous expenditure of resources by all sides. Congress also learned that more than half of the objections interposed in the relevant period were based at least in part on a concern with discriminatory purpose. Blocking changes adopted with a discriminatory purpose necessarily blocks unconstitutional state action.

Congress also gathered evidence of voting discrimination from outside the Section 5 process, including: successful Section 2 suits filed against covered jurisdictions; continued disparities between minority voters' registration and participation rates as compared to those of non-Hispanic white voters; the Attorney General's experience in certifying and dispatching election observers; the persistence of severe racially polarized voting in covered jurisdictions; and testimony of experts, voters, and practitioners about ongoing intimidation, harassment, voter suppression, and intentionally dilutive practices by covered jurisdictions. Congress reasonably determined that there remains an unacceptable degree of discrimination against minority voters in covered jurisdictions, and that Section 2 of the VRA alone would afford an inadequate remedy in those jurisdictions.

Congress also acted well within its authority in concluding that it should maintain Section 5's existing geographic coverage scope. Congress gathered evidence comparing the extent of voting discrimination in covered and noncovered jurisdictions since the prior reauthorization, and that evidence showed that discrimination remains substantially more prevalent in covered jurisdictions. A particularly probative comparator is the prevalence of Section 2 suits with outcomes favorable to minority plaintiffs: Although Section 5 itself halts the implementation of new discriminatory practices, Congress found that covered jurisdictions nonetheless accounted for much more than their proportional share of such cases.

Congress accordingly left unaltered the statutory coverage criteria in Section 4(b) of the VRA. That provision describes covered jurisdictions in terms of objective, election-related criteria that were reverse-engineered to capture the jurisdictions Congress knew it wanted to cover when initially enacting the VRA. Congress in 2006 determined that the same jurisdictions should continue to be covered.

Because of the statute's bail-in and bailout mechanisms, moreover, Section 5's geographic scope is not set in stone. Covered jurisdictions that have not discriminated against minority voters for ten years, as evidenced by statutorily defined indicia, may terminate their coverage. In the short time since this Court's decision in *Northwest Austin* expanded the number of jurisdictions eligible to apply for bailout, the number of bailouts has sharply increased. There is every reason to think that jurisdictions exhibiting a reformed commitment to nondiscriminatory conduct will continue to bail out of coverage. For covered jurisdictions that fail to do so, Congress's reasoned judgment that it needs to extend the life of what has been the most successful means of fighting a most egregious constitutional problem should be sustained.

ARGUMENT

THE 2006 REAUTHORIZATION OF SECTIONS 4(b) AND 5 OF THE VOTING RIGHTS ACT VALIDLY ENFORCES THE GUARANTEES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Assuring the sanctity of the right to vote is essential to our democratic system of government. That right, as this Court has said, is "preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966); see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). The guarantee that the government will not invidiously discriminate against individuals because of their race is equally fundamental. Nearly 150 years ago, the Nation adopted two constitutional amendments prohibiting States from infringing citizens' right to equal participation in the political system because of their race. But securing the promise of those amendments has required a great struggle.

To be sure, progress has been made in the last 50 years, much of it as a direct result of Section 5, and it is true that we are now a very different nation. In 2006, however, Congress made the considered judgment that there remains considerable work to do and that Section 5 remains essential to doing it. That assessment was not undertaken lightly or without appreciation of the differential obligations the statute places upon covered jurisdictions; Congress held 21 hearings, amassing thousands of pages of evidence. And in an era of sharp partisan division within the legislative branch, Congress voted nearly unanimously to reauthorize Section 5. That judgment is entitled to deference and should be upheld, just as the Court affirmed Congress's comparable judgments in enacting and repeatedly reauthorizing Section 5 previously.

Because Sections 4(b) and 5 of the VRA are valid means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments, they do not violate Article IV of the Constitution or the Tenth Amendment. The restrictions embodied in the Fourteenth and Fifteenth Amendments "are directed to the States, and they are to a degree restrictions of State power." *Ex parte Virginia*, 100 U.S. 339, 346 (1880). Congress's legitimate enforcement of those restrictions "is no invasion of State sovereignty." *Ibid.*; see *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-283 (1999).

A. When Congress Enacted Section 5, And In Its Previous Reauthorizations, It Determined Both That Section 5's Burdens Were Justified By Then-Current Needs And That Its Geographic Scope Was Tailored To The Problem It Targets

Although the question before the Court is whether Section 5 of the Voting Rights Act today remains a valid means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments, this Court explained in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966), that the "constitutional propriety" of that provision "must be judged with reference to the historical experience which it reflects." That experience demonstrates Congress's active role in assessing the evolving problem of voting discrimination and tailoring its response. Congress's 2006 reauthorization is of a piece with its prior actions.

1. "The first century of congressional enforcement of the [Fifteenth] Amendment * * * can only be regarded as a failure." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009); see *South Carolina*, 383 U.S. at 310. During that period, southern States enacted various means of preventing minority

citizens (primarily African-Americans) from registering to vote and casting ballots. *Id.* at 310-311. Congress eventually responded in the 1950s and 1960s with a series of enforcement measures that "depended on individual lawsuits filed by the Department of Justice." *Northwest Austin*, 557 U.S. at 197. But those measures proved ineffective. See *id.* at 197-198; *South Carolina*, 383 U.S. at 314, 335. Congress again responded by enacting the VRA, which includes (in Section 2) another means of case-by-case litigation. But having tried and failed for decades to combat voting discrimination in the South through piecemeal litigation, Congress also enacted the stronger medicine of Section 5 for "areas where voting discrimination has been most flagrant." *Northwest Austin*, 557 U.S. at 198.

2. Congress assumed that Section 5's preclearance regime for covered jurisdictions would not be necessary forever, and provided that it would expire in five years unless reauthorized. See 1965 Act § 4(a), 79 Stat. 438. In so doing, Congress ensured that future legislatures would periodically assess whether the burdens imposed by Section 5 continued over time to "be justified by current needs." *Northwest Austin*, 557 U.S. at 203. Congress has taken that obligation seriously each time it has reauthorized Section 5.

As the end of Section 5's initial five-year period approached, Congress held 14 hearings to examine the state of affairs in covered jurisdictions. See H.R. Rep. No. 397, 91st Cong., 1st Sess. 2 (1969) (*1969 House Report*); 116 Cong. Rec. 5517-5518, *Joint View of 10 Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965* (1970) (*Joint View*). Congress recognized that significant progress had been made, in large part because of Section 5. *Joint View*

5521. But the evidence amassed by Congress showed that ongoing discrimination in covered jurisdictions remained sufficiently severe to necessitate Section 5's extension. *Id.* at 5520-5521.

In 1975, Congress again "gave careful consideration to the propriety of readopting § 5's preclearance requirement," holding 20 days of hearings. *City of Rome* v. *United States*, 446 U.S. 156, 181 (1980); H.R. Rep. No. 196, 94th Cong., 1st Sess. 4 (1975) (*1975 House Report*); S. Rep. No. 295, 94th Cong., 1st Sess. 10 (1975) (*1975 Senate Report*). Congress again acknowledged that Section 5 had continued to advance the voting rights of minority citizens in covered jurisdictions. *1975 House Report* 6-8; *1975 Senate Report* 13-15. Relying on the character and extent of Section 5 objections interposed by the Attorney General, however, Congress concluded that "the nature of that progress ha[d] been limited" and that there were many "gains yet to be achieved." *1975 Senate Report* 13-15. Congress thus again reauthorized Section 5 (this time for seven years). 1975 Amendment. This Court upheld the extension, concluding that "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable." *City of Rome*, 446 U.S. at 182.

In 1982, Congress again reauthorized Section 5 after examining in detail—over 27 days of hearings—the extent of voting discrimination in covered jurisdictions. H.R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981) (*1981 House Report*); S. Rep. No. 417, 97th Cong., 2d Sess. 3 (1982) (*1982 Senate Report*). Although Congress concluded that Section 5's preclearance requirement remained an effective means of combating voting discrimination in the covered jurisdictions, *1981 House Report* 7-11; *1982 Senate Report* 4-9, Congress determined that covered jurisdictions continued to erect discriminatory barriers to registration and voting and continued to use discriminatory dilutive techniques. *1981 House Report* 13-20; *1982 Senate Report* 9-14. Congress therefore reauthorized Section 5 for an additional 25 years (thereby capturing two redistricting cycles). 1982 Amendment, § 2(b)(6), 96 Stat. 133.

3. Congress has also undertaken, in connection with each reauthorization, the second inquiry highlighted in *Northwest Austin—i.e.*, examining whether the "statute's disparate geographic coverage [has remained] sufficiently related to the problem that it targets." 557 U.S. at 203. In 1975, for example, Congress investigated voting discrimination in noncovered jurisdictions, particularly discrimination against racial minority groups "who are from environments in which the dominant language is other than English." *1975 Senate Report* 24; *id.* at 24-30. Finding "overwhelming evidence" of "the voting problems encountered by language minority citizens," Congress expanded the scope of Section 5 to cover jurisdictions where such discrimination was the most severe, including States such as Texas, Alaska, and Arizona. *Id.* at 30-31; 1975 Amendment §§ 201-208, 89 Stat. 400-402. In 1982, Congress again considered whether to expand the geographic scope of Section 5—this time rejecting a proposal to extend Section 5 to every jurisdiction in the nation because it could not make the same "extensive * * * findings of voting discrimination" nationwide that it had made and reaffirmed for covered jurisdictions. *1982 Senate Report* 14-15.

When Congress opted in 1982 to retain Section 5's existing geographic coverage, it also provided a new means for jurisdictions to bail out of that coverage. A covered jurisdiction originally could bail out only by showing that it should not have been covered in the first place (*i.e.*, by showing that it had not used a test or device to discriminate). 1965 Act § 4(a), 79 Stat. 438. In 1982, Congress enabled a covered jurisdiction to bail out by demonstrating that it has not discriminated for ten years, as measured by statutory criteria such as compliance with Sections 2 and 5. 1982 Amendment § 2(b)(5)(B), 96 Stat. 131-133. Congress intended that the new bailout standard would afford an "incentive to comply" with Section 5. *1982 Senate Report* 14.

4. When Congress considered whether to reauthorize Section 5 in 2006, it again focused on (i) whether the provision's burdens are justified by current needs, and (ii) whether its geographic scope remains sufficiently related to its purpose. As explained in the following pages, Congress answered both questions in the affirmative, based on investigations similar in nature and scope to the investigations it had undertaken (and this Court had approved) in the past. In reviewing Congress's nearly unanimous judgment, this Court has explained that it must remain "keenly mindful of [its] institutional role," cognizant that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [any] Court is called on to perform.'" *Northwest Austin*, 557 U.S. at 204-205 (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

When examining Congress's exercise of its authority to enforce the Fifteenth Amendment's guarantees, this Court has repeatedly stated that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina*, 383 U.S. at 324; see *id.* at 325-327 (adopting rationality standard of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); *City of Rome*, 446 U.S. at 175-178; *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *Lopez*, 525 U.S. at 282-285. The Court has also described Congress's authority to enforce the Fourteenth Amendment's prohibition on race discrimination in broad terms:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Reconstruction] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Virginia, 100 U.S. at 345-346; see also *Tennessee* v. *Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States."). The Court should apply that understanding in assessing the constitutionality of Congress's 2006 reauthorization.

The "congruence and proportionality" framework more recently articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), is fully consistent with that understanding here, where Congress seeks to enforce an established right rather than redefine the Constitution's protections. In *Boerne* and the cases that followed, the Court has emphasized that Congress is entitled to greater leeway in determining when and by what means it may exercise its authority to enforce the Fourteenth Amendment (and by implication the Fifteenth Amendment) when it acts to enforce a right subject to heightened constitutional protection. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003); *Lane*, 541 U.S. at 528-529. Section 5 of the VRA operates at the intersection of the most fundamental of constitutional rights and the most invidious form of discrimination. Both the "any rational means" formulation articulated in *South Carolina*, 383 U.S. at 324, and the congruence-and-proportionality framework articulated in *Boerne* (at least as applied to a statute prohibiting racial discrimination in voting) demand substantial deference to Congress's considered judgment that Section 5 of the VRA remains an appropriate means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments.

It is true that Section 5 imposes a burden on covered jurisdictions that is not imposed equally on all sovereign States. But the text of the Fourteenth and Fifteenth Amendments vests Congress with the power to enforce their substantive prohibitions through "appropriate legislation." From our country's history and the context in which the amendments were adopted, it is to be expected that Congress would focus its enforcement authority on jurisdictions most resistant to those constitutional guarantees. As this Court's decisions make clear, legislation is appropriate, and therefore within Congress's authority, so long as Congress is enforcing the rights guaranteed by those amendments and not defining new rights, see *Boerne*, 521 U.S. at 519-520, and the burden and scope of the obligations Congress imposes are justified by current needs. The 2006 reauthorization fully meets those standards. Section 5 is therefore an appropriate exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments, notwithstanding its differential treatment of the States. See

United States v. *Morrison*, 529 U.S. 598, 626-627 (2000) (favorably noting, for purposes of congruence-and-proportionality review, that Section 5 is "directed only to those States in which Congress found that there had been discrimination"); *South Carolina*, 383 U.S. at 328-329 (noting that the "doctrine of the equality of States" does not bar selective application of "remedies for local evils" where they appear).

B. Section 5's Preclearance Requirement Is Justified By Current Needs

There is no question that "[t]hings have changed in the South" since 1965. *Northwest Austin*, 557 U.S. at 202. But Congress made the considered judgment in 2006 (as it had in 1970, 1975, and 1982) that covered jurisdictions continue to resist minority voters' equal enjoyment of the right to participate in the political process. Congress held 21 hearings, heard from scores of witnesses, and amassed more than 15,000 pages of evidence regarding ongoing voting discrimination in covered jurisdictions. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 5, 11 (2006) (*2006 House Report*); S. Rep. No. 295, 109th Cong., 2d Sess. 2, 10 (2006) (*2006 Senate Report*). Just as it had with each previous reauthorization, Congress found that the voting rights of minority citizens in covered jurisdictions had improved, largely thanks to Section 5, but that discrimination against minority voters persists in those jurisdictions to an unacceptable degree.

1. Congress found substantial evidence of ongoing discrimination in covered jurisdictions

By a nearly unanimous vote, Congress codified the results of its investigation in statutory findings. 2006 Amendment § 2(b), 120 Stat. 577-578. Congress recognized that "[s]ignificant progress ha[d] been made in eliminating first generation barriers experienced by minority voters" and that such "progress is the direct result of the Voting Rights Act of 1965." § 2(b)(1). But Congress found that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." § 2(b)(2). The phrase "first generation barriers" describes barriers to registration and the ability to cast a vote. The phrase "second generation barriers" refers to other means of depriving minority voters of the opportunity to participate in the democratic process on an equal basis—means such as discriminatory management of district lines, the adoption of at-large election schemes, and other dilutive techniques. In 1970, 1975, and 1982, Congress concluded that, as minority citizens secured the right to register and vote in greater numbers, covered jurisdictions made increasing resort to such dilutive techniques for discriminatory purposes. See *1982 Senate Report* 6; *1981 House Report* 17-18; *1975 Senate Report* 27; *1975 House Report* 19; *1969 House Report* 7; see also *Briscoe* v. *Bell*, 432 U.S. 404, 405-406 (1977). Congress reached the same conclusion in 2006.

a. Evidence from the Section 5 process

By halting the implementation of any voting change until there is a determination that the change is not intended to discriminate and will not have the effect of discriminating on the basis of race, Section 5 effectively exposes voting discrimination in covered jurisdictions. In assessing the continuing need for Section 5, it therefore makes sense for Congress to rely on evidence from the preclearance process, as this Court recognized in

City of Rome. 446 U.S. at 181 ("The recent objections entered by the Attorney General * * * clearly bespeak the continuing need for this preclearance mechanism.") (quoting *1975 House Report* 10). In 2006, Congress found "[e]vidence of continued discrimination" in "the hundreds of [Section 5] objections interposed" since 1982. 2006 Amendment § 2(b)(4)(A) and (8); see *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 272 (2006) (*Continued Need*).

i. The 2006 record demonstrates that Section 5 continues to play an active role in preventing and deterring constitutional violations and maintaining the progress achieved since enactment of the VRA. The number of objections interposed by the Attorney General and the District Court for the District of Columbia has not dwindled, as one would expect had Section 5 outlived its usefulness. Between 1982 and 2006, more than 750 Section 5 objections blocked the implementation of approximately 2400 discriminatory voting changes.[1] See *2006 House Report* 21-22, 36; *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 104-2595 (2005) (*History, Scope, & Purpose*) (reproducing objections); see also Pet. App. 31a-35a, 206a-220a.

Petitioner argues (Br. 29-30) that Section 5 is no longer needed because the proportion of objections, as compared to the number of submitted changes, has diminished over time. But petitioner's statistical analysis paints a materially incomplete picture. Over the years, covered jurisdictions have made an ever-increasing number of submissions for preclearance, from 300-400 per year in the early 1970s to 4000-5000 per year in the 1990s and 2000s. *2006 House Report* 22. What is particularly important, however, is the number of discriminatory voting changes that were blocked by Section 5—and that number has not significantly decreased over time. It is true that the number of objections per year from 1968-1982 was slightly higher than the number from 1982 to the present. See *Continued Need* 172. But that number remains substantial, and it actually *increased* in the post-1982 time period in several covered States, *id.* at 60 (Louisiana); *id.* at 54 (2/3 of objections in Mississippi interposed after 1982). That evidence indicates that the incidence of discrimination has remained significant over time in covered jurisdictions.

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[1] The Department of Justice tracks the number of individual changes objected to in each objection letter.

ii. To be sure, not all Section 5 objections represent a finding of unconstitutional discrimination. Pet. Br. 30. But Congress learned that more than half of the objections interposed by the Attorney General blocked implementation of changes the Attorney General concluded were intentionally discriminatory, thereby directly implicating constitutional violations.[2] Pet. App. 33a; see *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 8 (2005) (*Preclearance Standards*). One study before Congress found a "consistent increase over time of objections based on the purpose prong." *Id.* at 134. In particular, the study found that 43% of all objections interposed in the 1990s were based on intent alone and that an additional 31% were based on a combination of intent and effect. *Id.* at 136.

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[2] Petitioner attempts (Br. 35) to dismiss all of the Attorney General's purpose-based objections on the basis of this Court's decision in *Miller* v. *Johnson*, 515 U.S. 900 (1995). But the infirmity identified in that case (and related cases) was limited to a handful of statewide redistricting objections in the early 1990s. See p. 43, *infra*.

Examples of intentionally discriminatory voting changes blocked by Section 5 abound. In 2001, for example, the Attorney General interposed an objection when the all-white incumbent town governance in Kilmichael, Mississippi, attempted to cancel an election shortly after black citizens had become a majority of the registered voters. *History, Scope, & Purpose* 1616-1619. When the citizens of Kilmichael finally voted (as a result of the Attorney General's objection), they elected the town's first African-American mayor and three African-American aldermen. *2006 House Report* 37. In 2000, the Attorney General objected to a redistricting plan for the school board in Webster County, Georgia, because the jurisdiction had "intentionally decreas[ed] the opportunity of minority voters to participate in the electoral process" after the county elected a majority-black board for the first time. *History, Scope & Purpose* 830-833. Similarly, the Attorney General objected in 1998 to a redistricting plan for the city of Grenada, Mississippi, because the plan was adopted with the "purpose to maintain and strengthen white control of a City on the verge of becoming majority black." *Id.* at 1606-1612; see also *id.* at 1760-1763 (1987 objection to a change in the method of election in Bladen County, North Carolina, because "the board [of commissioners] undertook extraordinary measures to adopt an election plan [that] minimizes minority voting strength" in order to "maintain white political control to the maximum extent possible"). And in 1991, the Attorney General objected to Mississippi's legislative redistricting plans, which were "calculated not to provide black voters in the Delta with the equal opportunity for representation required by the [VRA]," and the enactment of which was "characterized by overt racial appeals." *Id.* at 1410-1413; see *Modern Enforcement of the Voting Rights Act: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 22 (2006) (*Modern Enforcement*).

Thus, although there has been progress in the South since 1965, the problem of voting discrimination in covered jurisdictions remains serious. In the most recent round of statewide redistricting, the three-judge District Court for the District of Columbia unanimously concluded that Texas intentionally discriminated against minority voters in redrawing portions of several statewide plans.[3] See *Texas* v. *United States*, No. 11-1303, 2012 WL 3671924, at *18-*21, *59-*63, *65-*73 (Aug. 28, 2012), appeal pending, No. 12-496 (S. Ct.) (filed Oct. 19, 2012). In redrawing its congressional districts, for example, Texas removed from the only three African-American ability-to-elect districts (and from one Hispanic ability district) the major economic engines of each district as well as the home district office of each incumbent. *Id.* at *19-*20, *67-*69. The State performed "[n]o such surgery" on any majority Anglo districts, declined at trial to defend its behavior on partisan grounds, and offered no explanation other than "coincidence." *Ibid.*; see *id.* at *20 n.31. The court concluded that "[t]he improbability of these events alone could well qualify as a 'clear pattern, unexplainable on grounds other than race,'" that would "lead [it] to infer a discriminatory purpose." *Id.* at *20 (internal citation omitted). In addition, in redrawing its congressional and State House plans, Texas split hundreds of voting precincts throughout the State. See *id.* at *37, *72, *82. As the district court noted, partisan voting data are not available at that census-block-by-census-block level within precincts, although racial data are. *Id.* at *82-*83. That line-drawing behavior was evidence that Texas moved certain areas into or out of particular districts *because of* the racial composition of the areas rather than because of their partisan affiliations. See *id.* at *37, *72, *82-*83.

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[3] Petitioner contends (Br. 52-53) that the evidence before Congress as of 2006 is the only evidence relevant to Section 5's continued viability. But this Court has considered post-enactment evidence when determining whether Congress validly exercised its authority under the Reconstruction Amendments. See *Lane*, 541 U.S. at 524-525 & nn.6-8, 11, 13-14; *Hibbs*, 538 U.S. at 733-734 & nn.6-9.

Because Section 5 places the burden of proof on the submitting jurisdiction, it is true that a purpose-based objection can be predicated on a failure to demonstrate the absence of discriminatory purpose rather than on an affirmative finding of illicit purpose. But as the district court in *Texas* recently explained, a covered jurisdiction can satisfy its burden "by making out a prima facie case for nondiscrimination," thereby shifting the burden to the Attorney General to rebut that showing. 2012 WL 3671924 at *13 & n.19. Both the district court in a judicial preclearance case and the Attorney General in an administrative preclearance matter assess the sufficiency of a jurisdiction's nondiscriminatory explanation under the criteria set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977). See 28 C.F.R. 51.54(a). That is also what a court would do in assessing a voting practice challenged as unconstitutional in case-by-case litigation. Thus, although the initial burden on a covered jurisdiction is greater under Section 5, the ultimate substantive determination regarding discriminatory purpose is not materially different.

iii. Section 5 objections based on retrogressive effect reinforce the ongoing need for the provision. By halting the implementation of voting changes in covered jurisdictions that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U.S. 130, 141 (1976), Congress sought to protect the fragile gains minority voters had won and would continue to win through means such as case-by-case litigation, see *City of Rome*, 446 U.S. at 182. As this Court held in *City of Rome*, it was reasonable for Congress to "conclude[] that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it [is] proper to prohibit changes that have a discriminatory impact." *Id.* at 177 (footnote omitted). Section 5 essentially requires such a jurisdiction to consider whether its voting changes will further erode the voting rights of its minority citizens.

A seemingly innocuous adjustment in the location or number of polling sites, for instance, can have substantial adverse consequences for minority voters in covered jurisdictions. In 1992, the Attorney General objected to the relocation of a polling place in Johnson County, Georgia, from the county courthouse to the American Legion, noting that "the American Legion in [that county] has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants" and was "used for functions to which only whites are welcome." *History, Scope, & Purpose* 726-728. The Attorney General concluded that "the atmosphere at the

American Legion is considered hostile and intimidating to potential black voters, and it appears that locating a polling place there has the effect of discouraging black voters from turning out to vote." *Id.* at 727. In 2006, the Attorney General objected to a Texas jurisdiction's plan to reduce the number of polling sites because it would result in a remarkably uneven assignment of voters, with more than ten times as many voters assigned to the precincts with the highest proportion of minority voters than to the precincts with the lowest proportion. *Modern Enforcement* 83-84. Such a change would have materially affected the ability of minority voters to cast their ballots.

Additionally, retrogression-based objections often halt the implementation of broader changes that would undo hard-won progress for minority voters in covered jurisdictions. During the redistricting cycle following the 2000 Census, for example, the Attorney General objected to statewide redistricting plans for Arizona and Texas that would have dismantled existing districts in which Hispanic voters possessed the ability to elect their candidates of choice (without replacing those districts with other ability-to-elect districts) even though each State had sizeable Hispanic populations. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 19 (2005) (*Impact and Effectiveness*); *History, Scope, & Purpose* 87, 496-501, 524-529, 2518-2523. And in some instances when the D.C. district court or the Attorney General concludes that a change is retrogressive, preclearance may be denied on that basis alone without reaching the question whether the change is also intentionally discriminatory. See, *e.g.*, *Texas*, 2012 WL 3671924, at *36-*37.

iv. Congress also concluded that Section 5 continues to *deter* unconstitutional discrimination. *2006 House Report* 24. Congress heard repeatedly that "Section 5 has a strong deterrent effect" that has prevented jurisdictions from implementing discriminatory voting changes. *Continued Need* 34; see also, *e.g.*, *id.* at 13, 88, 92, 303, 127, 310, 365; *Preclearance Standards* 44-45; *Impact and Effectiveness* 66; *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 22-23 (2006) (*Section 5 Pre-Clearance*); *History, Scope, & Purpose* 84.

Congress's recognition of Section 5's deterrent effect cannot be dismissed as "speculative." Pet. Br. 19. The recent preclearance litigation over South Carolina's photo-identification requirement affords a concrete refutation of that charge. The Attorney General objected to the new photo-identification law as South Carolina initially presented it. As the judicial preclearance action progressed, South Carolina officials repeatedly altered their understanding of what the law requires and how it would be enforced until the law had evolved to a form that the court could preclear. *South Carolina* v. *United States*, No. 12-203, 2012 WL 4814094, at *4 (D.D.C. Oct. 10, 2012) (three-judge court). The evolution of that law—from one raising "serious concerns" about its effect on African-American voters to one "accomplish[ing] South Carolina's important objectives while protecting every individual's right to vote"—is directly attributable to the Section 5 process. *Id.* at *21 (Bates, J., concurring); *id.* at *22 ("[T]he history of [the photo-identification law] demonstrates the continuing utility of Section 5 of the Voting Rights Act.").

An additional tangible indication of Section 5's deterrent effect relied on by Congress comes from the "administrative mechanism, known as a 'more information request'" (MIR). *2006 House Report* 40; see Pet. App. 32a-36a, 220a-223a. In certain instances, an MIR causes a jurisdiction to alter a proposed change after concluding "that the change would be objected to as violating the Act if it were not withdrawn." *Continued Need* 124; *History, Scope, & Purpose* 93-94. Since 1982, more than 205 voting changes have been withdrawn in response to MIRs. *2006 House Report* 41. A recent study concluded that MIRs were particularly effective during the period from 1999 to 2005, deterring many times more suspect changes than had formal objections. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 221 (2006).

b. Other evidence of ongoing discrimination

As previous Congresses had done when reauthorizing Section 5, Congress in 2006 also examined indicia of voting discrimination outside the Section 5 process, including "the tens of thousands of Federal observers dispatched to monitor polls in [covered] jurisdictions," "the continued filing of section 2 cases that originated in covered jurisdictions," continued race-based disparities in registration and participation rates, and direct evidence of voter suppression and intimidation. 2006 Amendment § 2(b)(4)(C), (7), and (8); *2006 House Report* 12-45, 52-53.

i. Section 8 of the VRA authorizes the Attorney General to assign federal observers to monitor polling places in covered jurisdictions when, *inter alia*, he has received meritorious complaints "that efforts to deny or abridge the right to vote under the color of law on account of race or color * * * are likely to occur." 42 U.S.C. 1973f(a)(2)(A). Congress gathered evidence that the Attorney General had made such assignments based on the "reasonable belief that minority citizens are at risk of being disenfranchised," often through "harassment and intimidation inside polling locations." *2006 House Report* 44; see Pet. App. 38a-40a, 240a-245a. In several covered States, the number of elections with assigned federal observers was greater after 1982 than it had been between 1965 and 1982. See *Continued Need* 78-80. The evidence before Congress established that the Attorney General often sends observers to covered jurisdictions precisely because minority voters recently faced discrimination there. See, *e.g.*, *id.* at 182-183, 302 (observers sent to Greensboro, Alabama, after white election officials attempted to prevent black voters from entering polling places following election of first black officials to local office in 1992); *id.* at 3533 (observers sent to Pike County, Georgia, in 1990 for special election after originally scheduled election was enjoined because city held illegal after-hours voter registration session open to whites only); *id.* at 3578 (observers sent to Humphreys County, Mississippi, in 1993 after finding that polling-place officials had harassed black voters); *id.* at 3642-3643 (observers sent to Galveston and Jefferson Counties in Texas in 1996 after white poll watchers harassed minority voters).

ii. Congress also found that "[e]vidence of continued discrimination includes * * * the continued filing of section 2 cases that originated in covered jurisdictions." 2006 Amendment § 2(b)(4)(C). Analysis of reported Section 2 cases reveals widespread judicial findings of serious voting discrimination against minority voters in covered jurisdictions. See, *e.g.*, *Continued Need* 14; see *id.* at 340 (South Dakota); *id.* at 251, 283-287 (maps and table showing number of county-level voting practices altered as a result of Section 2 litigation in, *e.g.*, Alabama (275), Texas (274), Georgia (76), Mississippi (74), and North Carolina (56)); *History, Scope, & Purpose* 78 (Texas, North Carolina, Alabama).[4]

One notable example was the subject of this Court's decision in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006). The Court found that Texas adopted a congressional districting plan in 2003 bearing "the mark of intentional discrimination that could give rise to an equal protection violation" by purposefully diminishing the voting strength of a cohesive Latino community. *Id.* at 440. The Court explained that the State's intentional splitting of that cohesive minority population "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive," and that "the State took away the Latinos' opportunity" to elect their candidate of choice precisely "because Latinos were about to exercise it." *Id.* at 439-440.

iii. Congress also continued to rely in 2006 on disparities in registration and turnout rates between minority and nonminority voters. When this Court upheld the 1975 reauthorization of Section 5 in *City of Rome*, it noted that, "largely as a result of" the VRA, registration of black voters "had improved dramatically since 1965." 446 U.S. at 180. Nevertheless, the Court credited Congress's conclusion that a significant disparity remained in at least certain covered jurisdictions, including disparities of between 16 and 24 percentage points in Alabama, Louisiana, and North Carolina. *1975 House Report* 6; *1975 Senate Report* 13. Comparable disparities persisted in 2006 (particularly between Hispanic and Anglo citizens), when Congress found gaps of between 11 and 20 percentage points in registration and turnout rates in Virginia and Texas. *2006 House Report* 25, 31. In fact, when the statistics are adjusted to distinguish between "White Hispanic" and "White non-Hispanic" residents, the gaps are even more notable, showing that both black and Hispanic registration rates continue to lag behind those of non-Hispanic whites in all but one covered State. *Northwest Austin (D.D.C.)*, 573 F. Supp. 2d at 248; see Pet. App. 200a-203a.

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[4] Petitioner dismisses (Br. 36) much of the Section 2 evidence because most Section 2 suits that are resolved in plaintiffs' favor do not result in a finding of intentional discrimination. But that practice by courts adjudicating such suits reflects the general rule of constitutional avoidance—a finding of intentional discrimination is tantamount to a finding of unconstitutional conduct.

iv. Beyond the quantitative and statistical evidence, Congress also gathered thousands of pages of testimony and documents chronicling ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions. Examples of vote suppression, far beyond what can be summarized here, included minority voters threatened with arrest or prosecution for voting, *Continued Need* 3619-3620, 3979, poll workers telling language minority voters that they should not vote if they do not speak English, *id.* at 350, 3980, and large-scale efforts to challenge minority voters' registration, *id.* at 93. Examples of vote dilution included techniques such as dilutive redistricting plans, discriminatory annexations, anti-single-shot rules, and at-large election systems. *Id.* at 20, 123.

Thus, while it is true that things have changed in covered jurisdictions, the abundant evidence collected by Congress demonstrated that discrimination remains a serious problem that fully justifies Section 5 as appropriate legislation to enforce the basic guarantees of the Fourteenth and Fifteenth Amendments. *2006 House Report* 6. Congress found that the progress made in combating that discrimination "is the direct result of the Voting Rights Act." 2006 Amendment § 2(b)(1). But Congress made the predictive judgment that further enforcement of Section 5 is necessary because, without its "protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Amendment § 2(b)(9). After careful review, a near-unanimous Congress—including members representing jurisdictions covered by Section 5—voted to reauthorize the law. That determination is entitled to "much deference" by this Court. *Boerne*, 521 U.S. at 536.

2. *Petitioner's Attempts To Minimize The Legislative Record Are Unavailing*

Petitioner argues (Br. 27-33) that much of the evidence Congress considered—and, by implication, much of the evidence previous Congresses considered—is irrelevant to assessing whether Section 5 is justified by current needs. Petitioner is incorrect.

a. Petitioner first asserts (Br. 27-28) that Congress was limited in 2006 to considering evidence that covered jurisdictions continued to engage in "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpet[u]ating voting discrimination in the face of adverse federal court decrees." Br. 27-28 (quoting *South Carolina*, 383 U.S. at 335). Petitioner misperceives the Congress's focus in enacting Section 5 and this Court's focus in upholding it.

Although the Court noted in *South Carolina* that "some" of the States covered under Section 5 had engaged in the type of brazen obstruction petitioner describes, it also recognized that not all covered States had been so unsubtle in their discriminatory tactics. 383 U.S. at 329-330, 335. Both Congress and this Court instead primarily focused on the limited effectiveness of case-by-case litigation. See *id.* at 314-315, 327-328. In 2006, Congress again concluded that the same problems with case-by-case litigation persist today. See pp. 39-41, *infra.*

Section 5's preclearance remedy was specifically designed to remove most opportunities for jurisdictions to engage in such blatant voting discrimination. Because a covered jurisdiction may not adopt a voting change without preclearance, it cannot evade a federal judicial decree by adopting new strategies for disenfranchising minority voters. In that respect, Section 5 has been a resounding success, and wnen this Court upheld the 1975 reauthorization of Section 5 in *City of Rome*, it did not inquire whether covered jurisdictions had continued to engage in the most notorious forms of voting discrimination. See 446 U.S. at 180-182. Indeed, if the obstructionist tactics that characterized the behavior of some covered jurisdictions in the 1950s and 1960s had continued unabated, that would be a strong indication that Section 5 had failed. Section 5's effectiveness at preventing covered jurisdictions from continuing the most brazen forms of voting discrimination should not be held against it. Section 5 is designed to halt implementation of *all* discriminatory voting changes. In 2006, Congress took seriously its duty to periodically assess whether the provision's burdens remain justified by current needs and concluded that the persistence of more subtle (but no less consequential) forms of discrimination warranted reauthorizing Section 5.[5]

b. Petitioner also argues (Br. 32-33) that, even within the limited category of brazen obstruction by covered jurisdictions, the only evidence relevant to the ongoing need for Section 5 is evidence that jurisdictions continue to prevent minority voters from registering and casting votes (*i.e.*, first-generation barriers). That is so, petitioner argues (Br. 32), because the Fifteenth Amendment bars intentional interference with access to the ballot and nothing more. This Court has not decided whether the Fifteenth Amendment bars intentional vote dilution on the basis of race. See *City of Mobile* v. *Bolden*, 446 U.S. 55, 65-66 (1980). But it has decided that such intentional discrimination violates the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982). Thus, while the government believes Congress has authority under the Fifteenth Amendment to address discriminatory dilutive tactics, Congress has unquestioned authority to address such unconstitutional behavior pursuant to its authority to enforce the Fourteenth Amendment. See *2006 House Report* 53 & n.136, 90.

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[5] For examples of Section 5 objections induced by jurisdictions' adoption of changes that would undermine the effect of successful Section 2 actions, see *History, Scope, & Purpose*, 330-332, 340-343, 429-434, 607-608, 678-680, 795-797, 812-814, 907-910, 1141-1144, 1207-1210, 1360-1361, 1384-1386, 1388-1390, 1402-1404, 1516-1521, 1538-1540, 1574-1579, 1730-1732, 1823-1825, 1833-1836, 1935-1937, 1957-1959, 2041-2043, 2212-2213, 2269-2271, 2300-2303, 2307-2311.

Congress and this Court have long recognized covered jurisdictions' history of employing intentionally dilutive techniques—such as at-large elections, racial gerrymandering, selective annexations, and anti-single-shot requirements—to limit the effectiveness of minority citizens' exercise of the franchise. Pet. App. 28a, 116a-117a; *City of Rome*, 446 U.S. at 160; *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 550, 565-566 (1969); *Continued Need* 142-143; *Impact and Effectiveness* 1139-1140, 1161-1168, 1196-1197, 1205-1208, 1223-1228, 1244, 1263. Each time Congress has reauthorized Section 5, it has noted that, although the VRA has successfully reduced barriers to minority participation, Section 5 remains necessary because covered jurisdictions continued to employ other means, including dilutive techniques, to minimize minority voters' effectiveness. See, *e.g.*, *1982 Senate Report* 6, 10, 12 n.31; *1981 House Report* 7, 18; *1975 House Report* 10-11; *1975 Senate Report* 16-18; *1969 House Report* 7-8.

Petitioner attempts to downplay the significance of the evidence of intentional vote dilution, arguing both that there are only a handful of Section 2 findings of such discrimination and that Congress may not rely on evidence of racially polarized voting. In making the first assertion (see Br. 32), petitioner disregards the hundreds of Section 5 objections interposed between 1982 and 2006, many of which blocked the implementation of intentionally dilutive changes. Nor is petitioner correct (Br. 32-33) that the only dilutive technique available to covered jurisdictions is district line-drawing, which petitioner asserts can be remedied by a judicial decree. Setting aside the necessity of redrawing district lines on at least a decennial basis, the record is replete with examples of covered jurisdictions' use of additional dilutive techniques. Petitioner itself was one of several defendants in a statewide Section 2 suit resulting in a finding that the Alabama legislature had intentionally discriminated against African-American voters by authorizing counties to switch from single-member districts to at-large voting, prohibiting single-shot voting in at-large elections, and requiring numbered posts in at-large elections. *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. 1347, 1356-1360 (M.D. Ala. 1986).

Petitioner also errs in dismissing out of hand (Br. 31) evidence of racially polarized voting. Racially polarized voting of course is not state action and thus cannot itself violate the Constitution. But evidence of pervasive racially polarized voting bears directly on the continued need for Section 5 because it is a necessary precondition for intentionally dilutive changes to achieve their intended discriminatory effect. See, *e.g.*, *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 49-61 (2005). In a jurisdiction where minority voters and nonminority voters consistently choose the same candidates, changing district lines would rarely dilute minority voting strength. This Court has repeatedly explained the critical role of racially polarized voting in diluting the effectiveness of minority voting strength. See, *e.g.*, *City of Rome*, 446 U.S. at 183-184; *Rogers*, 458 U.S. at 616; *Thornburg* v. *Gingles*, 478 U.S. 30, 46-61 (1986). Congress was justified in making a statutory finding that "continued evidence of racially polarized voting in each of the" covered jurisdictions "demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the" VRA. 2006 Amendment § 2(b)(3).[6]

3. *Section 5 is appropriately tailored to remedy the documented discrimination in covered jurisdictions*

a. Congress reasonably determined that, given the extensive evidence of voting discrimination in covered jurisdictions, case-by-case adjudication remains an inadequate guarantee of the constitutional rights of minority voters in covered jurisdictions. Petitioner asserts (Br. 37-38) that Section 2 affords a sufficient remedy. But that is a judgment for Congress to make, and after months of hearings, Congress concluded otherwise. See Pet. App. 45a-47a, 277a-278a. This Court has repeatedly affirmed that Congress is entitled to flexibility in choosing a legislative remedy when it has already tried and failed to cure a constitutional problem through alternate means. In *South Carolina* and *City of Rome*, for example, the Court acknowledged that Congress was justified in enacting Section 5's preclearance remedy after previous attempts at legislative solutions had failed. See 383 U.S. at 309-315; 446 U.S. at 174. Similarly, the Court in *Hibbs* acknowledged that, "where previous legislative attempts ha[ve] failed" to cure a constitutional problem, "[s]uch problems may justify added prophylactic measures in response." 538 U.S at 737.

The record before Congress documented three shortcomings of Section 2 litigation. First, Section 2 is purely an after-the-fact remedy. Section 2 actions can take years to litigate, during which time the challenged practice, no matter how discriminatory, remains in place. If a candidate is elected under what turns out to be an illegal voting scheme, that individual will nonetheless enjoy significant advantages of incumbency. *Impact and Effectiveness* 13-14; *Continued Need* 97. Although preliminary injunctions may be available in some cases, an illegal voting practice often must remain in effect for several election cycles before a Section 2 plaintiff can gather enough evidence to prove a discriminatory effect. *History, Scope, & Purpose* 92. For example, the *Dillard* litigation (in which petitioner was a defendant) took nearly two decades to reach a resolution. See Pet. App. 145a-147a; *Dillard* v. *Baldwin Cnty. Comm'rs*, 376 F.3d 1260, 1262 (11th Cir. 2004); p. 38, *supra*.

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[6] Petitioner's assertion (Br. 48) that there were "105 instances of racially polarized voting" in the record before Congress ignores the hundreds of objection letters noting the existence of racially polarized voting throughout covered jurisdictions.

Second, Section 2 places the burden of proof on minority plaintiffs to demonstrate discrimination, while Section 5 places the burden on covered jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *Continued Need* 97. Covered jurisdictions are much better positioned than individual citizens to amass information about potential discrimination in voting procedures without incurring undue expense. That is particularly so with respect to the purpose prong: a jurisdiction need only establish initially that it has a legitimate nondiscriminatory reason for enacting a particular change, and the jurisdiction is in the best position to know that reason.

Finally, Section 2 places a heavy financial burden on minority voters who challenge illegal election practices. See *History, Scope, & Purpose* 92, 97. Section 5, on the other hand, alleviates the financial burden on minority voters and places a comparatively modest financial burden associated with preclearance—especially for the vast majority of changes submitted for administrative preclearance—onto covered jurisdictions. The financial burden of Section 2 litigation is particularly pronounced in local communities and rural areas, "where minority voters are finally having a voice on school boards, county commissions, city councils, water districts and the like," but generally "do not have access to the means to bring litigation under Section 2 of the Act, [though] they are often the most vulnerable to discriminatory practices." *Id.* at 84. Congress also heard testimony that complying with Section 5 is much less burdensome for covered jurisdictions in terms of "costs, time, and labor" than defending against Section 2 claims. *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 11-13, 120-121 (2006) (*Policy Perspectives*).[7]

b. Petitioner asserts (*e.g.*, Br. 11) that Section 5 also burdens covered jurisdictions in less tangible ways by, *e.g.*, requiring adoption of voting practices that would be illegal under Section 2. In particular, petitioner suggests that Section 5 requires covered jurisdictions to make race the predominant factor in redistricting and requires jurisdictions to guarantee electoral success for minority populations. That is incorrect and reflects a misunderstanding of Section 5's operation.

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[7] The dissenting opinion below incorrectly assumes (Pet. App. 77a) that "plaintiffs' costs for § 2 suits can in effect be assumed by the Department of Justice by its either exercising its authority to bring suit itself or by intervening in support of the plaintiff." As noted, p. 22, *supra*, more than 750 Section 5 objections halted the implementation of approximately 2400 discriminatory voting changes between 1982 and the mid-2000s.

This Court has long held that a legislature may be cognizant of racial demographics in the process of redistricting, as long as race is not the predominant consideration. See ***Miller*** v. ***Johnson***, 515 U.S. 900, 915-916 (1995); see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 336 (2004). That reflects recognition that race is one axis along which citizens form communities of interest—as with, for instance, geographic proximity, similar socioeconomic status, a shared school district, political affiliation, and religious identity. Although the Constitution properly forbids reliance on race above all else in drawing district lines, it does not require jurisdictions to blind themselves to the natural occurrence of racial communities of interest within their borders so as to render minority citizens more vulnerable to dilution of their political effectiveness. Section 5 follows the same model. Indeed, the Attorney General's regulatory guidance governing the submission of redistricting plans for Section 5 preclearance expressly states that a retrogressive redistricting plan may be entitled to Section 5 preclearance when a jurisdiction cannot draw a less retrogressive plan without violating equal protection principles by making race a predominant consideration. 76 Fed. Reg. 7472 (Feb. 9, 2011).

The recent statewide redistricting in Texas illustrates how Section 5's purpose prong *prevents* rather than encourages the consideration of race above other traditional districting factors. The district court concluded that Texas had divided hundreds of existing precincts, redrawing district lines on a census-block-by-census-block level. Although Texas claimed that it was motivated by partisanship, partisan voting data are unavailable below the precinct level. *Texas*, 2012 WL 3671924 at *81-*82. Racial data are available at the census-block level, however, indicating that Texas elevated racial considerations above all others in dividing preexisting political units. See *id.* at *37, *72, *82-*83.

The dissenting opinion below warned of hypothetical unconstitutional applications of Section 5. Pet. App. 73a, 103a-110a. But any statute can be applied in an unconstitutional way; that does not mean it is unconstitutional on its face. As with any law, particular applications of Section 5 may be challenged, and this Court stands as the final arbiter. In the years immediately following the post-1990 redistricting, for example, this Court held that the Attorney General's application of Section 5 to a handful of statewide redistricting plans required the relevant States to violate the Equal Protection Clause. See *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Miller*, *supra*; *Abrams* v. *Johnson*, 521 U.S. 74 (1997). The Department of Justice responded by adjusting its enforcement of Section 5. See 28 C.F.R. 51.56 ("In making determinations [under Section 5,] the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts."). There is no indication that the Attorney General's enforcement of Section 5 today raises any constitutional concerns; but that in any event would properly be the subject of an as-applied challenge, not a basis for invalidating the statute in its entirety in this facial challenge.

The dissenting opinion also relied on recent state laws requiring in-person voters to show identification in order to cast a vote, contending that it is irrational that noncovered States can enact such laws while covered States cannot. Pet. App. 103a. That is incorrect in both its premise and conclusion. Although the Attorney General has objected to voter-identification requirements recently enacted by two covered States (South Carolina and Texas), he has not objected to voter-identification requirements adopted by several other fully or partially covered States (*e.g.*, Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia). The South Carolina objection exemplifies Section 5's efficacy, as explained. See pp. 29-30, *supra*. As for Texas, a three-judge court recently concluded that Texas's voter-identification law could not be implemented because the State failed to establish that it will not discriminate against minority voters. *Texas* v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), notice of appeal filed, Docket entry No. 366 (D.D.C. Dec. 19, 2012). The Texas law significantly differs from the Indiana law upheld in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), see 2012 WL 3743676 at *13, which in any event did not present the question whether that law had the purpose or effect of discriminating on the basis of race. Because all States are subject to Section 2, all States are barred from adopting voter-identification requirements that have the purpose or effect of discriminating on the basis of race. It is true that jurisdictions covered by Section 5 bear the burden of demonstrating that their laws do not have such an intent or effect; but the shift of the burden that attends Section 5 coverage is justified by covered States' history and record of voting discrimination.

c. Petitioner errs in arguing (Br. 25-27) that the two major substantive amendments to Section 5 in 2006 increased the burdens on covered jurisdictions in a manner augmenting the arguments against the provision's continued constitutionality.

In 2006, Congress clarified that it intended Section 5 to block all intentionally discriminatory changes, not just changes adopted with a purpose to retrogress. That amendment, which superseded this Court's interpretation of the purpose prong in *Bossier II*, reflects Section 5's general focus on voting changes and is unobjectionable.

The retrogression standard this Court established in *Beer* allows the preclearance decisionmaker to determine whether a proposed change itself (isolated from other factors) will have a discriminatory effect. In making that determination, the Attorney General (or a three-judge court) compares minority voters' rights under the benchmark practice today (*i.e.*, when the new practice is submitted for preclearance) with those rights under the proposed practice today. By comparing operation of the two practices at the same moment in time, the Attorney General can assess the *effect* of the change isolated from other changes such as demographic shifts. But there is no need to limit *purpose* objections under Section 5 to changes intended to retrogress. If a proposed change is intended to discriminate on the basis of race, it "has the purpose * * * of denying or abridging the right to vote on account of race." 42 U.S.C. 1973c(a). Congress was therefore justified in clarifying that Section 5 halt implementation of unconstitutional changes by denying preclearance to any voting change with a discriminatory purpose. Cf. *United States* v. *Georgia*, 546 U.S. 151, 158 (2005) ("[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (ellipsis in original).

Congress also amended Section 5's retrogression prong to supplant this Court's decision in *Georgia* v. *Ashcroft*, 539 U.S. 461, 480-482 (2003), which held that a proposed redistricting plan, while reducing minority voters' ability to elect their candidates of choice, was non-retrogressive because it created new districts in which minority voters could potentially influence election outcomes. See *2006 House Report* 71 & n.197. That amendment, too, is unobjectionable and fails to advance petitioner's position.

Congress determined that allowing covered jurisdictions to dismantle ability-to-elect districts while creating influence districts (the existence of which is much harder to assess) would invite dilutive tactics and undermine the progress minority voters have gained. *2006 House Report* 70; *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 50, 136, 139 (2005) (*Judicial Evolution*). Congress also heard extensive testimony that *Ashcroft*'s rule was impossible to administer, particularly in the short time-frame for administrative preclearance, see, *e.g.*, *Impact and Effectiveness* 889; *Section 5 Pre-Clearance* 8, and that switching the focus from ability-to-elect districts to influence districts would compromise the integrity of the process by enabling the injection of partisanship into Section 5 determinations, *Section 5 Pre-Clearance* 33; *Judicial Evolution* 26.

Petitioner errs in suggesting (Br. 9) that the amended retrogression provision requires a guarantee of minority electoral success. A change is retrogressive under Section 5 only if it diminishes minority voters' demonstrated "ability * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). But any group with the *ability* to elect a candidate of choice will from time to time fail to do so, and Section 5 imposes no requirement to prevent such an outcome. The amended retrogression standard leaves intact the settled principle that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished." *Bush* v. *Vera*, 517 U.S. 952, 983 (1996) (O'Connor, J.) (plurality).[8]

Section 5's retrogression scheme also leaves intact States' discretion to choose among nondiscriminatory voting practices and procedures. Section 5 does not dictate which voting practices covered jurisdictions must use nor when jurisdictions must alter existing practices. It therefore does not intrude on States' prerogative to set voter qualifications on a nondiscriminatory basis. Section 5 is remedial, ensuring that, when a covered jurisdiction does opt to change its voting practices and procedures, it does not thereby disadvantage minority voters. And even within that framework, a State is generally free to respond to a preclearance objection by choosing among nonretrogressive alternatives.

C. Section 5's Geographic Scope Is Tailored To The Problem It Seeks To Remedy

Based on the foregoing evidence, Congress determined that an extension of Section 5 was necessary in order to "banish the blight of racial discrimination in voting" in the jurisdictions that were covered at the time of the reauthorization. *South Carolina*, 383 U.S. at 308. To accomplish that, Congress could have repealed Section 4(b)'s coverage criteria and enacted a provision stating that all jurisdictions subject to Section 5 as of July 27, 2006, would remain covered until the provision next expired or until a jurisdiction bailed out pursuant to Section 4(a). Congress instead left Section 4(b) untouched, but the effect was exactly the same. Congress did not redetermine from scratch which jurisdictions should be subject to Section 5 in 2006 by reapplying the criteria set forth in Section 4(b). Congress used those criteria in 1965, 1970, and 1975 to determine which jurisdictions to bring under the prophylactic remedy of Section 5, and this Court has upheld those determinations. See *South Carolina*, 383 U.S. at 329-333; *Briscoe*, 432 U.S. at 409-415. In 2006, Congress opted not to extend Section 5 to any new jurisdictions (just as it did in 1982). Instead, it maintained the existing geographic scope after determining that voting discrimination remained concentrated in covered jurisdictions.

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[8] Amicus Nix is incorrect in asserting (Br. 30) that Section 5 requires jurisdictions to maintain "influence districts."

1. Although the geographic scope of Section 5 is expressed in terms of the criteria included in Section 4(b), it has long been clear—and this Court has long understood—that those criteria were not selected because Congress was specifically focused on the voting-related concerns the criteria reflect. On the contrary, Congress sought to address all forms of voting discrimination in the jurisdictions it sought to cover. And Congress was particularly concerned about methods of voting discrimination it may not yet have seen. After holding extensive hearings in 1965, Congress determined which areas of the country were engaged in the most egregious forms of voting discrimination. Congress opted to apply Section 5's distinctive scheme only to those areas with the worst records of discrimination.

Congress then "reverse-engineer[ed]" the coverage criteria in Section 4(b) to describe in objective terms those jurisdictions Congress already knew it wanted to cover. Pet. App. 56a-57a; see also *South Carolina*, 383 U.S. at 329; H.R. Rep. No. 439, 89th Cong., 1st Sess. 13-14 (1965); Pet. App. 285a-287a. The registration and turnout triggers included in Section 4(b), along with the test-or-device requirement, thus provided a means of describing—without expressly naming—the jurisdictions with a history of "widespread and persistent discrimination in voting." *South Carolina*, 383 U.S. at 328; see also, *e.g.*, *1975 House Report* 3, 22-23. Accordingly, as early as the first reauthorization, Congress noted that an improvement in the criteria included in Section 4(b) alone would not "serve as a criterion for determining when the discriminatory efforts" of covered jurisdictions "had been sufficiently eradicated to warrant removing the safeguards which made the improvement possible." *Joint View* 5521.

Petitioner thus misunderstands the purpose and function of Section 4(b) in complaining (*e.g.*, Br. 40-41) that the coverage criteria are decades old. Contrary to the assertion of amici covered States (Br. of Arizona, *et al.* 9), the distinctions drawn among States by Section 4(b) are based on their respective records of voting discrimination, *not* on the enumerated statutory proxies. Those criteria are tied to decades-old data because the determinations about which jurisdictions had "perpetrat[ed] the evil" of voting discrimination to a degree warranting initial coverage were made decades ago. The relevant question in 2006 was not what modern objective criteria could be substituted for the criteria included in Section 4(b) in order to describe the same covered jurisdictions. The question was whether Section 5 is still needed in the covered jurisdictions—a question Congress answered overwhelmingly in the affirmative.

2. Petitioner also argues (Br. 32-54) that Congress should not have maintained the same geographic scope in 2006 because the evidence failed to show that voting discrimination remains concentrated in the covered jurisdictions. Petitioner is incorrect.

In addition to showing that discrimination against minority voters in covered jurisdictions continues to an unacceptable degree in absolute terms, the evidence before Congress also demonstrated that "[t]he evil that § 5 is meant to address"—racial discrimination in voting—is "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S. at 203. Although, as this Court has suggested, see *City of Rome*, 446 U.S. at 181, information from the Section 5 process is the most reliable indicator of whether covered jurisdictions continue to discriminate, such information by definition is unavailable for noncovered jurisdictions. In comparing covered and noncovered jurisdictions, Congress therefore relied on national indicators such as successful Section 2 suits, disparities in registration and turnout rates, and the prevalence of racially polarized voting. See Pet. App. 49a-61a, 232a-248a, 287a-290a. And in each indicator, Congress found evidence that minority voters remain worse off in jurisdictions covered by Section 5. See, *e.g.*, *2006 House Report* 25-34; *Section 5 Pre-Clearance* 36-37, 66-68.

The data concerning Section 2 suits with favorable outcomes for minority plaintiffs are a particularly significant indicator that voting discrimination remains concentrated in the covered jurisdictions. Congress had before it a study showing that covered jurisdictions accounted for 56% of all reported Section 2 decisions between 1982 and 2005 with favorable outcomes for minority citizens. Pet. App. 49a; see also *Impact and Effectiveness* 964-1124 (the Katz study). Petitioner understates that data in arguing (Br. 50-51) that Section 2 decisions show no difference between covered and noncovered States. Covered jurisdictions contain less than 25% of the nation's total population, and the nine fully covered States contain only 32% of the nation's African-American population and 28% of the nation's Hispanic population.[9] Covered jurisdictions thus account for much more than their proportional share of plaintiffs' successful suits in reported Section 2 decisions. The study further showed that "the rate of successful [reported] section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions" when controlling for total population, and that the absolute rate of success also is higher in covered jurisdictions. Pet. App. 49a-51a.

In addition, a more comprehensive study undertaken in the course of this litigation indicates that the differential between covered and noncovered jurisdictions is even more pronounced when considering settled and unreported Section 2 suits with outcomes favorable to minority plaintiffs. That information, derived from a study presented to Congress by the National Commission on the Voting Rights Act and supplemented in this litigation with a study by a Department of Justice historian, shows that 81% of all Section 2 cases with outcomes favorable to minority plaintiffs between 1982 and 2005 were filed in covered jurisdictions. J.A. 35a-76a, 144a-155a.

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[9] See *Statistical Abstract of the United States, State Rankings, Black or African-American Population Alone, Number—July 2008*, http://www.census.gov/compendia/statab/2012/ranks/rank12.html; *Statistical Abstract of the United States, State Rankings, Hispanic or Latino Population, Number—July 2008*, http://www.census.gov/compendia/statab/2012/ranks/rank16a.html.

Petitioner attempts (Br. 47-48, 51-53) to distort the Section 2 data by focusing on the absolute number of such cases per State without regard to population differences. But such differences matter. If a study revealed that Rhode Island and Texas had the same number of traffic incidents per year, we would conclude that Texas drivers are much safer, not that Texas and Rhode Island drivers are equally safe. When data are broken down by State, the Section 2 data show a very high correlation between the jurisdictions with the greatest number of Section 2 actions with outcomes favorable to minority plaintiffs and the jurisdictions covered by Section 5—including in absolute terms, but particularly when adjusted for population. Pet. App. 51a-53a. Of the twelve States with the highest number of successful published and unpublished Section 2 cases per million residents,[10] eleven are either covered, partially covered, or have at times been subject to preclearance through the VRA's bail-in mechanism. Pet. App. 52a-53a; see App. A, *infra* (listing 18 jurisdictions, including the States of Arkansas and New Mexico, ordered to obtain preclearance pursuant to Section 3(c)).

The Section 2 data must be understood, moreover, against the backdrop of Section 5. Section 5's preclearance requirement halts the implementation of retrogressive and intentionally discriminatory voting changes. Where that mechanism is in place, one would expect to see fewer successful Section 2 actions over time, not more. That there have been more successful Section 2 suits in covered jurisdictions (many more, when adjusted for population)—even after Section 5 has been in place in those jurisdictions for 50 years—reinforces that the incidence of voting discrimination in those jurisdictions continues to be higher than in noncovered jurisdictions. That is particularly so when the Section 2 data are viewed in light of the entire record before Congress. See Pet. App. 44a-45a (summarizing evidence of discrimination in covered jurisdictions).

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[10] Those States are Alabama, Arkansas, Georgia, Louisiana, Mississippi, Montana, New Mexico, North Carolina, South Carolina, South Dakota, Texas, and Virginia. See Pet. App. 53a (chart compiled by court of appeals, which disaggregates covered and noncovered areas in North Carolina and South Dakota).

3. Finally, the geographic scope of Section 5 is not reflected in the coverage criteria in Section 4(b) alone. In Section 3(c), Congress provided that additional jurisdictions may be "bailed-in" to the preclearance regime if a court determines that they have violated the Fourteenth or Fifteenth Amendments. 42 U.S.C. 1973a(c). Since 1984, moreover, every covered jurisdiction has had the power to terminate its coverage pursuant to Section 4(a)'s bailout provision by ceasing discrimination within its borders. 42 U.S.C. 1973b(a). Petitioner suggests (Br. 55-56) that Congress's amendment of the bailout standard in 1982 made the statute more burdensome rather than less. But as discussed, p. 4, 17, *supra*, the original bailout standard could only correct initial coverage determinations that were over-inclusive. See *South Carolina*, 383 U.S. at 331-332. Under that standard, bailout would have been impossible for petitioner. See Alabama Am. Br. 5-10. The amended bailout standard, in contrast, permits a covered jurisdiction to terminate its coverage if it can demonstrate that neither it nor any of its subjurisdictions has discriminated for ten years

based on prescribed indicia. 42 U.S.C. 1973b(a). In so doing, Congress provided an incentive to covered jurisdictions to end voting discrimination within their borders, *1981 House Report* 32, granting them a measure of control over whether and how long they remain covered.

Congress heard extensive testimony, moreover, that it is neither unduly difficult nor expensive for eligible jurisdictions to bail out of Section 5 coverage. *Policy Perspectives* 265-266; *Modern Enforcement* 8, 26; *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 353-355 (2006). Indeed, the Justice Department has consented to every bailout action filed by an eligible political subdivision since the amended bailout standard became effective in 1984. And in *Northwest Austin*, this Court vastly expanded the number of jurisdictions eligible to seek bailout (compared to the Justice Department's previous understanding of Section 4(a)), and since that decision in 2009, the rate of successful bailouts has rapidly increased. See App. B, *infra*.

Since the current bailout standard took effect in 1984, there have been 38 successful bailout actions, resulting in the termination of Section 5 coverage for 196 different jurisdictions. See App. B, *infra*. More than half of those cases (20) were filed in the less than four years since *Northwest Austin*, accounting for 65% of the total number of jurisdictions that have bailed out. *Ibid.* Those recent bailouts include the first ever bailouts from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; the largest bailout at least since

1984 in terms of population, in Prince William County, Virginia; and the largest bailout at least since 1984 in terms of the number of subjurisdictions, in Merced County, California, which included 84 subjurisdictions. *Ibid.* (reliable population and subjurisdiction data are not available for the pre-1984 bailouts). There are also two additional bailout actions pending court approval, including a bailout of all covered jurisdictions in New Hampshire (which likely could have obtained bailout under the original bailout standard had it sought to do so). See Consent Judgment and Decree (proposed), *New Hampshire* v. *Holder*, No. 12-1854 (D.D.C., filed Dec. 21, 2012) (three-judge court).

Petitioner and certain amici argue (Pet. Br. 54-55; Alaska Am. Br. 12) that the possibility of bailout is illusory for covered States because they cannot bail out if one of their political subdivisions has, *e.g.*, drawn a Section 5 objection or lost a Section 2 case. Of course, that argument does not account for the opportunity of many covered subjurisdictions within covered States to bail out—an opportunity manifestly exhibited by the increased number of bailouts in the few years since *Northwest Austin*. More to the point, requiring covered jurisdictions to demonstrate that governmental units within their boundaries have not discriminated in voting is reasonable. Section 5 is intended to protect minority voters in covered jurisdictions and, as Congress explained in 1982, "the Fifteenth Amendment places responsibility on the [S]tates for protecting [the] voting rights" of its citizens. *1982 Senate Report* 56. States also have "significant statutory and practical control" over the election practices of their political subdivisions. *Ibid.* The amended bailout provision thus "contemplate[s] the same level of state responsibility and protection as was contemplated by the framers of the Fifteenth Amendment, and the drafters of the 1965 Act." *Id.* at 57; *ibid.* ("States have historically been treated as the responsible unit of government for protecting the franchise."). Congress understood, moreover, that "[w]here state attorneys general have been active in advising and educating local officials about their obligation, e.g., Virginia, there has been much less non-compliance with the law than in other covered states." *Ibid.* Indeed, it has been more than nine years since the Commonwealth of Virginia or any of its political subdivisions has incurred a Section 5 objection, lost a Section 2 case, or had federal examiners or observers.

Moreover, the Attorney General enforces the bailout criteria in a flexible and practical manner. For example, if a jurisdiction seeking bailout discovers that it failed to submit voting changes in the previous ten years, the Attorney General will review those changes and, if they are determined not to be retrogressive or intentionally discriminatory, will retroactively preclear them. See Merced County Am. Br. 36-38; Alaska Am. Br. 15-18. Amicus Alaska's insistence (Br. 18-22) that the Attorney General should not be afforded such flexibility is puzzling in light of the bailout provision's explicit statement that bailout should not be denied based on violations of voting laws that "were trivial, were promptly corrected, and were not repeated." 42 U.S.C. 1973b(a)(3); see *Northwest Austin*, 557 U.S. at 207 (adopting a "broader reading of the bailout provision" because of the structure of the VRA and underlying constitutional issues).

Petitioner also complains (Br. 56) that bailout is not a real option because a jurisdiction that successfully bails out may be subject to Section 5 anew if it is found to have violated its citizens' voting rights in the ten years following the bailout. 42 U.S.C. 1973b(a)(5). A jurisdiction with a sufficiently egregious historical record of discriminating against minority voters to warrant Section 5 coverage is poorly positioned to complain about the possibility that its terminated coverage will be reactivated if it resumes its discriminatory ways. In any event, no jurisdiction that has bailed out under the current standard has ever been recove red. Even if petitioner were correct that bailout is currently an illusory option, however, that is by definition an argument for easing of the bailout standard, not a basis for going further to second-guess Congress's careful determination of which jurisdictions should be covered.

Because Sections 3(c), 4(a), and 4(b) together continue to identify jurisdictions in which racial discrimination in voting remains concentrated, Section 5's "disparate geographic coverage [remains] sufficiently related to the problem that it targets," *Northwest Austin*, 557 U.S. at 203.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Jurisdictions That Have Been Ordered by a District Court to Comply With Preclearance Requirement Pursuant to Bail-in Mechanism in Section 3(c) of the Voting Rights Act

1. Thurston County, Nebraska, see *United States* v. *Thurston Cnty.*, C.A. No. 78-0-380 (D. Neb. May 9, 1979);
2. Escambia County, Florida, see *McMillan* v. *Escambia Cnty.*, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979);
3. Alexander County, Illinois, see *Woodring* v. *Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983);
4. Gadsden County School District, Florida, see *N.A.A.C.P.* v. *Gadsden City Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984);
5. State of New Mexico, see *Sanchez* v. *Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984);
6. McKinley County, New Mexico, see *United States* v. *McKinley Cnty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986);
7. Sandoval County, New Mexico, see *United States* v. *Sandoval Cnty.*, C.A. No. 88-1457-SC (D.N.M. May 17, 1990);
8. City of Chattanooga, Tennessee, see *Brown* v. *Board of Comm'rs of City of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990);

9. Montezuma-Cortez School District RE01, Colorado, see *Cuthair* v. *Montezuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D. Col. Apr. 8, 1990);

10. State of Arkansas, see *Jeffers* v. *Clinton*, 740 F. Supp. 585 (E.D. Ark. May 16, 1990), appeal dismissed, 498 U.S. 1129 (1991);

11. Los Angeles County, California, see *Garza & United States* v. *Los Angeles Cnty.*, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991);

12. Cibola County, New Mexico, see *United States* v. *Cibola Cnty.*, C.A. No. 93-1134-LH/LFG (D.N.M. Apr. 21, 1994);

13. Socorro County, New Mexico, see *United States* v. *Socorro Cnty.*, C.A. No. 93-1244-JP (D.N.M. Apr. 11, 1994);

14. Alameda County, California, see *United States* v. *Alameda Cnty.*, C.A. No. C 95-1266 (SAW) (N.D. Cal. Jan. 22, 1996);

15. Bernalillo County, New Mexico, see *United States* v. *Bernalillo Cnty.*, C.A. No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998);

16. Buffalo County, South Dakota, see *Kirke* v. *Buffalo Cnty.*, C.A. No. 03-CV-3011 (D.S.D. Feb. 10, 2004);

17. Charles Mix County, South Dakota, see *Blackmoon* v. *Charles Mix Cnty.*, C.A. No. 05-CV-4017 (D.S.D. Dec. 4, 2007); and

18. Village of Port Chester, New York, see *United States* v. *Village of Port Chester*, C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

APPENDIX B

Covered Jurisdictions That Have Successfully Terminated Section 5 Coverage Pursuant to Bailout Mechanism in Section 4(a) of the Voting Rights Act

Jurisdictions Successfully Bailed Out of Section 5 Coverage Before August 5, 1984

1. Wake County, North Carolina, see *Wake Cnty.* v. *United States*, No. 1198-66 (D.D.C. Jan. 23, 1967);
2. Curry, McKinley, and Otero Counties, New Mexico, see *New Mexico* v. *United States*, No. 76-0067 (D.D.C. July 30, 1976);
3. Towns of Cadwell, Limestone, Ludlow, Nashville, Reed, Woodland, Connor, New Gloucester, Sullivan, Winter Harbor, Chelsea, Sommerville, Carroll, Charleston, Webster, Waldo, Beddington, and Cutler, Maine, see *Maine* v. *United States*, No. 75-2125 (D.D.C. Sept. 17, 1976);
4. Choctaw and McCurtain Counties, Oklahoma, see *Choctaw and McCurtain Cntys.* v. *United States*, No. 76-1250 (D.D.C. May 12, 1978);
5. Campbell County, Wyoming, see *Campbell Cnty.* v. *United States*, No. 82-1862 (D.D.C. Dec. 17, 1982);
6. Towns of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and

Wrentham, Massachusetts, see *Massachusetts* v. *United States*, No. 83-0945 (D.D.C. Sept. 29, 1983);

7. Towns of Groton, Mansfield, and Southbury, Connecticut, see *Connecticut* v. *United States*, No. 83-3103 (D.D.C. June 21, 1984);
8. El Paso County, Colorado, see *Board of Cnty. Comm'rs* v. *United States*, No. 84-1626 (D.D.C. July 30, 1984);
9. Honolulu County, Hawaii, see *Waihee* v. *United States*, No. 84-1694 (D.D.C. July 31, 1984); and
10. Elmore County, Idaho, see *Idaho* v. *United States*, No. 82-1778 (D.D.C. July 31, 1984).

Jurisdictions Successfully Bailed Out of Section 5 Coverage After August 5, 1984

1. City of Fairfax, Virginia (including City of Fairfax School Board), see *City of Fairfax v. Reno*, No. 97-2212 (D.D.C. Oct. 21, 1997);
2. Frederick County, Virginia (including Frederick County School Board; Towns of Middletown and Stephens City; and Frederick County Shawneeland Sanitary District), see *Frederick Cnty. v. Reno*, No. 99-941 (D.D.C. Sept. 10, 1999);
3. Shenandoah County, Virginia (including Shenandoah County School Board; Towns of Edinburg, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock; Stoney Creek San-

itary District; and Toms Brook-Maurertown Sanitary District), see *Shenandoah Cnty. v. Reno*, No. 99-992 (D.D.C. Oct. 15, 1999);

4. Roanoke County, Virginia (including Roanoke County School Board and Town of Vinton), see *Roanoke Cnty. v. Reno*, No. 00-1949 (D.D.C. Jan. 24, 2001);
5. City of Winchester, Virginia, see *City of Winchester v. Reno*, No. 00-3073 (D.D.C. June 1, 2001);
6. City of Harrisonburg, Virginia (including Harrisonburg City School Board), see *City of Harrisonburg v. Reno*, No. 02-289 (D.D.C. Apr. 17, 2002);
7. Rockingham County, Virginia (including Rockingham County School Board and Towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville), see *Rockingham Cnty.* v. *Reno*, No. 02-391 (D.D.C. May 24, 2002);
8. Warren County, Virginia (including Warren County School Board and Town of Front Royal), see *Warren Cnty.* v. *Ashcroft*, No. 02-1736 (D.D.C. Nov. 26, 2002);
9. Greene County, Virginia (including Greene County School Board and Town of Standardsville), see *Greene Cnty.* v. *Ashcroft*, No. 03-1877 (D.D.C. Jan. 19, 2004);

10. Pulaski County, Virginia (including Pulaski County School Board and Towns of Pulaski and Dublin), see *Pulaski Cnty.* v. *Gonzales*, No. 05-1265 (D.D.C. Sept. 27, 2005);

11. Augusta County, Virginia (including Augusta County School Board and Town of Craigsville), see *Augusta Cnty.* v. *Gonzales*, No. 05-1885 (D.D.C. Nov. 30, 2005);

12. City of Salem, Virginia, see *City of Salem* v. *Gonzales*, No. 06-977 (D.D.C. July 27, 2006);

13. Botetourt County, Virginia (including Botetourt County School Board and Towns of Buchanan, Fincastle, and Troutville), see *Botetourt Cnty.* v. *Gonzales*, No. 06-1052 (D.D.C. Aug. 28, 2006);

14. Essex County, Virginia (including Essex County School Board and Town of Tappahannock), see *Essex Cnty.* v. *Gonzales*, No. 06-1631 (D.D.C. Jan. 31, 2007);

15. Middlesex County, Virginia (including Middlesex County School Board and Town of Urbanna), see *Middlesex Cnty.* v. *Gonzales*, No. 07-1485 (D.D.C. Jan. 7, 2008);

16. Amherst County, Virginia (including Town of Amherst), see *Amherst Cnty.* v. *Mukasey*, No. 08-780 (D.D.C. Aug. 13, 2008);

17. Page County, Virginia (including Page County School Board and Towns of Luray, Stanley, and Shenandoah), see *Page Cnty.* v. *Mukasey*, No. 08-1113 (D.D.C. Sept. 15, 2008);

18. Washington County, Virginia (including Washington County School Board and Towns of Abington, Damascus, and Glade Spring), see *Washington Cnty.* v. *Mukasey*, No. 08-1112 (D.D.C. Sept. 23, 2008);

19. Northwest Austin Municipal Utility District Number One, Texas, see *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, No. 06-1384 (D.D.C. Nov. 3, 2009);

20. City of Kings Mountain, North Carolina, see *City of Kings Mountain* v. *Holder*, 746 F. Supp. 2d 46 (D.D.C. Oct. 22, 2010);

21. City of Sandy Springs, Georgia, see *City of Sandy Springs* v. *Holder*, No. 10-1502 (D.D.C. Oct. 26, 2010);

22. Jefferson County Drainage District Number Seven, Texas, see *Jefferson Cnty. Drainage Dist. No. Seven* v. *Holder*, No. 11-461 (D.D.C. June 6, 2011);

23. Alta Irrigation District, California, see *Alta Irrigation Dist.* v. *Holder*, No. 11-758 (D.D.C. July 15, 2011);

24. City of Manassas Park, Virginia, see *City of Manassas Park* v. *Holder*, C.A. No. 11-749 (D.D.C. Aug. 3, 2011);

25. Rappahannock County, Virginia (including Rappahannock County School Board and Town of Washington), see *Rappahannock Cnty.* v. *Holder*, C.A. No. 11-1123 (D.D.C. Aug. 9, 2011);

26. Bedford County, Virginia (including Bedford County School Board), see *Bedford Cnty.* v. *Holder*, No. 11-499 (D.D.C. Aug. 30, 2011);
27. City of Bedford, Virginia, see *City of Bedford* v. *Holder*, No. 11-473 (D.D.C. Aug. 31, 2011);
28. Culpeper County, Virginia (including Culpeper County School Board and Town of Culpeper), see *Culpeper Cnty.* v. *Holder*, No. 11-1477 (D.D.C. Oct. 3, 2011);
29. James City County, Virginia (including Williamsburg-James City County School Board), see *James City Cnty.* v. *Holder*, No. 11-1425 (D.D.C. Nov. 9, 2011);
30. City of Williamsburg, Virginia, see *City of Williamsburg* v. *Holder*, No. 11-1415 (D.D.C. Nov. 28, 2011);
31. King George County, Virginia (including King George County School District), see *King George Cnty.* v. *Holder*, No. 11-2164 (D.D.C. April 5, 2012);
32. Prince William County, Virginia (including Prince William County School District and Towns of Dumfries, Haymarket, Occoquan, and Quantico), see *Prince William Cnty.* v. *Holder*, No. 12-14 (D.D.C. April 10, 2012);
33. City of Pinson, Alabama, see *City of Pinson* v. *Holder*, No. 12-255 (D.D.C. April 20, 2012);
34. Wythe County, Virginia (including Wythe County School Board and Towns of Rural Retreat and

Wytheville), see *Wythe Cnty.* v. *Holder*, No. 12-719 (D.D.C. June 18, 2012);

35. Grayson County, Virginia (including Grayson County School Board and Towns of Fries, Independence, and Troutdale), see *Grayson Cnty.* v. *Holder*, No. 12-718 (D.D.C., July 20, 2012);
36. Merced County, California (including approximately 84 subjurisdictions), see *Merced Cnty.* v. *Holder*, No. 12-354 (D.D.C. Aug. 31, 2012);
37. Craig County, Virginia (including Craig County School District and Town of New Castle), see *Craig Cnty.* v. *Holder*, No. 12-1179 (D.D.C. Nov. 29, 2012); and
38. Carroll County, Virginia (including Carroll County School District and Town of Hillsville), see *Carroll Cnty.* v. *Holder*, No. 12-1166 (D.D.C. Nov. 30, 2012).

Bailout Actions Currently Pending

1. Towns and Townships of Rindge, Millsfield, Pinkham's Grant, Stewartstown, Stratford, Benton, Antrim, Boscawen, Newington, and Unity, New Hampshire, see *New Hampshire* v. *Holder*, No. 12-1854 (D.D.C.), proposed consent decree filed Dec. 21, 2012;
2. Browns Valley Irrigation District, California, see *Browns Valley Irrigation Dist.* v. *Holder*, No. 12-1597 (D.D.C.), proposed consent decree filed Jan. 2, 2013; and

3. City of Wheatland, California, see *City of Wheatland* v. *Holder*, No. 13-54 (D.D.C.), complaint filed Jan. 14, 2013.

APPENDIX C

1. 42 U.S.C. 1973a provides:

Proceeding to enforce the right to vote

(a) Authorization by court for appointment of Federal observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d[1] of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

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[1] See References in Text note below. [Reference states: "Section 1973d of this title, referred to in subsec. (a), was repealed by Pub. L. 109–246, § 3(c), July 27, 2006, 120 Stat. 580."]

(b) Suspension of use of tests and devices which deny or abridge the right to vote

If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) Retention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

2. 42 U.S.C. 1973b provides in pertinent part:

Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determina-

tions were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I–A to I–C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory—

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I–A to I–C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second

sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or

color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973f or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter,

(2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

3. 42 U.S.C. 1973c provides:

Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney

General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

4. 42 U.S.C. 1973f provides:

Use of observers

(a) Assignment

Whenever—

(1) a court has authorized the appointment of observers under section 1973a(a) of this title for a political subdivision; or

(2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 1973b(b) of this title, unless a declaratory judgment has been rendered under section 1973b(a) of this title, that—

(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title are likely to occur; or

(B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;

the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.

(b) Status

Except as provided in subsection (c), such observers shall be assigned, compensated, and separated without regard to the provisions of any statute administered by the Director of the Office of Personnel Management, and their service under subchapters I–A to I–C shall not be considered employment for the purposes of any statute administered by the Director of the Office of Personnel Management, except the provisions of section 7324 of title 5 prohibiting partisan political activity.

(c) Designation

The Director of the Office of Personnel Management is authorized to, after consulting the head of the appropriate department or agency, designate suitable persons in the official service of the United States, with their consent, to serve in these positions.

(d) Authority

Observers shall be authorized to—

(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and

(2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

(e) Investigation and report

Observers shall investigate and report to the Attorney General, and if the appointment of observers has been authorized pursuant to section 1973a(a) of this title, to the court.

REPLY
BRIEF

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

A. Respondent Cannot Avoid The Careful Judicial Review Necessary To Ensure That Congress Exercises Its Enforcement Authority Appropriately. .3

B. Respondent Has Failed To Demonstrate That Section 4(b)'s Coverage Formula Is Rational In Theory And Practice 5

1. Section 4(b) is no longer rational in theory 6

2. Section 4(b) is no longer rational in practice 9

3. Bailout and bail-in cannot save Section 4(b)'s coverage formula. 12

C. Respondent Has Not Shown That Current Conditions Justify Section 5's Extraordinary Preclearance Remedy 13

1. Respondent ignores Section 5's current burdens. 13

Page

2. The 2006 record does not measure up to the records considered in *Katzenbach* and *Rome* 15

3. Respondent's additional evidence fails to demonstrate Section 5's necessity......19

4. The record evidence shows that Section 2 is an adequate remedy in covered jurisdictions.........................21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

CASES

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 3, 4, 5, 20

City of Boerne v. Flores,
521 U.S. 507 (1997) . . . . *passim*

City of Rome v. United States,
446 U.S. 156 (1980) . . . . *passim*

Civil Rights Cases,
109 U.S. 3 (1883) 3, 5

Coleman v. Court of Appeals of Md.,
132 S. Ct. 1327 (2012) 3-4, 14

Georgia v. Ashcroft,
539 U.S. 461 (2003) 1, 14, 21

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) . . . . *passim*

Nw. Austin Mun. Util. Dist. No. One v. Mukasey,
573 F. Supp. 2d 221 (D.D.C. 2008) 20

Oregon v. Mitchell,
400 U.S. 112 (1970) 3, 4, 8, 24

Perez v. Perry,
No. 5:11-cv-360 (W.D. Tex.) 23

Page

Perry v. Perez,
132 S. Ct. 934 (2012) 23

Reno v. Bossier Parish School Bd.,
528 U.S. 320 (2000) 14, 22, 23

Riley v. Kennedy,
553 U.S. 406 (2008) 15

Sherbert v. Verner,
374 U.S. 398 (1963) 4

South Carolina v. Katzenbach,
383 U.S. 301 (1966) . . . . *passim*

Tennessee v. Lane,
541 U.S. 509 (2004) 2, 4, 8, 18

Thornburg v. Gingles,
478 U.S. 30 (1986) 10

White v. Alabama,
74 F.3d 1058 (11th Cir. 1996) .22

STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. X 4

U.S. Const. amend. XIV 2, 3

U.S. Const. amend. XV 2, 3

Page

42 U.S.C. § 1973 22

42 U.S.C. § 1973j 23

42 U.S.C. § 1973*l* 23

42 U.S.C. § 1988 23

H.R. Rep. No. 109-478 (2006) .16, 17

S. Rep. No. 94-295 (1975) 16

S. Rep. No. 109-295 (2006) 16, 20

Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before Senate Comm. on the Judiciary, 109th Cong. (June 13, 2006) .17

Ellen Katz, *VRI Database Master List* 18

Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173 (1989) 22

U.S. Census, Voting and Registration (2004) (Table 4a) 16, 17

U.S. Census Population Estimates (2006) 10

REPLY BRIEF FOR PETITIONER

Four years ago, this Court expressed grave doubts about Congress' reenactment of Sections 4(b) and 5 of the Voting Rights Act ("VRA"), emphasizing preclearance's extraordinary federalism burden, departure from the principle of equal sovereignty, and substantive command to make voting changes that "would be unconstitutional" elsewhere in the country. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202-03 (2009) ("*Northwest Austin*") (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring)). Nevertheless, Congress and the Attorney General took no steps to address these serious constitutional concerns.

Respondent therefore is forced to make attenuated arguments to mask the statute's constitutional flaws. The government dresses up a plea for judicial abdication as deference to Congressional judgment while asking the Court to uphold preclearance based on evidence Congress never considered. It emphasizes Section 5's historic accomplishments but fails to explain how current conditions even remotely compare to the widespread intentional disenfranchisement that justified preclearance as an enforcement remedy in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980). And it concedes that Section 4(b)'s formula is irrational in theory, defending it only as rational in practice, and even then resorting to statistical manipulations.

Thus, Respondent must misconstrue precedent to vindicate its position. Notwithstanding preclearance's departure from foundational principles, this Court twice upheld it as an emergency response to obstructionist Fifteenth Amendment violations "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S. at 203. In 2006, Congress claimed to target Fourteenth Amendment vote dilution—but it never documented conditions showing Section 2 to be inadequate, crafted a coverage formula "sufficiently related to [that] problem," or confined this burdensome prior restraint to jurisdictions where vote dilution is uniquely problematic. *Id.*

This Court has a duty to ensure that Congress does not misuse its enforcement authority to undermine "vital principles necessary to maintain separation of powers and the federal balance." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Those concerns are especially pronounced in this setting as preclearance deprives covered States of that which defines them as sovereign entities—"autonomy with respect to the machinery of self-government." *Northwest Austin*, 557 U.S. at 217 (Thomas, J.). Consequently, this Court must exercise its independent judgment under Article III to determine whether the legislative record documents "relevant constitutional violations," *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting), and reveals the "unique circumstances" peculiar to covered jurisdictions that could "justify legislative measures not otherwise appropriate," *Katzenbach*, 383 U.S. at 334. Because the 2006 legislative record does not meet this test, Congress' reenactment of Sections 4(b) and 5 exceeds its remedial enforcement authority under the Fourteenth and Fifteenth Amendments.

A. Respondent Cannot Avoid The Careful Judicial Review Necessary To Ensure That Congress Exercises Its Enforcement Authority Appropriately.

Respondent seeks to narrow this Court's review of Sections 4(b) and 5 by trumpeting the cardinal importance of preventing racial discrimination in voting. Brief for the Federal Respondent ("Br.") 17-19. The intersection of voting rights and anti-discrimination concerns, the government claims, places Congress at the apex of its enforcement powers, requiring the Court to give Congress "greater leeway." Br. 18. But Respondent seeks deference so comprehensive that it would fundamentally degrade this Court's ability to fulfill its Article III duty. And affording this special deference to some constitutional values—but not others—would wrongly specify a hierarchy of Fourteenth and Fifteenth Amendment rights. At base, otherwise unconstitutional enforcement legislation cannot be saved by asking this Court to accept on faith Congress' determination that prophylactic legislation does not exceed constitutional limits.

Unchecked judicial deference cannot be reconciled with the remedial scope of congressional enforcement authority. The Court has always understood that the enforcement power does not encompass "general legislation upon the rights of the citizen, but corrective legislation." *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883). It is "appropriately exercised only in response to state transgressions." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). Absent this focus, remedial "legislation may become substantive in operation and effect." *Boerne*, 521 U.S. at 520; *Coleman v. Court of Appeals of Md.*, 132

S. Ct. 1327, 1333-38 (2012). The Court must independently decide whether Congress has employed its enforcement authority prophylactically to prevent future constitutional violations or has inappropriately extended a prescriptive power into areas reserved to the States under the Tenth Amendment.

To keep Congress from crossing this line, the Court must ensure that enforcement legislation correctly identifies the constitutional violations against which it proposes to act. Because Congress has not "been given the power ... to determine what constitutes a constitutional violation," *Boerne*, 521 U.S. at 519, the Court itself must determine whether the record documents "relevant constitutional violations," *Lane*, 541 U.S. at 564 (Scalia, J., dissenting), or catalogs state action transgressing only a barrier established by Congress, *see, e.g.*, *Garrett*, 531 U.S. at 369. The Court also must determine for itself whether the prophylactic remedy is appropriately responsive or instead attempts to reshape the balance of power between the States and the federal government. *Northwest Austin*, 557 U.S. at 223-26 (Thomas, J.); *see, e.g.*, *Katzenbach*, 383 U.S. at 334 ("[E]xceptional conditions ... justify legislative measures not otherwise appropriate."); *Mitchell*, 400 U.S. at 130-34 (Black, J.) (upholding literacy-test ban but invalidating 18-year-old voting age in state elections based on same legislative record).

Moreover, no decision has held that Congress' enforcement power varies with the right safeguarded. *See, e.g.*, *Garrett*, 531 U.S. at 365, *Coleman*, 132 S. Ct. at 1333-34. In enacting RFRA, Congress sought to safeguard the free exercise of religion, *Boerne*, 521 U.S. at 519, a right entitled to no less protection than the right to vote, *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Yet this

Court reviewed RFRA without according "greater leeway" and explained that the differing outcomes of *Katzenbach* and *Boerne* resulted from the records on which Congress acted rather than differing review standards. *Boerne*, 521 U.S. at 530-31. Indeed, the distinctive factor that has affected the Court's scrutiny of Section 5 is not the right it enforces but its extraordinary federalism burden. *Northwest Austin*, 557 U.S. at 224-25 (Thomas, J.).

Finally, neither the size of the legislative record nor bipartisan support alters the analysis. Br. 12, 20. *Garrett* invalidated Title I of the ADA despite 17 hearings, 63 public forums, 8,000 pages of testimony, 149 Cong. Rec. S5411 (2003) (Sen. Tom Harkin), and passage by a margin of 377-28 in the House and 91-6 in the Senate, 136 Cong. Rec. 17296-97, 17376 (1990). RFRA passed the Senate 97-3 and the House by voice vote. 139 Cong. Rec. H2363, S14471 (1993). "[T]he responsibility of an independent judgment is now thrown upon this court" and the Court is "bound to exercise it." *Civil Rights Cases*, 109 U.S. at 10. Whether the Court frames its review as following from *Katzenbach*, *Boerne*, *Northwest Austin*, or any combination thereof, the outcome is the same: Congress exceeded its enforcement authority by reenacting Sections 4(b) and 5. *Compare* Judicial Education Project Am. Br. 3-22, *with* Project 21 Am. Br. 6-15.

B. Respondent Has Failed To Demonstrate That Section 4(b)'s Coverage Formula Is Rational In Theory And Practice.

A singular characteristic of Section 5 preclearance is its application only to jurisdictions falling within Section 4(b)'s formula. To survive review, that formula must target jurisdictions where Congress has found a pattern of constitutional violations and exclude jurisdictions not having similar characteristics. Only then could it be "rational in both practice and theory." *Katzenbach*, 383 U.S. at 330. Respondent fails to show that Section 4(b) passes either test.

1. Section 4(b) is no longer rational in theory.

Respondent ignores *Northwest Austin*'s admonition that the "disparate geographic coverage formula" must be "sufficiently related to the problem that it targets," 557 U.S. at 203, offering no theoretical defense of Section 4(b). Nor could it. Pet. Br. 40-43. In *Katzenbach*, this Court found Section 4(b) rational in "theory" because its two triggers—use of discriminatory tests and devices and low registration and turnout—reliably signaled a pattern of constitutional violations. 383 U.S. at 329-31. Respondent thus wrongly claims that "those criteria were not selected because Congress was specifically focused on the voting-related concerns the criteria reflect." Br. 48. "Congress had learned that widespread and persistent discrimination in voting … ha[d] typically entailed the misuse of tests and devices, *and this was the evil for which the new remedies were specifically designed.*" *Katzenbach*, 383 U.S. at 331 (emphasis added). Tests and devices were Congress' target; low voting rates were indicative of their discriminatory effect on minority voters.

Respondent denies the significance of Section 4(b)'s "criteria" because they highlight the irrationality of retaining a formula "based on data that is now more than 35 years old" and that "fails to account for current political conditions." *Northwest Austin*, 557 U.S. at 203. Tests and devices have been outlawed nationally for decades, and "condemnation under §4(b) is a marker of higher black registration and turnout." Pet. App. 83a (Williams, J.). In renewing Section 5, Congress claimed it was targeting a different problem altogether—vote dilution—but the point of *Katzenbach* and *Northwest Austin* is that Congress must do more than train its sights on one constitutional violation or another. It must rationally tie coverage to the problem it targets. Neither Congress nor Respondent makes a colorable showing of any theoretical connection between the formula's triggers and a pattern of unconstitutional vote dilution. Pet. Br. 41-42.

Respondent nevertheless asks the Court to ignore the formula and review it only as a shorthand specification of those jurisdictions Congress wanted to cover. In the government's view, Congress sought to "reverse engineer" a formula matching its 2006 findings and serendipitously discovered that the antiquated formula was suited to the task. Br. 48-50. Respondent's fanciful reconstruction of the legislative process is not borne out by the record. Congress did not carefully survey the national landscape and learn that vote dilution was "concentrated" in the exact same 12,000 jurisdictions—not one more, not one less—covered under a formula that has not been amended since 1975. Congress asked if "Section 5 is still needed in the covered jurisdictions" when analyzed collectively, Br. 49-50, without ever considering (perhaps for political reasons) whether vote dilution was equally or more prevalent in any non-covered jurisdiction, Pet. Br. 45; Southeastern Legal Found. Am. Br. ("SLF") 24-28.

The choice between a formula and singling out covered jurisdictions via a list also is not the academic question Respondent would like it to be. Br. 48. Congress' use of neutral criteria rationally targeting the original "evil" Section 5 was designed to remedy persuaded the *Katzenbach* Court to tolerate imperfections in coverage. Because Section 4(b)'s criteria were rational in "theory," it was "permissible" to impose preclearance in places with less evidence "of substantial voting discrimination in recent years" and to "exclude[] certain localities which [did] not employ voting tests and devices but for which there [was] evidence of voting discrimination by other means." *Katzenbach*, 383 U.S. at 330-31. Those imperfections would have been impermissible absent theoretically rational coverage criteria.

Indeed, express designation of specific jurisdictions for coverage would have required individualized statutory findings justifying the placement of each jurisdiction in federal receivership. *Mitchell*, 400 U.S. at 284 (Stewart, J.); *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). Congress was not willing to bear the burden of "expressly naming" the jurisdictions it sought to cover in 1965. Br. 49. And it certainly was unwilling to do so in 2006. Congress made no finding that Shelby County or any other jurisdiction had a current record of voting discrimination distinguishing it from the rest of the country. The only thing "Congress answered overwhelmingly in the affirmative," Br. 50, was its unwillingness to revisit the formula.

Intervenors' argument—which Respondent does not join—that Petitioner cannot maintain a challenge to the formula because Section 4(b) can be upheld as applied to Shelby County even if "the record of discrimination in … other jurisdictions … is insufficient to justify coverage" fails for the same reason. Cunningham Br. 47-51. The formula's constitutionality raises a legal question that cannot be answered by pretending that it is a list and then scouring the legislative record to try to prove that Congress *could have* justified preclearance as to a particular jurisdiction even though it never did. Shelby County is covered by formula—not specification—and, as in *Katzenbach*, may contest coverage by challenging the formula itself.

2. Section 4(b) is no longer rational in practice.

Respondent's arguments attempting to show that Section 4(b) is rational in practice also miss the mark. Rather than considering each State individually—the only process that would afford equal dignity to each one, Pet. Br. 49-50—Respondent relies on the Katz study of Section 2 litigation and lumps the States together in an attempt to manufacture a collective distinction between covered and non-covered jurisdictions. Petitioner already has addressed this use of the Katz study and need not repeat its arguments. Pet. Br. 50-54. But it bears repeating that the Katz study relied on "favorable outcomes for minority plaintiffs," Br. 50, a category of cases that is inherently unreliable and therefore not probative for evaluating which jurisdictions are most likely to violate the Constitution. Pet. Br. 49; Texas Am. Br. 22-23.

Respondent's only additional argument rests on artificially inflating the narrow covered versus non-covered divide by supplementing it with a study of "unreported cases for the non-covered areas" derived "from a compilation" by Peyton McCrary, Harris Br. 52 n.29, that he prepared "in the course of this litigation," and then "adjust[ed]" for population to "Section 2 cases per million residents," Br. 51-52. Mr. McCrary admitted that evidence of unreported cases in the legislative record was "restricted to jurisdictions covered by Section 5" and his own search "may be under-inclusive." JA 43a-45a. The study thus is inherently unreliable because it is not in the legislative record, *see infra* 20, and for several other reasons, Pet. App. 93a-94a (Williams, J.).

Respondent's manipulation of the data according to statewide population also is troubling. Neither Congress nor this Court has ever "adjusted" Section 2 litigation data based on population to evaluate a jurisdiction's propensity to discriminate. Nor does Respondent explain why this metric is probative rather than simply conjured up to bolster its position. There is no empirically valid reason, for example, to believe that Montana (pop. 945,000; two Section 2 violations) is 38 times more likely to discriminate than California (pop. 36.1 million; two Section 2 violations). U.S. Census Population Estimates (2006), *available at* http://www.census.Gov/popest/data/state/asrh/2008/SCEST2008-03.html ("*2006 Census Report*"). Indeed, there is every reason to doubt it.

Almost every Section 2 case involves vote dilution and thus is dependent on the concentration of minorities within a local community—not the statewide population. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). It is quite likely, then, that Arkansans (black pop. 453,000; four Section 2 violations) are not different from Oklahomans and Kansans (combined black pop. 447,000; zero Section 2 violations), and that the people of Colorado (Hispanic pop. 937,000; two Section 2 violations) do not have greater propensity to discriminate than their neighbors in Utah and Nevada (combined Hispanic pop. 891,000; zero Section 2 violations). *2006 Census Report*. To determine whether any jurisdiction has a greater tendency than another to engage in vote dilution, Congress needed to compare similar local communities with the kind of demographics making vote dilution possible. Congress, of course, made no such comparison. It did not even compile the data necessary to make such a comparison.

But even "adjusting" for population cannot help Respondent; the great majority of covered jurisdictions remain "indistinguishable from their uncovered peers." Pet. App. 93a (Williams, J.). "The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions." *Id.* There is thus no correlation between coverage and successful Section 2 cases per million residents. *Id.* 92a. If anything, Respondent's need to resort to such manipulations reveals the weakness of its position.

Perhaps realizing that her study undermines rather than supports the formula, Professor Katz—participating as *amicus* here—suggests another way to manufacture a disparity between covered and non-covered jurisdictions. She contends that the disparity in Section 2 litigation becomes pronounced when adjusted for the relative number of political subdivisions. Katz Am. Br. 8-9. But given that vote dilution depends on the concentration of minorities within a jurisdiction, "adjusting" for the number of political subdivisions makes no more sense than doing the same for population. It is the racial demographics of a political division—not the number of them—that matters for vote dilution purposes. In short, no matter how Respondent and its *amici* sort the data (something Congress never did), the formula is a "remarkably bad fit" to the vote-dilution problem Congress sought to remedy. Pet. App. 95a (Williams, J.).

3. Bailout and bail-in cannot save Section 4(b)'s coverage formula.

Respondent does not argue that bailout continues to ameliorate Section 4(b)'s overbreadth by terminating preclearance for jurisdictions that "should not have been covered in the first place." BIO 4. Rather, the government acknowledges that, as amended in 1982, bailout is "an incentive to [all] covered jurisdictions to end voting discrimination within their borders." Br. 54; Pierson Br. 41. Since bailout no longer performs the tailoring function that once made it constitutionally pertinent, *Katzenbach*, 383 U.S. at 331-33, it is immaterial to the issues here.

In any event, Respondent's own bailout statistics confirm its infinitesimal impact. There have been 38 successful bailout actions resulting in the termination of coverage for 196 discrete jurisdictions since 1984. Br. 54. Bailout thus affects only a tiny fraction of the 12,000 covered jurisdictions and, as Respondent concedes, Br. 55-56, is not a viable option for States—even for States with no Section 2 violations, *see* Arizona, *et. al.* Am. Br. 27-30; Alaska Am. Br. 26-33. And for jurisdictions that pursue it, bailout comes at substantial expense. Merced County Am. Br. 29 (spending "approximately $350,000" on bailout). All of this "underscores how little relationship there is between the existence of bailout and the constitutionality" of the preclearance regime under this formula. *Northwest Austin*, 557 U.S. at 215 n.1 (Thomas, J.).[1]

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[1] Respondent's contention that it enforces "the bailout criteria in a flexible and practical manner," Br. 56, is cause for concern given the potential for abuse. Alaska Am. Br. 13-22.

Finally, Respondent's argument that bail-in solves the formula's under-inclusiveness is misplaced. Br. 53. Bail-in operates nationwide and is available only after a judicial finding of unconstitutional discrimination. It does not require the bailed-in jurisdiction to seek approval from the Attorney General or to contest changes in a remote venue. And it can be terminated without satisfying elaborate bailout criteria. Alaska Am. Br. 23-26. Bail-in is the kind of targeted remedy that can complement Section 2 to ensure that minority voters throughout the nation are afforded ample protection from unconstitutional conduct. NBCC Am. Br. 23-27. It underscores rather than solves the problems with the coverage formula.

C. Respondent Has Not Shown That Current Conditions Justify Section 5's Extraordinary Preclearance Remedy.

Invalidating Section 4(b) would eliminate preclearance, but Section 5 is itself unconstitutional as Congress did not compile a record that could justify subjecting *any* jurisdiction to preclearance. Although Respondent asserts that "the same problems with case-by-case litigation" that existed when *Katzenbach* and *Rome* were decided "persist today," Br. 35, the record does not substantiate the assertion. Because "[t]hings have changed in the South," *Northwest Austin*, 557 U.S. at 202, "the extensive pattern of discrimination that led the Court to previously uphold §5 ... no longer exists," *id.* at 226 (Thomas, J.).

1. Respondent ignores Section 5's current burdens.

Respondent misconceives the standard under which the Court must evaluate Section 5 by ignoring its "current burdens." *Northwest Austin*, 557 U.S. at 203. Federalism is not an afterthought that must give way when Congress invokes its remedial enforcement authority. Preclearance is a radical departure from the division of powers between the States and the federal government. *See, e.g.* Arizona *et. al.* Am. Br. 24-27; Alabama Am. Br. 13-21; Texas Am. Br. 5-15; Alaska Am. Br. 9-12. It imposes a sweeping prior restraint on all voting changes and places a massive financial strain on covered jurisdictions. *See, e.g.*, Merced County Am. Br. 29. Respondent even acknowledged that preclearance cost covered jurisdictions more than $1 billion over ten years. Transcript of Oral Argument 33, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (Apr, 29, 2009). And despite defending Congress' decision to overturn *Ashcroft* and *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) (*"Bossier II"*), Br. 41-47, Respondent does not dispute the amendments' increase to the already significant preclearance burden. Former Officials Am. Br. 7-17; Nix Am. Br. 34-38.

Given these burdens, Congress must do more than assemble a record showing that preclearance is a "valid" or "effective means of combating voting discrimination in the covered jurisdictions." Br. 13, 15-16. A remedy that is "valid" in one circumstance may be invalid in another. *Katzenbach*, 383 U.S. at 334. And a prior restraint can be "effective," but preclearance's federalism costs also require it to be "drawn in narrow terms" in response to current political conditions. *Coleman*, 132 S. Ct. at 1334. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 308, 334). Whether "exceptional conditions," *Katzenbach*, 383 U.S. at 334, continue to justify preclearance is the precise issue the Court isolated in asking whether "current needs" justify "current burdens," *Northwest Austin*, 557 U.S. at 203.

2. The 2006 record does not measure up to the records considered in *Katzenbach* and *Rome*.

Respondent does not even attempt to argue that the legislative record documents conditions resembling those that led the Court to uphold Section 5 in *Katzenbach*. Pet. Br. 27-33. It instead speculates that preclearance is the reason why obstructionist tactics are no longer employed. Br. 34-36. Even if improvements were "due in significant part to the Voting Rights Act itself, and stand as a monument to its success," *Northwest Austin*, 557 U.S. at 202; *Riley v. Kennedy*, 553 U.S. 406, 429-30 (2008) (Stevens, J., dissenting), Congress needed to document that systematic obstruction—not its absence—still permeates covered jurisdictions. Otherwise Section 5 could be reenacted in perpetuity based on "outdated assumptions about racial attitudes in the covered jurisdictions," *Northwest Austin*, 557 U.S. at 226 (Thomas, J), instead of "reliable evidence of actual voting discrimination," *Katzenbach*, 383 U.S. at 329.

Respondent's correlation of present circumstances to those confronting the Court in *Rome* also is misplaced. Br. 27, 35-38. Current conditions differ dramatically from those Congress confronted in 1975 just 10 years after passage of the VRA. At that time, "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions." *Rome*, 446 U.S. at 180. As shown below, those disparities no longer exist.

	1972			2004		
	White	Black	Gap	White	Black	Gap
Alabama	80.7	57.1	23.6	73.8	72.9	0.9
Georgia	70.6	67.8	2.8	63.5	64.2	-0.7
Louisiana	80.0	59.1	20.9	75.1	71.1	4.0
Mississippi	71.6	62.2	9.4	72.3	76.1	-3.8
North Carolina	62.2	46.3	15.9	69.4	70.4	-1.0
South Carolina	51.2	48.0	3.2	74.4	71.1	3.3
Virginia	61.2	54.0	7.2	68.2	57.4	10.8

S. Rep. No. 109-295 at 11 (2006); H.R. Rep. No. 109-478 at 12 (2006); S. Rep. No. 94-295 at 14 (1975).

Respondent points to a registration gap between non-Hispanic whites and Hispanics in Virginia and Texas as supporting preclearance. Br. 33. Unlike 1975, however, such disparities do not distinguish these States from non-covered jurisdictions—let alone justify retaining the old coverage formula. The Census Report reveals that the national registration gap between white non-Hispanics and Hispanics is 39.2%, and there are huge gaps in non-covered states, such as Maryland (54.0%) and Oklahoma (52.2%). U.S. Census, Voting and Registration (2004) (Table 4a), *available at* http://www.census.gov/population/socdem/voting/cps2004/tab04a.xls. Further, the gap shrinks precipitously once citizenship is taken into account. The national registration gap between white non-Hispanic and Hispanic citizens is 17.3%. Louisiana (13.6%), Mississippi (9.9%), South Carolina (-5.0%), Texas (16.0%), and Virginia (15.2%) are better than the national average. *See id.* Respondent notably does not claim that any disparity resulted from unconstitutional conduct.[2]

Respondent also claims that the absolute number of Section 5 objections since 1982 establishes that conditions in the covered states have not improved since 1975. Br. 22-23. But like the court of appeals, it fails to explain how the absolute number could be more relevant than the objection *rate* given the comparison of unequal periods and the post-1982 increase in submissions, Pet. Br. 35 n.7. In any case, an average of 30 objections a year across 12,000 covered jurisdictions does not suggest that case-by-case litigation would be an ineffective remedy for any change that violates Section 2 or the Constitution. It demonstrates the opposite.

Respondent also ignores the downward trend of post-1982 objections. The objection rate dropped from 1.06% in the first eight years after the 1982 reauthorization, to 0.96% over the next eight years, to 0.15% (or 57 objections out of 36,345 submissions) from 1998 until 2005. H.R. Rep. No. 109-478, at 22. An objection in 1983 is certainly less indicative of current conditions than one in 2005.[3] The relevant issue is whether there is a "modern," *Boerne*, 521 U.S. at 530, or "current," *Northwest Austin*, 557 U.S. at 203, pattern of voting discrimination. 57 objections out of 36,345 submissions from 12,000 jurisdictions over nine years is not a pattern of anything except near-perfect compliance with Section 5.

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[2] Respondent claims in passing that registration and turnout disparities between non-Hispanic white and minority voting rates support preclearance, but Congress did not make this comparison. Br. 33. Nor was any historical comparison possible given that the Census did not begin reporting non-Hispanic white statistics until 1988. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before Senate Comm. on the Judiciary*, 109th Cong., at 147 (June 13, 2006). In any event, the 2004 Census Report shows that six fully covered States are better than the national average and better than many non-covered States.

Moreover, very few Section 5 objections are proof of "relevant constitutional violations." *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). Even accepting Respondent's conclusion that any change objected to on discriminatory purpose grounds means that it had such a purpose, *but see* Former Official Am. Br. 22-24, it acknowledges that "not all Section 5 objections represent a finding of unconstitutional discrimination" and many that did were "predicated on a failure to demonstrate the absence of discriminatory purpose rather than on an affirmative finding of illicit purpose," Br. 23, 26. Objections based on discriminatory effect are even less probative, showing at most "adverse consequences for minority voters." Br. 27. Neutral laws with "incidental burdens" on minority voters cannot justify enforcement legislation claiming to remedy intentional discrimination. *Boerne*, 521 U.S. at 531. In sum, neither the "number" nor "nature" of objections since 1982 supports reauthorization. *Rome*, 446 U.S. at 181.

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[3] Section 2 litigation shows a similar downward trend. Two-thirds of the Section 2 violations identified in the Katz Study occurred between 1982 and 1994, the first half of the studied time period; of the 30 Section 2 violations that occurred in the latter half, more occurred in non-covered (16) than covered jurisdictions (14). Katz, *VRI Database Master List*, *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

Fundamentally, however, *Rome* did not rest on parsing objections or other statistical barometers. The Court upheld Section 5 in *Rome* because it did not trust that the "limited and fragile" gains observed only a decade removed from Bloody Sunday would be durable without *seven* more years of federal supervision. *Id.* at 182. But constitutional justification can no longer be found in *Katzenbach*'s wake. By any measure, the improvements of record are no longer limited and fragile. None of the factors the *Rome* Court examined suggest that restoring full sovereignty to covered States could unleash rampant discrimination. Simply put, reauthorization cannot be justified by presuming an incurable racial animus after 45 years of social change and close federal supervision.

3. Respondent's additional evidence fails to demonstrate Section 5's necessity.

Respondent attempts to fill the record gap with evidence not relied on in *Katzenbach* and *Rome* by seeking to credit the *filing* of Section 2 actions, more information requests, racially polarized voting, and federal election observers. Br. 30-32, 38-39. But none of these indicates the widespread pattern of *intentional* discrimination needed to justify preclearance. Pet. Br. 31; *Northwest Austin*, 557 U.S. at 228 (Thomas, J.); Center for Constitutional Jurisprudence Am. Br. 9-22. At least on a statistical level, these categories are not "reliable evidence of actual voting discrimination" in covered jurisdictions. *Katzenbach*, 383 U.S. at 329.

Respondent discusses isolated instances of voting discrimination to bolster the statistical relevance of "second generation" barriers. Br. 24-34. But whether there is *some* voting discrimination in covered jurisdictions is not the question. There have been 105,433 voting changes across 12,000 jurisdictions since 1982. S. Rep. No. 109-295 at 13-14. That Respondent can identify scattered malpractices is not surprising. Had Congress closely studied non-covered jurisdictions, it would have found many examples there as well. The question is whether there is such rampant discrimination and obstruction that Section 2—although adequate protection for minority voters throughout the rest of the country—is inadequate in covered jurisdictions. Pet. Br. 31-33; Nix Am. Br. at 10-14. Anecdotal evidence cannot establish the "systematic resistance" to voting rights necessary to justify Section 5. *Katzenbach*, 383 U.S. at 328.

Respondent also tries to expand its evidence outside the legislative record. Br. 25-26, 29-30. But the relevant question is "whether *Congress* identified a history and pattern of unconstitutional" government action. *Garrett*, 531 U.S. at 368 (emphasis added). It would be paradoxical for the Court to defer to Congressional findings *and* to uphold Section 5 based on evidence Congress never considered. Review is limited to "actual evidence Congress considered." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008); Reason Foundation Am. Br. 6-25.[4]

Moreover, Respondent's own post-enactment evidence further undermines the case for Section 5's reenactment.

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[4] Crediting this evidence also would thrust the Court into a broad survey of current electoral results—a task subject to conflicting views and beyond the Court's purview. SLF Am. Br. 28; Reason Foundation Am. Br. 24 & n.8.

The dispute over voter-identification laws highlights the unfairness of affording the laws of Indiana, Pennsylvania, and Wisconsin the presumption of validity to which all States are entitled while forcing South Carolina and Texas to engage in preclearance litigation in a remote venue to implement their laws. Pet. App. 71a (Williams, J.). Worse still, it shows how Section 5's mission has strayed from thwarting discriminatory tactics to providing Respondent with leverage to impose its preferred electoral system on covered jurisdictions. Officials Am. Br. 17-27; Nix Am. Br. 29-32, 38. Requiring jurisdictions to make (or refrain from making) voting changes for the benefit of certain races or ethnicities—rather than holding States to the mandate of non-discrimination—is not cause for praise. *Northwest Austin*, 557 U.S. at 203 (citing *Ashcroft*, 539 U.S. at 491-92 (Kennedy, J., concurring)).

4. The record evidence shows that Section 2 is an adequate remedy in covered jurisdictions.

Ultimately, the Court must determine whether there is "a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate." Pet. App. 26a. The Court previously found that obstructionist tactics made a traditional litigation remedy insufficient to confront continued evasion. *Katzenbach*, 383 U.S. at 314-15; *Rome*, 446 U.S. at 181. Respondent does not argue that this problem still exists; yet it ignores the significance of that concession. Without that evidence, the *Katzenbach* Court never would have upheld Section 5. Pet. Br. 37-38.

Shifting the focus of the inquiry, Respondent claims that Section 2 litigation is insufficient because it is an "after-the-fact remedy," "can take years to litigate," "places the burden of proof on minority plaintiffs," and "places a heavy financial burden on minority voters who challenge illegal election practices." Br. 39-40. But that dismal view of Section 2 suggests that Congress left minority voters in non-covered jurisdictions without an effective remedy. Respondent never suggests that Section 5 is a necessary supplement to Section 2 nationwide. By contrast, Section 5 was upheld in *Katzenbach* not because of the inherent attributes of civil litigation, but because the difference in the kind (discriminatory tests and devices) and level (systematic) of discrimination in covered States made Section 2 inadequate *in those areas*. *Northwest Austin*, 557 U.S. at 225 (Thomas, J.).

Moreover, Section 5 now targets vote dilution, a problem for which Section 2 affords minority plaintiffs an effective—and in some ways superior—remedy. NBCC Am. Br. 13-23. First, Section 2 provides *greater* protection against vote dilution than Section 5. Unlike Section 5, which protects against "backsliding," *Bossier II*, 528 U.S. at 335, Section 2 may "enhance the ability of the plaintiffs to elect their candidates of choice," *White v. Alabama*, 74 F.3d 1058, 1069 (11th Cir. 1996). Section 2 also includes a "results" test that permits plaintiffs to secure relief without proving discriminatory purpose. 42 U.S.C. §1973.

Second, Section 2 authorizes quick and effective injunctive relief. Preliminary injunctions are available and often granted, NBCC Am. Br. 16-17, as courts have "broad remedial authority in Section 2 cases." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 219 (1989). The fact that plaintiffs must marshal evidence to secure relief in Section 2 cases only further highlights the "extraordinary burden-shifting procedure[]" of Section 5. *Bossier II*, 528 U.S. at 335.

Third, Section 2 litigation proceeds expeditiously, NBCC Am. Br. 14-16, often *faster* than preclearance litigation, *see Perry v. Perez*, 132 S. Ct. 934, 939-40 (2012). Indeed, it appears that Section 5's chief consequence in redistricting cases is to impose on federal courts "the unwelcome obligation of creating an interim plan" while preclearance litigation drags on. *Id.* at 940 (internal quotation omitted). Respondent favors Section 5 because changes cannot take effect during the pendency of preclearance litigation. But that radical departure from traditional federalism principles makes preclearance uniquely problematic.

Fourth, Section 2 does not impose an excessive financial burden on plaintiffs. NBCC Am. Br. 18-20. Prevailing plaintiffs are entitled to attorneys' fees and expert fees, 42 U.S.C. §1973*l*(e), *id.* §1988, and the government may assume the financial burden by intervening in or bringing its own Section 2 action, *id.* §1973j(d); Pet. App. 77a (Williams, J.). Respondent also ignores that law firms and interest groups often represent Section 2 plaintiffs—either *pro bono* or with expectation of securing a fee award at the conclusion of successful litigation. In the *Perez* litigation, for example, plaintiffs are represented by 47 attorneys from 30 different law firms, organizations, and interest groups. *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex.); *Perez*, 132 S. Ct. at 938-39 (listing appellate counsel). The idea that disadvantaged individuals bear the costs of Section 2 litigation—especially in redistricting cases—contradicts recent experience.

Finally, Section 2's nationwide operation allows the country to move beyond recrimination and cohesively respond to problems no longer concentrated in covered jurisdictions. "Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country" and "underlines an awareness that the problem is a national one and reflects a national commitment to its solution." *Mitchell*, 400 U.S. at 283 (Stewart, J.). The dire local conditions that once called for a selective remedy no longer exist.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR.,
ATTORNEY GENERAL, *ET AL.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF ABRAHAM LINCOLN FOUNDATION FOR PUBLIC POLICY RESEARCH, INC., AMERICA'S PRAYER NETWORK, CHRISTIANS REVIVING AMERICA'S VALUES, U.S. JUSTICE FOUNDATION, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED IN 2006, EXCEEDS THE POWERS VESTED IN CONGRESS BY EITHER THE FOURTEENTH OR FIFTEENTH AMENDMENT 4

A. At Stake Is the Constitutionality of Section 5 of the Voting Rights Act of 1965, as Amended in 2006 5

B. The Constitutionality of the 2006 Amendments to VRA Section 5 Depends upon this Court's One-Person/One-Vote Rulings under the Fourteenth Amendment 8

C. Section 5 of the VRA, as Amended in 2006, Is Not Authorized by the Enforcement Provisions of Either the Fourteenth or the Fifteenth Amendment 10

D. Congress is Not Authorized Under the Fourteenth Amendment to Enforce the Equal Protection Guarantee Against Any State Law Regarding the Voting Franchise 14

II. SECTIONS 4(B) AND 5 OF THE VRA OF 1965, AS AMENDED IN 2006, PUT ALABAMA ON AN UNEQUAL FOOTING, IN VIOLATION OF THE STATUTE ADMITTING ALABAMA TO THE UNION, AND THE TENTH AMENDMENT 22

CONCLUSION 29

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION

Article I, Section 2 23
Article I, Section 4 23
Amendment XIV . . . . 4, *passim*
Amendment XV . . . . 4, *passim*
Amendment XVII 24
Amendment XIX 18, 19, 21, 24
Amendment XXIV 18, 21, 24
Amendment XXVI 18, 21, 24

STATUTES

42 U.S.C. § 1973c(b) 7, 9
42 U.S.C. § 1973c(c) 7
42 U.S.C. § 1973c(d) 7, 9

CASES

City of Boerne v. Flores, 521 U.S. 507 (1997) . . . . 10, *passim*
City of Mobile v. Bolden, 446 U.S. 55 (1980) 6, 9, 13, 14
Coyle v. Smith, 221 U.S. 559 (1911) 23, 26, 28
Crawford v. Marion County, 553 U.S. 181 (2008) 26, 28
Davis v. Bandemer, 478 U.S. 109 (1986) 16, 17
Foley v. Connelie, 435 U.S. 291 (1978) 22
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Gomillion v. Lightfoot, 364 U.S. 339 (1960) 15
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Northwest Austin Mun. Utility District v. Holder, 557 U.S. 193 (2009) . . . . 5, *passim*
Oregon v. Mitchell, 400 U.S. 112 (1970) 24
Oyama v. California, 332 U.S. 633 (1948) 22
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MISCELLANEOUS

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Resolution for Admission of Alabama into the Union 22
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INTEREST OF *AMICI CURIAE*[1]

Abraham Lincoln Foundation for Public Policy Research, Inc. ("ALF") is a nonprofit social welfare organization, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). ALF conducts research, education, and advocacy concerning the status of America's Black community, disseminates such information to Americans, promoting color-blind governmental policies. America's Prayer Network, Christians Reviving America's Values, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Each organization is interested in the proper construction of state and federal constitutions and statutes.

SUMMARY OF ARGUMENT

Whether Congress exceeded its authority under the Fourteenth and Fifteenth Amendments in the 2006 reauthorization of the Voting Right Act of 1965 ("VRA") under the preexisting formula of Section 4(b) depends, in the first instance, on whether the 2006 preclearance amendments to Section 5 exceeded Congress's authority under the enforcement provisions of either the Fifteenth or the Fourteenth Amendment.

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[1] It is hereby certified that the parties have filed blanket consents to the filing of *amicus* briefs, that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

According to the 2006 amendments to Section 5 of the VRA, a voting change in a Section 4(b) covered jurisdiction is impermissible if its purpose and effect "will ... diminish[] the ability of citizens of the United States ... to elect their preferred candidate of choice." Additionally, according to 2006 version of VRA, the purpose of preclearance is to "protect the ability of [minority] citizens to elect their preferred candidate of choice."

Under these amendments to VRA's Section 5, the purpose of preclearance is no longer concerned with preventing voting law changes that mask racial discrimination denying or abridging the right to vote. Therefore, it exceeds the authority vested in Congress by Section 2 of the Fifteenth Amendment.

Under these amendments to VRA's Section 5, the purpose of preclearance is now concerned with preventing voting law changes that may dilute the weight of the vote of minority groups to elect their preferred candidates to office. Therefore, it concerns the authority vested in Congress by Section 5 of the Fourteenth Amendment to enforce this Court's one-person/one-vote precedents which purportedly secure, under the Equal Protection guarantee, the right to have one's vote "equally effective" in the election of candidates to office.

Even under the one-person/one-vote rulings, this Court has not found that the equal protection guarantee secures a right that every voter is entitled to have an equal say in the outcome of an election. Furthermore, this Court has rejected the claim that groups of voters are entitled to substantial equal positions to elect the candidate of the group's choice. Because the Court has rejected the claim that the equal protection guarantee secures a political order based on group identity, Congress has no such authority to impose such an order upon the States, the power under Section 5 of the Fourteenth Amendment being remedial only.

Not only would the 2006 amendments to VRA exceed Congress' authority to enforce this Court's one-person/one-vote rulings, but those rulings, themselves, are outside the authority of this Court under the Equal Protection Clause. Textually, contextually, and historically, the Equal Protection guarantee has nothing to do with the right to vote, a right that belongs only to persons who are citizens, members of the political community, not to persons as human beings.

Additionally, VRA's section 4(b) has put Alabama on an unequal footing in violation of the statute admitting Alabama to the Union and the Tenth Amendment. At the very heart of the independence and sovereignty of the several States is the State's authority over its own electoral system. By subjecting Shelby County, Alabama to preclearance by federal authorities in Washington, D.C. with respect to every change in its voting laws, VRA has undermined the efforts of VRA-covered jurisdictions to address voting fraud, concentrating power in unelected bureaucrats that threatens public confidence in the integrity and legitimacy of the American federal republic.

If this Court continues to sanction what has become an outmoded system of centralized preclearance of voting law changes, it will encourage Congress to implement additional voting reforms, treating state and local governments as nothing more than subordinate departments of one unitary government vested with unlimited powers over federal, state, and local elections.

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED IN 2006, EXCEEDS THE POWERS VESTED IN CONGRESS BY EITHER THE FOURTEENTH OR FIFTEENTH AMENDMENT.

The question directly presented herein is whether Congress' decision in 2006 to reauthorize the Voting Rights Act ("VRA") under the preexisting formula of Section 4(b) of the VRA exceeded its authority under the Fourteenth and Fifteenth Amendments. That question cannot be answered adequately without first addressing whether Congress exceeded its authority with respect to its amendments to Section 5 of the VRA. As Shelby County points out in its merits brief, the 2006 amendments "made the [preclearance] burden more onerous by amending Section 5...." Brief for Petitioner ("Pet. Br."), p. 10. Indeed, not only did these amendments increase the preclearance burden, but also they changed entirely the purpose of the VRA. *Id.* As Shelby County has also pointed out, the new VRA Section 5 shifted the focus of the VRA from denying minority voters "ballot access" to ensuring minority voters "electoral success." Pet. Br., p. 41. Not only is it constitutionally "irrational" for Congress to have raised the bar to voting law changes in those jurisdictions governed by a 35-year old coverage formula, but also it is unconstitutional for Congress to have changed the VRA purpose from outlawing discriminatory "interference with the ability to cast a ballot" to prohibiting the "employ[ment of] electoral practices undermining the effectiveness of the ballot once cast." *See id.* at 42.

The purpose of this *amicus* brief, then, is to address directly the constitutionality of the 2006 version of Section 5 of the VRA. If the new Section 5 is unconstitutional, then the means employed by Congress in Section 4(b) to accomplish the purpose of amended VRA Section 5 is unconstitutional.

A. At Stake Is the Constitutionality of Section 5 of the Voting Rights Act of 1965, as Amended in 2006.

Invoking its power under section 2 of the Fifteenth Amendment to enforce the prohibition against any State denying or abridging "[t]he right of citizens of the United States to vote ... on account of race, color or previous condition of servitude," Congress enacted the Voting Rights Act of 1965 ("VRA"). *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966). Relying exclusively on that same enumerated power, "Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years)." *See* Northwest Austin Mun. Utility District v. Holder, 557 U.S. 193, 200 (2009). In 2006, however, "when reauthorizing [VRA for another 25 years], Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments," thereby putting into play for the first time its remedial powers under section 5 of the Fourteenth Amendment to enforce the prohibition against any State "deny[ing] to any person ... equal protection of the laws" in order to protect against "vote dilution," not just "vote discrimination." *See* Shelby County, Alabama v. Holder, 679 F.3d 848, 864 (D.C. Cir. 2102). As the appellate court below noted, there is no court precedent supporting the claim that "intentional vote dilution violates the Fifteenth Amendment," but there is precedent that "the Fourteenth Amendment prohibits vote dilution intended 'invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Id.* (citing City of Mobile v. Bolden, 446 U.S. 55, 66 (1980)).

Purporting to act in furtherance of this equal protection principle against "vote dilution," the 2006 VRA reauthorization contains two significant new provisions whose constitutionality depends completely upon Congress's remedial authority under section 5 of the Fourteenth Amendment.

First, prior to 2006, VRA Section 5 provided that a "covered" state or political subdivision could be barred from making a voting law change only if the purpose or effect of the proposed change would "**worsen** the position of minority voters." *See* Reno v. Bossier Parish School Board, 528 U.S. 320, 324 (2000) (emphasis added). Under the 2006 amendments, however, a voting law change would not be approved unless the covered jurisdiction proved the absence of "**any** discriminatory purpose." *See* 42 U.S.C. § 1973c(c) (emphasis added).

Second, prior to 2006, a voting law change in a covered jurisdiction would be barred if, after considering a variety of relevant factors, the change would have an overall **retrogressive** effect on the voting strength of a minority group. *See* Georgia v. Ashcroft, 539 U.S. 461, 479-80 (2003). After 2006, a voting law change would not meet approval if it "has the purpose or will have the effect of diminishing the **ability** of any citizens of the United States on account of race or color ... to **elect** their preferred candidates of choice." *See* 42 U.S.C. § 1973c(b) (emphasis added); *see also* § 1973c(d), which expressly states that the purpose of this specific amendment "is to **protect** the **ability** of [minority] citizens to **elect** their preferred candidates of choice." (Emphasis added.)

In short, these 2006 amendments are designed not just to provide a prophylactic approach to racial discrimination that denies or abridges the right to cast a ballot or to have one's vote counted, but rather are designed to ensure that racial minority groups' votes are sufficiently effective to elect persons responsive to the minority groups' interests. This Congressional object is outside the enumerated power of Congress under either Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment.

B. The Constitutionality of the 2006 Amendments to VRA Section 5 Depends upon this Court's One-Person/One-Vote Rulings under the Fourteenth Amendment.

In light of Northwest Austin, expressing reservations about the continuing constitutionality of VRA under the Fifteenth Amendment, the Government has offered Section 5 of the Fourteenth Amendment as authority to enact VRA's ban on "intentional acts of vote dilution on the basis of race...." Brief for the Respondents in Opposition ("Govt. Resp. Br."), p. 19. In their brief in opposition to Shelby County's petition for a writ of certiorari, Respondents-Intervenors have taken this argument one step further, asserting that "it was entirely proper for Congress to rely on both Amendments when it acted to reauthorize Section 5 and Section 4(b) in 2006." Brief in Opposition for Respondents-Intervenors ("Intrv. Resp. Br."), p. 33.

According to the Respondents-Intervenors, the Fourteenth and Fifteenth Amendments synergistically prohibit what neither provision does alone:

> [B]eginning in the 1970's, the Supreme Court built upon its **one-person, one-vote** rulings under the Fourteenth Amendment to hold that a **different** form of vote dilution — one that denies minority voters the opportunity to elect candidates of choice — also violates the Fourteenth Amendment.... Thus, constitutional law as applied to discrimination in voting has

> progressed to including the prohibitions in both the Fourteenth and Fifteenth Amendments. [Intrv. Resp. Br., p. 34 n.22 (emphasis added).]

Indeed, there would have been no reason for Congress to have invoked the Fourteenth Amendment in support of the 2006 VRA but for the amendment to Section 5 which alters the ultimate preclearance question to be whether a voting law change "has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color ... to **elect** their preferred candidate of choice." *See* 42 U.S.C. § 1973c(b) (emphasis added). Having explicitly stated in 42 U.S.C. § 1973c(d) that "the **purpose** of subsection (b) is to **protect** the ability of such citizens to **elect** their preferred candidates of choice" (emphasis added), Congress relied on Section 5 of the Fourteenth Amendment, in recognition that Congress's remedial authority under the Fifteenth Amendment is confined to redress or prevent state action which abridges or denies the right to vote on the basis of race, not to redress or prevent state action that "dilutes" the weight of a vote cast. *See, e.g.,* City of Mobile v. Bolden, 446 U.S. 55, 62-63 (1979).

As the Intervenors in their brief in response have recounted, the constitutionality of the original VRA was adequately supported by Section 2 of the Fifteenth Amendment, because in the beginning the aim of the law concerned "discrimination in voting." *See* Intrv. Resp. Br., p. 34 n.22. However, as the Intervenors also have asserted, it was not until this Court had extended the Equal Protection Clause in its "one-person, one-vote rulings [that] a different form of vote dilution —

one that denies minority voters the opportunity to **elect** candidates of choice — also violates the Fourteenth Amendment." *Id.* Thus, by stating that the purpose of the new Section 5 is to protect the ability of minority citizens to elect candidates of their choice, Congress has relied upon whatever remedial authority is allowed by the "one-person/one-vote" rulings under the Equal Protection Clause.

C. Section 5 of the VRA, as Amended in 2006, is Not Authorized by the Enforcement Provisions of Either the Fourteenth or the Fifteenth Amendment.

Congress's power to "enforce" the Equal Protection Clause of the Fourteenth Amendment is remedial in nature and purpose. City of Boerne v. Flores, 521 U.S. 507, 519 (1997). Therefore, the authority vested in Congress by Section 5 of the Fourteenth Amendment is not plenary; rather, Congress's power to "enforce" the "provisions" of the Amendment is "inconsistent with the [notion] that Congress has the power to decree [their] substance...." *Id.* Had such a power been intended, Congress would have proposed for state ratification the first version of the Amendment which was placed in 1866 before the 39th Congress and which read:

> The Congress shall have the power to make all laws which shall be necessary and proper to secure ... to all persons in the several States equal protection of life, liberty and property. [Cong. Globe, 39th Cong., 1st Sess. 813, 1034 (1866).]

As this Court recounted in Boerne, Congress rejected this proposal on the ground that "the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." Boerne, 521 U.S. at 521. As a result of these objections, the Amendment was redrafted. In its present form, Section 1 "impose[s] self-executing limits on the States," and Section 5 "'enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation, by a formal congressional enactment.'" Boerne, 521 U.S. at 522-23.

In addition to its federal design, the Fourteenth Amendment was crafted in such a way as to "maintain[] the traditional separation of powers between Congress and the Judiciary." *Id.*, 521 U.S. at 523-24. In response to concerns that the original Fourteenth Amendment proposal would "vest[] in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation" (*id.*, 521 U.S. at 524) and, thus, place the meaning of "legal equality ... in the hands of changing congressional majorities" (*id.* at 521), Congress adopted the present language which prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *Id.* By employing language limiting Congress's enforcement to a negative check on the abuse of state power, and granting Congress power only to "enforce" that "provision," Section 5's power is "corrective or preventive, not definitional...." *Id.*, 521 U.S. at 525. Otherwise, "Congress could define its own powers by altering the Fourteenth Amendment's meaning, [and] no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *Id.*, 521 U.S. at 529. Thus, patterned after the first eight Amendments to the Constitution, the first section of the Fourteenth Amendment "set[s] forth self-executing prohibitions on governmental action," affirming thereby that the Supreme Court has "primary authority to interpret those prohibitions." *Id.*, 521 U.S. at 524.

These same principles of separation of powers and federalism undergird the Fifteenth Amendment. *See* Boerne, 521 U.S. at 524, citing South Carolina v. Katzenbach, 383 U.S. at 325. As explained in Boerne, the Fifteenth Amendment, like the Fourteenth, vests in Congress only remedial powers, the substantive right of citizens to vote free of any denial or abridgment on account of race or color having been fixed by the constitutional text. *See id.*, 521 U.S. at 525-26. Until 2006, Congress abided by these limitations, adopting and reauthorizing Section 5 of VRA as a remedial tool, designed to correct state actions denying the right of American citizens the right to vote on account of race or color. *See* Northwest Austin, 557 U.S. at 197-99. The 2006 amendments, however, prompted this Court to construe the VRA "bailout" section liberally, in order to avoid the question of VRA's continuing constitutionality. *Id.*, 557 U.S. at 200-04. As Justice Thomas warned in his concurring and dissenting opinion, "[t]he Court quite properly alerts Congress that [VRA's] § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional." *Id.*, 557 U.S. at 216.

In an effort to avoid testing these "outer boundaries," the Government has urged this Court to sustain the 2006 version of VRA as a constitutional exercise of power under the Fourteenth Amendment. *See* Govt. Resp. Br., pp. 19, 29. The Government and Congress's reliance on Congress' enforcement powers under section 5 of the Fourteenth Amendment, however, is unavailing. As noted previously, under the federalism and separation of powers principles embraced by the Fourteenth Amendment, "Congress ... has been given the power 'to enforce,' not the power to determine, what constitutes a constitutional violation." Boerne, 521 U.S. at 519. Rather, it is for this Court to "interpret the Constitution in a case or controversy...." *Id.*, 521 U.S. at 524. In City of Mobile v. Bolden, this Court ruled that the one-person/one-vote rule[2] judicially derived from the Equal Protection Clause does not encompass any "entitlement to group representation," whether by race, religion, political affiliation, ethnicity, or otherwise. *Id.*, 446 U.S. at 78-80. As Justice Stevens asserted, any such grouping of the American citizenry undermines the principle of government of the people, by the people, and for the people, "emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Id.*, 446 U.S. at 89 (Stevens, J., concurring). Instead, Justice Stevens observed that group politics — whether racial or religious — beget "antagonisms that relate to race or to religion rather than to political issues," leading to "communities seek[ing] not the best representative but the best racial or religious partisan." *Id.* In short, rather than promoting "equality" among a diverse people, the goal of group representation would do the opposite.

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[2] The "one-person/one-vote" rule was formerly known as the "one-man/one-vote" rule.

The purpose of new Section 5 of the VRA — requiring disapproval of voting changes that have the effect of diminishing the ability of any citizens of the United States on account of race or color to elect their preferred candidate — squarely rests upon group identity politics rightfully rejected by this Court in City of Mobile. As this Court observed in that case, the "right to equal participation in the electoral process does not protect any 'political group' ... from electoral defeat [or] entail a right to have one's candidates prevail." *Id.*, 446 U.S. at 77 and n.24. Section 5 of the Fourteenth Amendment simply does not empower Congress in the name of "equal protection" to "protect the ability of minority citizens or any other self-identified political group to elect their preferred candidates of choice," as provided in the 2006 amendments to VRA Section 5. *See* City of Mobile, 446 U.S. at 75 n.22 and 78 n.26.

D. Congress Is Not Authorized Under the Fourteenth Amendment to Enforce the Equal Protection Guarantee Against Any State Law Regarding the Voting Franchise.

As noted above, the Fourteenth Amendment's Equal Protection Clause is a Johnny-come-lately to the justification of the enactment and reauthorization of VRA. *See* I.B., *supra*. Indeed, because the Fifteenth Amendment explicitly prohibits the denial or abridgment, on account of race or color, of the right of an American citizen to vote, there would be no reason to invoke the equal protection guarantee in support of legislation designed only to enforce the constitutional ban on racial discrimination denying or abridging the right to vote. Not surprisingly, up through the 1960's, vote discrimination cases were governed generally by the Fifteenth Amendment. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960). Currently, however, it is assumed that the Fourteenth Amendment's Equal Protection Clause, like the Fifteenth Amendment, prohibits racial discrimination in voting. *See* Intv. Br., pp. 33-34.

However, this Court has construed the equal protection guarantee, as applied to the right to vote, to impose upon the States not only a prohibition against racial discrimination, but also an obligation to configure electoral districts in both houses of their legislatures in proportion to each district's population. Popularly known as the "one-person/one-vote rule," this Court has determined that the equal protection guarantee requires that each qualified voter's vote must be weighted equally with every other qualified voter's vote. *See* Reynolds v. Sims, 377 U.S. 533 (1964). In an opinion that waxes more poetical than analytical,[3] the Reynolds Court optimistically assumed that its new rule of one-person/one-vote would usher in a new political order in which:

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[3] *See, e.g.*, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Id.*, 377 U.S. at 562.

> each and every citizen has an unalienable right to full and effective participation in the political processes of his State's legislative bodies.... Full and effective participation by all citizens in state government requires, therefore, that each citizen have an **equally effective** voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. [*Id.*, 377 U.S. at 565 (emphasis added).]

Twenty-one years later, this Court addressed the equal protection claim of the Indiana Democratic Party, which asserted that a Republican Party reapportionment scheme that gerrymandered Democratic Party voters in such a way as to deny Democratic Party voters full and equal participation in the State House and Senate elections violated the one-person/one-vote rule. In particular, the Democratic Party pointed to two multi-member districts where Democratic Party candidates drew 46.6 percent of the vote, but only 3 of the 21 house seats were filled by Democrats. Davis v. Bandemer, 478 U.S. 109, 115 (1986).

In order for each voter's vote to count equally to every other voter's vote, as required by the one-person/one-vote principle, the Democratic Party argued that the number of house members elected ought to be proportionate to the number of Democrat votes counted. The Court rejected this argument on the ground that such inequality of electoral outcomes "is inherent in winner-take-all, district-based elections." *Id.*, 478 U.S. at 130. Thus, the Court concluded that "we **cannot** hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates." *Id.* (emphasis added).

As for those voters who reside in districts admittedly drawn by the Republican Party "to save as many incumbent Republicans as possible" (*id.*, 478 U.S. at 117), the Court recognized that voters who are members of the minority party would not have a ghost of a chance ever to elect a person to office. *Id.*, 478 U.S. at 131. The Court offered the consolation that:

> [T]he power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually **deemed** to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.... This is true even in a safe district where the losing group loses election after election. [*Id.*, 478 U.S. at 132 (emphasis added).]

Yet, according to Reynolds, the constitutional right "of all qualified citizens to vote ... in state ... elections ... can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id., 377 U.S. at 554-55. Indeed, according to Reynolds, "the Equal Protection Clause of the Fourteenth Amendment ... established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id.*, 377 U.S. at 560-61. In fact, however, as the entire text of the Fourteenth Amendment as well as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments demonstrate, the Equal Protection Clause was designed to establish **no** such principle governing a citizen's right to vote and to have that vote counted regardless of whether such right is denied or abridged or limited in any other way.

In his Reynolds dissent, Justice Harlan contended that the equal protection guarantee of the first section must be read in context with the second section of the Fourteenth Amendment. As he observed, the second section specifically addressed the "right to vote," providing for a particular remedy to be imposed upon a State that "denied [or in any way abridged that right] at any election ... for the members of the Legislature ... to any of the ... inhabitants of such State, being twenty-one years of age, and citizens of the United States..., except for participation in rebellion, or other crime." And, as he explained:

> The Amendment is a single text.... It was discussed as a unit in Congress, and proposed as a unit to the States.... Whatever one might take to be the application to these cases of the Equal Protection Clause if it stood alone, I am unable

> to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny "or in any way"abridge the right of their inhabitants to vote for "the members of the [State] legislature," and its express provision of a remedy for such denial or abridgement. [*Id.*, 377 U.S. at 594.]

Backing up his reading of the text, Justice Harlan carefully reviewed the legislative hearings, ratification process, and legislative apportionment history. He concluded that there was not a scintilla of evidence supporting the Reynolds majority's presumption that the equal protection guarantee either limited the powers of the States with respect to the voting franchise, or authorized Congress to intrude upon those powers, even if exercised to deny or abridge the right to vote on account of race or on any other ground. *See id.*, 377 U.S. at 595-611. Additionally, Justice Harlan noted that, if the equal protection guarantee prohibited the denial or abridgment of the right to vote on account of race, there would have been no need for either the Fifteenth or Nineteenth Amendment. *Id.*, 377 U.S. at 611-12. As Justice Harlan concluded: "[It] is inescapable that the Court has ... relegated the Fifteenth and the Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned." *Id.*, 377 U.S. at 612.

The Reynolds Court paid no attention to Justice Harlan's protestations, disregarding the long-standing rule of construction that "[I]n expounding the Constitution ..., every word must have its due force and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *See* Holmes v. Jennson, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of conforming its opinion to the written Constitution, as required by its very nature and purpose,[4] the Reynolds Court conformed the Constitution to the Court's political philosophy. Without reciting a single word in the constitutional text, the Court proclaimed:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. [Reynolds, 377 U.S. at 561-62.]

As the sole support for this statement, the Court cited Yick Wo v. Hopkins, 118 U.S. 356 (1886), a case involving a San Francisco city ordinance discriminating against Chinese laundries, as if the rule of equal protection laid down with respect to engaging in a business enterprise were applicable to the exercise of the voting franchise. But, as Yick Wo acknowledges, the equal protection guarantee applies to distinctions among "persons" — citizens and aliens alike — who are entitled "to the full and equal benefit of all laws and proceedings for the security of persons and property ...." *Id.*, 118 U.S. at 369-70. In contrast, the Yick Wo Court observed that "the political franchise of voting is ... not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will ...." *Id.*, 118 U.S. at 370. Indeed, the right to vote is not even a privilege of United States citizenship protected from state abridgments by the Fourteenth Amendment. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

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[4] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803).

With respect to the right to vote, then, the Fourteenth Amendment equal protection guarantee does not even apply. That guarantee addresses only those rights that belong to "persons," as persons, not to "citizens," as citizens. Indeed, in each of the four Amendments to the United States Constitution limiting the power of the United States and the States respecting the right to vote, the beneficiaries of those limitations are identified as "citizens of the United States," not persons. Thus, a person who is not an American citizen may not make any claim of a constitutional right to vote under the Fifteenth, Nineteenth, Twenty-Fourth, or Twenty-Sixth Amendments.

To extend the Fourteenth Amendment's Equal Protection Clause to the right to vote disregards the fundamental difference between rights that belong to persons in America because they are citizens and rights that belong to persons because they are human beings. A citizen "means a person owing allegiance to the government, and entitled to protection from it." 2 J. Story, Commentaries on the Constitution, §1932, p. 685 (5th ed. 1891). While a citizen, qua citizen, does not have a right to vote, a person must be at least a citizen to make any colorable constitutional claim to such a right.[5] *Id.* at 682 n.2. While States have discretion to extend the voting franchise to persons who are not citizens, such an extension would be based upon some evidence of political allegiance, such as a declaration of intent to become a citizen.[6] That is not so with regard to the equal protection of the laws, which is a right that extends to all persons regardless of one's political allegiance. *See* Oyama v. California, 332 U.S. 633, 647-79 (1948) (Black, J. Concurring) (land ownership). Thus, Congress had absolutely no authority under section 5 of the Fourteenth Amendment to enact the 2006 VRA, a law that benefits only those persons who are American citizens.

II. SECTIONS 4(B) AND 5 OF THE VRA OF 1965, AS AMENDED IN 2006, PUT ALABAMA ON AN UNEQUAL FOOTING, IN VIOLATION OF THE STATUTE ADMITTING ALABAMA TO THE UNION, AND THE TENTH AMENDMENT.

On December 14, 1819, the United States Congress admitted the State of Alabama into the union, "'on an equal footing with the original States,'"[7] "in all respects whatever."[8]

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[5] Indeed, this Court has withheld from aliens the equal protection of those laws that exclude them from employment by state and local governments in positions that "involve[] discretionary decision making, or execution of policy, which substantially effects members of the political community." *See* Foley v. Connelie, 435 U.S. 291 (1978) (serving in state police force).

[6] *See* Minor v. Happersett, 88 U.S. at 177.

As this Court observed in a case involving the powers and prerogatives of the State of Oklahoma, upon that State's admission to the Union:

> On her admission she at once became entitled to and possessed of all rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them.... Equality of constitutional right and power is the condition of all the States in the Union, old and new. [Coyle v. Smith, 221 U.S. 559, 575 (1911).]

As this Court has "consistently recognized[,] the Constitution gives the States ... authority over the structuring of electoral systems." *See* Northwest Austin, 557 U.S. at 216 (Thomas, J., concurring and dissenting). Indeed, at the beginning, the original States had unfettered power over their own electoral systems. *See* 1 J. Story, Commentaries, §§ 583-86, pp. 433-37. Additionally, Article I, Section 2 keyed the qualification of electors to the United States House of Representatives to those "of the most numerous Branch of the State Legislature," subject only to the power of Congress under Article I, Section 4 to regulate the "times, places and manner" of such elections. Even with the adoption of the Seventeenth Amendment in 1913, providing for the popular election of Senators, the States retained the power to determine "the qualifications requisite for electors of the most numerous branch of the state legislatures."

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[7] Resolution for Admission of Alabama into the Union, http://www.legislature.state.al.us/misc/history/constitutions/1819/1819resolution.html.

[8] Act for the Admission of Alabama, 3 Stat. 489, Section 1.

To be sure, the States today do not have the same unlimited powers under the Constitution over their own electoral systems as did the original thirteen before the adoption and ratification of the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments. However, even when coupled with this Court's mistaken precedents extending the Fourteenth Amendment equal protection guarantee to the electoral franchise,[9] the Constitution "assume[s] that the States [have] general supervisory power over state elections." *See* Oregon v. Mitchell, 400 U.S. 112, 125-26 (1970) (opinion, Black, J.). As Justice Black observed in the Oregon case striking down a federal measure extending the voting franchise to 18-year olds in state elections, "no function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.*, 400 U.S. 112, 125 (1970). And, as

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[9] The Fourteenth Amendment is omitted from this list because it was not originally designed to impose any restrictions upon the voting franchise, but rather only erroneously imposed by this Court, as demonstrated above. *See* Section I.D., *supra*.

Justice Thomas recently observed, while "state authority over local elections is not absolute"[10]:

> State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority. [*Id.*]

In light of this historic record of state sovereignty with respect to elections, it should come as no surprise that Section 4(b) of the VRA threatens "our historic tradition that all States enjoy 'equal sovereignty,'" Northwest Austin, 557 U.S. at 203. Under that section, certain States and political subdivisions have been singled out, requiring "preclearance from federal authorities in Washington, D.C. before [they] can change anything about [their] elections." *Id.*, 557 U.S. at 196. At a minimum, such "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*, 557 U.S. at 203.

In addition to the obvious failure of the VRA, as amended in 2006, "to account for current political conditions," having rested its coverage formula on data "that is now more than 35 years old" (*id.*), and the continuing requirement that any voting law change, no matter how insignificant and unrelated to racial discrimination, must be precleared,[11] there are additional reasons to conclude that VRA Section 4(b), as amended in 2006, does not meet the Boerne test of "congruence and proportionality"[12] and is, therefore, unconstitutional.

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[10] Northwest Austin, 557 U.S. at 217.

After an extensive discussion of the fundamental importance of adhering to the principle that each and every State is admitted to the union on an equal footing, the Court in Coyle v. Smith added this insight:

> [T]he constitutional equality of the States is **essential** to the **harmonious** operation of the scheme upon which the Republic was organized. When that **equality disappears** we may remain a free people, but the Union will **not** be the Union of the Constitution. [*Id.,* 221 U.S. at 580 (emphasis added).]

In the months and weeks leading up to the 2012 elections, efforts were made in several States to enact laws requiring voters to produce photo identifications. Encouraged by the Supreme Court's decision in Crawford v. Marion County, 553 U.S. 181 (2008), upholding the constitutionality of an Indiana law, the states of South Carolina and Texas enacted similar photo ID laws, only to find them blocked by the Attorney General. Because Indiana is not a covered jurisdiction under VRA, it was free to implement its photo ID law without preclearance from Washington,

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[11] *See* Pet. Br., pp. 17-23 .

[12] *Id.*, 521 U.S. at 520.

D.C., but both South Carolina and Texas were required to undergo preclearance before their changes in the law could be implemented. *See* E. Connor, "S.C. sues feds for blocked voter ID law," *USA Today* (Feb. 8, 2012)[13]; S. Horwitz, "Eric Holder vows to aggressively challenge voter ID laws," *Washington Post* (Jul. 10, 2012).[14] *See also* Shelby County, 679 F.3d at 902 (Williams, J., dissenting).

As VRA-covered jurisdictions, not only must Texas and South Carolina initiate court review of the Attorney General's denial of preclearance, but both States must satisfy the burden of proving that their voter photo ID laws actually enhance the vote of minority groups, enabling their members' votes to be more effective, before they can be implemented. On the other hand, Indiana, a jurisdiction not covered by VRA, need take no action to obtain preclearance from the Attorney General or, if denied such preclearance, to file a court action in a three-judge District Court in Washington, D.C. Instead, the Indiana law could be challenged only by the initiation of a lawsuit by an aggrieved Indiana citizen or political party.

Yet, as dissenting Circuit Judge Williams pointed out in the court of appeals below:

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[13] http://usatoday30.usatoday.com/news/washington/story/2012-02-07/south-carolina-voter-id/53001466/1.

[14] http://articles.washingtonpost.com/2012-07-10/politics/35486272_1_voter-id-laws-harm-hispanic-voters-new-voter

> Why should voter ID laws from South Carolina and Texas be judged by different criteria (at a minimum, a different burden of persuasion which is often critical ...) from those governing Indiana? A glimpse at the charts shows that Indiana ranks "worse," than South Carolina and Texas in registration and voting rates, as well as in black elected officials. [Shelby County, 679 F.3d at 902, Williams, J., dissenting.]

Under VRA, the Attorney General may presume that a covered state's voter picture ID law would dilute the minority vote by discouraging members of minority groups from voting. *See* "Holder vows to aggressively challenge voter ID laws," *supra*. However, the Supreme Court found the Indiana photo ID law was designed to "deter[] and detect[] voter fraud." Crawford, 553 U.S. at 191, 192-97. If the Government were truly concerned about "dilution" of the weight of a minority voter's vote, as it claims to be in defending the constitutionality of VRA, it ought to be equally concerned about the "dilution" of the weight of every qualified voter's vote that occurs when there is voter fraud. *See id.*, 553 U.S. at 196-97. By treating the two voting concerns unequally, VRA sends a divisive message that the covered jurisdictions are second-class States, not "equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *See* Coyle v. Smith, 221 U.S. at 567.

Lastly, proponents of new VRA Section 5 may not have fully thought through the real world consequences of the principle they are advancing.

Should this Court sanction the disparate treatment of the states established by this pre-clearance procedure, it would establish a precedent that could encourage Congress to rely on that authority to implement other types of voting reforms. For example, if Congress found evidence of voter fraud in specific urban areas,[15] it could enact a law by which federal uniformed officers would be stationed at polling places in those specific locales where prior offenses were believed to have existed to prevent voter fraud in federal, state, or local elections.

CONCLUSION

The decision of the court of appeals should be reversed.

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[15] *See, e.g.*, "In 59 Philadelphia voting divisions, Mitt Romney got zero votes," Philly.com (Nov. 12, 2012), http://articles.philly.com/2012-11-13/news/35069785_1_romney-supporters-_mitt-romney-voter-id-law; B. York, "When 1,099 felons vote in [Minnesota Senate] race won by 312 ballots," The Examiner (Aug. 6, 2012), http://washingtonexaminer.com/york-when-1099-felons-vote-in-race-won-by-312-ballots/article/2504163; J. Farah, "Did Voter Fraud Swing the Election?" World Net Daily (Nov. 11, 2012), http://www.wnd.com/2012/11/did-voter-fraud-swing-election/; R. Alexander, "Obama Likely Won Re-Election Through Election Fraud," Townhall.com (Nov. 11, 2012), http://townhall.com/columnists/rachelalexander/2012/11/11/obama_likely_won_reelection_through_election_fraud/page/full/.

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BRIEF

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In the
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,
Respondents.

◆

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

◆

BRIEF OF STATE OF ALABAMA AS *AMICUS CURIAE* SUPPORTING PETITIONER

◆

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. The Alabama of 2013 is not the Alabama of 1965—or of 1970, 1975, or 1982. 4
  1. Alabama in 1965 5
  2. Alabama in 1970 7
  3. Alabama in 1975 8
  4. Alabama in 1982 9
  5. Alabama today 10

B. The 25-year reauthorization will impose unwarranted burdens on States 13
  1. The preclearance mechanism inhibits nondiscriminatory state-law reforms. 14
  2. Preclearance inhibits States' attempts to comply with federal law. 15
  3. The preclearance mechanism allows DOJ to discriminate between covered States. 17
  4. Section 5 undermines state sovereignty in unanticipated ways. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999)....................21

Beer v. United States,
425 U.S. 130 (1976)....................6

City of Boerne v. Flores,
521 U.S. 507 (1997)....................13

City of Rome v. United States,
446 U.S. 156 (1980)....................5, 8, 11

Georgia v. United States,
411 U.S. 526 (1973)....................7

Nw. Austin Mun. Utility Dist. No. One v. Holder,
557 U.S. 193 (2009)....................1, 13

Printz v. United States,
521 U.S. 898 (1997)....................14

Riley v. Kennedy,
533 U.S. 406 (2008)....................6

South Carolina v. Katzenbach,
383 U.S. 301 (1966)....................4, 13

United States v. Flowers,
444 F. Supp. 2d 1192 (M.D. Ala. 2006)....................12, 13

United States v. Frazer,
317 F. Supp. 1079 (M.D. Ala. 1970)....................8

United States v. Frazer,
No. 2709-N, 1976 WL 729 (M.D. Ala. 1976) 10

United States v. Sheffield Bd. of Comm'rs,
435 U.S. 110 (1978) 5

Other Authorities

Candice Jackson, *Touring the Civil Rights Trail*, WALL ST. J., Mar. 7, 2009 20

Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbls.2-5 (2005) .... passim

DOJ File No. 2006-2900 17

DOJ File No. 2006-3444 17

DOJ File No. 2006-3446 17

DOJ File No. 2006-3449 17

DOJ File No. 2006-3450 17

DOJ File No. 2006-3454 17

DOJ File No. 2006-3533 17

DOJ File No. 2006-3537 17

DOJ File No. 2006-3548 17

DOJ File No. 2006-3551 17

DOJ File No. 2006-3555 17

DOJ File No. 2006-3556 17

DOJ File No. 2006-4509 17

DOJ File No. 2007-3488 15

DOJ File No. 2007-4397 16

DOJ File No. 2008-1576 15

DOJ File No. 2008-1621 12

DOJ File No. 2008-3861 15

DOJ File No. 2008-427 15

DOJ File No. 2008-5601 15

DOJ File No. 2011-5037 18

DOJ File No. 2011-5304 18

DOJ File Nos. 2006-3470 through 2006-3484 17

DOJ File Nos. 2006-3539 through 2006-3541 17

DOJ File Nos. 2006-3568 through 2006-3580 17

DOJ File Nos. 2006-3583 through 2006-3594 17

Interim Projections of the Population by Selected Age Groups for the United States and States, U.S. Census Bureau 11

Lee Roop, *Schmitz Guilty of Fraud, Loses Seat*, HUNTSVILLE TIMES, Feb. 25, 2009 16

Quick Facts for Alabama, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/01000.html 12

U.S. DEP'T JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/al_obj2.php 12

Voting and Registration in the Election of November 2008, U.S. CENSUS BUREAU tbl.4b 11

Legislative History

H.R. Rep. No. 109-478 (2006) 7

H.R. Rep. No. 89-439 (1965) 6, 7

H.R. Rep. No. 91-397 (1970) 7

Roster of the House of Representatives of Alabama, ALA. S. J. (1965) 9

Roster of the House of Representatives of Alabama, ALA. S. J. (1975) 9

Roster of the Senate of Alabama, ALA. S. J. (1965) 9

Roster of the Senate of Alabama, ALA. S. J. (1975) 9

S. Rep. No. 109-295 (2006) 11

S. Rep. No. 94-295 (1975) 7, 9

Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 44-45 (2005) 11

Constitutions and Statutes

42 U.S.C. §15301 *et seq.* 16

42 U.S.C. §15483 17

ALA. CODE §11-3-1 15

ALA. CODE §17-17-1 *et seq.* 14

ALA. CODE §31-13-28 17

U.S. CONST. art. VI 21

INTEREST OF AMICUS CURIAE

In 2013, there should not be the Uncovered States of America and the Covered States of America. There should be the United States of America. Other States have persuasively explained why their experiences support this proposition. This brief provides Alabama's own, unique perspective. George Wallace and Bull Connor used to be in Alabama, and Selma and the Edmund Pettus Bridge still are. These people and places were particularly responsible for making the preclearance mechanism necessary and appropriate in 1965. Things that have happened in Alabama in the meantime should thus be particularly instructive in determining whether Congress can employ the same extraordinary measure now.

Alabama's experience on these fronts is consistent with the Court's assessment four Terms ago. Things in the South have, indeed, changed. *See Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). Alabama has a new generation of leaders with no connection to the tragic events of 1965. The effects of those events on voting and political representation have now, thankfully, faded away. These on-the-ground realities show that the 2006 Congress abdicated its constitutional responsibilities when it simply reimposed, on Alabama and other States ready to be equal partners in the Union, burdens that previously were necessary and appropriate only because of a defiance and recalcitrance whose vestiges no longer exist.

SUMMARY OF ARGUMENT

Congress justifiably applied §5's preclearance mechanism to Alabama in 1965, and then again in 1970, 1975, and 1982. But 2006 was a different story. As necessary and proper as §5 was to correct injustices committed by Alabamians in the 1960s and to maintain the fragile balance in the years that followed, its 25-year reauthorization in 2006, using the decades-old coverage formula, was not a necessary and appropriate response to problems that are currently present.

A. Alabama more than earned its spot on §5's original coverage list in 1965. Through violence and willful defiance of federal law, Alabama maintained an all-white legislature and low black voter-registration and turnout rates in 1965. When Congress justifiably renewed §5 in 1970, 1975, and 1982, Alabama's progress had been minimal.

But that was a long time ago. When Congress renewed §5 in 2006, Alabama had long closed the registration and turnout gaps. African Americans compose a percentage of Alabama's legislature that reflects the overall population numbers in the State. Alabama's governments have shed their systematic defiance of federal civil-rights law. DOJ has not objected to a statewide preclearance submission from Alabama in 16 years. In fact, in the decade leading up to §5's 2006 renewal, DOJ objected to only 0.06% of preclearance submissions from all levels of government in Alabama. Alabama still grapples with race-relations issues, but they are the same kind of issues every State currently is endeavoring to solve. The recalcitrance and defiance are now gone.

B. Section 5 is not a proportionate response to problems Alabama faces today. During the past ten years, the State has experienced §5's burdensome effects in a variety of ways. It was fair for Congress to impose those costs on Alabama in 1965, 1970, 1975, and 1982, but it is not fair for Congress to impose those costs today.

ARGUMENT

The other State amici have persuasively demonstrated that at a minimum, Congress acted beyond its enumerated powers when it renewed §4(b)'s coverage formula in 2006. As Judge Williams wrote below, the criteria §4(b) sets for imposing the preclearance requirement are not "adequate in themselves to justify the extraordinary burdens" associated with the requirement that these jurisdictions preclear all changes in their voting laws with the federal government. Pet. App. 70a. Nor do those criteria "draw a rational line between covered and uncovered jurisdictions." *Id.* No sensible formula would force Alaska to preclear all changes in its voting laws based on a mistake made by a single city within its borders. Nor would any sensible formula force Arizona to preclear these changes while not requiring Nevada to do the same.

But the constitutional problem before this Court runs much deeper than that. The record before the 2006 Congress was insufficient to allow it to apply, to *any* American jurisdiction, the emergency measure it first undertook during the Civil Rights era. At the very least, the record was insufficient to justify renewing the measure not simply for five more years—

the amount of time the 1965 Congress originally thought prudent—but for a term five times as long. If the 2006 Congress had the power to impose these burdens on particular States, it did not have the power to do so for a term that insulated a quarter-century's worth of elected representatives from responsibility for the costs the measure imposes.

In light of Alabama's unique role in the history of §5, its experience is especially instructive on these fronts. It was one of those States that, as this Court put it, was all too "familiar to Congress" in 1965 as a "geographic area[] where immediate" and extraordinary action was "necessary." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). But in part because of §5, Alabama and other southern States have changed. Despite the race-relations issues Alabama and every other State continue to face, there are real, documented reasons to conclude that the acute concerns that justified the drastic preclearance remedy are now part of the past. As things currently stand, §5 will impose, through 2031, substantial and unfair burdens on many Alabama officials who were not even born in 1965. Congress could not rationally decide that it needed to extend this remedy to this new era.

A. The Alabama of 2013 is not the Alabama of 1965—or of 1970, 1975, or 1982.

When this Court has considered whether renewing §5 at a particular moment in our Nation's history was within Congress's powers, it has cited covered jurisdictions' lack of progress in three areas:

1. Registration and voting;

2. Minority participation in state government; and
3. Preclearance submissions and DOJ objections.

See City of Rome v. United States, 446 U.S. 156, 180-81 (1980). These factors serve as guideposts in assessing the country's need for the preclearance mechanism over the course of its history—from its original enactment in 1965, through its interim reenactments in 1970, 1975, and 1982, up to its most recent reenactment in 2006.

As applied to Alabama, these guideposts show that the State is not irrevocably bound to its tragic past. Just as America has changed since 1965 and even since 1982, so has Alabama. Whatever race-relations issues now exist in the State, they are the same kinds of problems that every State in this Nation faces. They are not the willful defiance and conscious disregard for voting rights that led Congress to adopt this measure in 1965, and to renew it in 1970, 1975, and 1982. The Alabama of today is meaningfully different in every material respect from the Alabama of each of those previous years, and Congress violated the Constitution when it refused to recognize as much.

1. Alabama in 1965

Preclearance was the 1965 Congress's extraordinary remedy for an extraordinary problem. *See United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). That problem centered in the South. For nearly a decade, southern officials had frustrated the Civil Rights

Acts by treating federal litigation, as Professor Karlan has put it, like a "game of Whac-A-Mole." Tr. of Oral Argument at 47, *Riley v. Kennedy*, 533 U.S. 406 (2008). Whenever a DOJ lawsuit would successfully knock down a particular discriminatory device, a new one would pop up. Section 5's novel requirement that these jurisdictions obtain federal preclearance before enforcing any changes to their voting laws "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976) (internal quotation marks omitted).

Alabama was a primary culprit. One of the most vivid examples of the evasions came out of Selma, the town that infamously became a household name, along with its bridge that spans the Alabama River, on Bloody Sunday, March 7, 1965. Four years earlier, only 156 of 15,000 voting-age African-Americans in the county where Selma is located were registered to vote. *See* H.R. Rep. No. 89-439, at 5 (1965) , *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. To ameliorate the problem, the United States sued the county registrars for violating the Civil Rights Act. *Id.* But while the case was pending, new registrars took office, thereby forcing the district court to deny relief. *Id.* The court of appeals eventually reversed and issued an injunction, but the gamesmanship continued. *Id.* The new registrars soon defied the court's order by heightening the county's application standards. *Id.* This prompted the United States to file yet another lawsuit. *Id.* While this new case proceeded, Alabama implemented two new, statewide "literacy and knowledge-of-government tests." *Id.* at 6.

Defiance in places like Selma denied African-Americans both the franchise and their proper representation within state government. Before 1965, less than 20% of eligible black Alabamians were registered to vote, while almost 70% of white Alabamians were registered. *See* H.R. Rep. No. 89-439, at 5; S. Rep. No. 94-295, at 6 (1975). Correspondingly, not a single African-American served in the state legislature. *See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbl.5 (Am. Enterprise Inst. 2005), *available at* http://www.aei.org/files/2006/05/05_VRAAlabama-study.pdf (hereinafter "Bullock & Gaddie").

2. Alabama in 1970

Despite the pressing situation in Alabama and other southern States, the 1965 Congress took a notably cautious approach. It did not impose the preclearance requirement indefinitely or even for an extended period of time. It instead provided that the mechanism would terminate after only five years—when at least a third of the Senators who voted on the original measure could reevaluate the need for its continued existence.

When Congress engaged in that process, it concluded that extending the mechanism for five more years, for what one committee report called a "cooling off period," made sense. H.R. Rep. No. 109-478, at 9 (2006) (quoting H.R. Rep. No. 91-397, at 4 (1970)). The record from Alabama amply supported that decision and this Court's endorsement of it in *Georgia v. United States*, 411 U.S. 526, 535 (1973).

Registration and turnout among black voters in Alabama still lagged far behind corresponding figures for whites. In the summer of 1970, the state Democratic Party nominated George Wallace, who had been governor when Congress passed §5 in 1965, for what would become his second term. And Alabama still did not have a single black legislator. *See* Bullock & Gaddie, *supra*, at tbl.5.

Events between 1965 and 1970 had highlighted even more racial disparities within Alabama's government. In 1968, the Justice Department had sued several state agencies over hiring and promotion practices for appointed positions. Those agencies had passed over 49 black applicants in favor of "lower-ranking white applicants." *United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970). As a result, in a state that was 25% black, African Americans held only 3.1% of government jobs. *See id.*

3. Alabama in 1975

The 1970 Congress provided for the 5-year reenactment to expire in 1975, but Congress at that time determined that another 7-year renewal, until 1982, made sense. Although some things had changed in Alabama by then, the record from the State still amply supported that extension. As this Court would later conclude, the extension "was necessary," in Alabama and other southern States, "to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Voter registration and turnout, while showing signs of progress, remained unsolved problems. The registration rates, for example, showed promise, but still were not where they needed to be. From 1965 to 1975, black voter registration rose from 19.3% to 57.1%. *See* S. Rep. No. 94-295, at 6 (1975). Yet the gap between blacks and whites still languished at 23.6%. *Id.* at 6.

Meanwhile, the composition of state government remained largely unchanged. George Wallace was still at the helm, and 11 legislators who had been in office in 1965 still held seats there. *Compare Roster of the Senate of Alabama,* ALA. S. J. 2136-38 (1965), *and Roster of the House of Representatives of Alabama,* ALA. S. J. 2139-42 (1965), *with Roster of the Senate of Alabama,* ALA. S. J. 3753-54 (1975), *and Roster of the House of Representatives of Alabama,* ALA. S. J. 3757-62 (1975). Only two African-Americans served in the state senate, and only 13 in the house. Bullock & Gaddie, *supra*, at tbl.5. Meanwhile, DOJ's suit over racial disparities in state appointed positions remained unresolved.

4. Alabama in 1982

Alabama had made still more progress when the 1975 Congress's 7-year renewal was set to lapse. But the 1982 Congress chose to reenact the statute again, and that decision again found support in evidence from Alabama. The State had closed the gaps on voter registration and turnout even further, but the discrepancy between blacks and whites, exceeding 10% on both fronts, remained far above the average for non-southern States. Bullock & Gaddie, *supra*, at tbls.2 & 3. Meanwhile, change in Alabama government still was slow-going. Governor Wallace, though by that time renouncing his prior segregationist views, would be elected again that fall, to his fourth term. African-American representation in the state legislature was virtually unchanged. Bullock & Gaddie, *supra*, at tbl.5. And the federal court in the suit over Alabama's appointment process entered a comprehensive injunction monitoring the State's conduct. *See United States v. Frazer*, No. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976).

These concerns supported Congress's decision to reauthorize the Act at that time, but it is fair to question whether Congress chose a constitutionally appropriate length for the reenactment. Although States like Alabama were closer than they had ever been to erasing the registration and turnout gaps, Congress did not choose a provisional 5- or 7-year term like the previous reenactments. It instead opted for a 25-year term, such that the statute would not expire until 2007. That decision entrenched, for a quarter-century, a mechanism that by design was supposed to be temporary. It rendered a generation of congressional representatives unaccountable for the measure's federalism costs. And time eventually would show that the 25-year term was far longer than Alabama and the other southern States needed to catch up with the rest of the Union.

5. Alabama today

When it comes to voting rights, Alabama at the time of the 1982 reauthorization's expiration was not its grandfather's State. It was not even its father's. Around two-thirds of the people who now call Alabama home were not yet in kindergarten in 1965. *See Interim Projections of the Population by Selected Age Groups for the United States and States*, U.S. Census

Bureau, *available at* http://wonder.cdc.gov/wonder/help/populations/population-projections/summarytabb1.xls. And it shows.

By 2006, the important indicia that justified §5's original enactment and its previous reauthorizations had dramatically changed. The original justification for preclearance, and the need "to preserve the 'limited and fragile' achievements of the Act" that justified the previous renewals, were things of the past. *City of Rome*, 446 U.S. at 182.

Alabama had effectively excised its prior discrepancies in registration and turnout. In every year since 1990, African-Americans had registered and voted in larger percentages in Alabama than in States outside the South. *See* Bullock & Gaddie, *supra*, tbls.2 & 3; *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). By 2004 and continuing through the most recent available data from 2008, Alabama had virtually eliminated the registration gap, to less than one percent, between black and white voters. *See* S. Rep. No. 109-295, at 11 (2006); *Voting and Registration in the Election of November 2008*, U.S. CENSUS BUREAU tbl.4b, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (last visited Dec. 28, 2012). Alabama's black voters out-participated white Alabamians in both the 2004 and 2008 general elections. S. Rep. No. 109-295, at 11; Bullock & Gaddie, *supra*, tbl.3; *Voting and Registration in the Election of November 2008*, *supra*, tbl.4b.

State officials' systematic defiance of federal authority is also a thing of the past. DOJ has not even objected to a state-wide Alabama preclearance submission in more than 16 years. In fact, in the 10 years preceding the 2006 reauthorization, DOJ had lodged objections to only 0.06% of preclearance submissions from *all* levels of government in Alabama: state, county, and municipal. *See* U.S. DEP'T JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/al_obj2.php (last visited Dec. 28, 2012). The only known sustained objection related to Calera, a city in Shelby County. *See* DOJ File No. 2008-1621.

Long gone, by 2006, were Governor Wallace and Alabama's all-white legislature. African Americans hold seats in the legislature at percentages that are roughly commensurate with Alabama's 26% African-American population. *See* Bullock & Gaddie, *supra*, tbl.5 (listing data for 2005 legislature); *Quick Facts for Alabama*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/01000.html (last visited Dec. 27, 2012). Alabama has made similar advances at the local level. A report submitted to the 2006 Congress showed that between 1975 and 2001, the number of elected black officials increased nearly five-fold, from 161 to 756. Bullock & Gaddie, *supra*, tbl.4.

Gone, too, was African-Americans' thin representation in other areas. In 2003, the United States and Alabama jointly asked the federal district court to terminate its injunction on state hiring practices. The parties explained that the injunction was no longer appropriate because "the racial make-up of Alabama's government is dramatically different from what it was in 1970." *United States v. Flowers*, 444 F. Supp. 2d 1192, 1193 (M.D. Ala. 2006). The "dramatic[]" difference was that as of 2003, African Americans constituted 39% of Alabama's government workforce, a figure more than 10 percentage points greater than their representation in the general population. *Id.*

Alabama is not suggesting that it has somehow eliminated all of the race-relations issues within its borders. The State is no doubt still grappling with these issues in 2013. But they represent the same kinds of concerns governments throughout the nation, covered and non-covered, are earnestly trying to address. Meanwhile, the distinct problems that justified Congress's "uncommon exercise of congressional power" have gone away. ***Katzenbach***, 383 U.S. at 334. Congress amassed no evidence in 2006 that Alabama's current leadership and their successors stand poised to "engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting" through 2031. *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

B. The 25-year reauthorization will impose unwarranted burdens on States.

The length of the 2006 extension creates particular constitutional problems. The 1975 reenactment's 7-year limit, like the 1965 Act's 5-year termination date, "tend[ed] to ensure" that the preclearance measure was "proportionate" to the harm Congress was addressing at those times. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997). In contrast, with no evidence that the same kind of constitutional harm was occurring in 2006, Congress opted for a 25-year timeframe. In making that choice, Congress abandoned any appearance of ensuring that this legislation would remain necessary and appropriate. It chose to avoid, for two-and-a-half decades, "taking the blame for" the measure's "burdensomeness and for its defects." *Printz v. United States*, 521 U.S. 898, 930 (1997). And it chose to impose the burdens of preclearance, long after any plausible basis for doing so had expired, on a generation of state leaders whose attitudes, beliefs and openness to change exceed their predecessors' in every way.

The other State amici have given examples of how the extension is already causing their leaders to bear burdens of this sort. The pages that follow relate similar examples from Alabama. They show that preclearance is now largely serving not to achieve the laudable goals that Congress originally had in mind, but rather to undermine good government in a variety of ways.

1. The preclearance mechanism inhibits nondiscriminatory state-law reforms.

The preclearance mechanism is making it substantially more difficult for Alabama's current leaders to achieve important, much-needed reforms. Preclearance is, at the very least, delaying those reforms for long amounts of time. And it is doing so even though these reforms are obviously nondiscriminatory.

Two recent examples prove the point. Alabama's legislature recently took on the task of rewriting its entire election code to conform with advances in modern voting technology. *See* ALA. CODE §17-17-1 *et seq*. The Legislature also modernized and unified its laws relating to government at the county level, a process that included setting residency requirements for county commissioners. *See id.* §11-3-1(a). In noncovered jurisdictions, these sorts of extensive, ameliorative changes could have gone into effect as soon as the legislature and governor reached a deal on what their omnibus bills would say. That is not what happened in Alabama. Instead, lawyers for the State spent months preparing massive documents seeking DOJ's permission to implement these laws. These submissions, which exceeded 1,000 pages in some instances, had to account for the histories of all code provisions affected by the new acts. *See* DOJ File No. 2007-3488; DOJ File Nos. 2008-427, 2008-1576, 2008-3861, 2008-5601. And despite the submissions' detail and the laws' facially nondiscriminatory nature, DOJ in one of these instances asserted that it needed more information. *See* DOJ File No. 2007-3488. In the end, DOJ approved both measures. But the process put the reforms on hold for more than a year after Alabama's leaders wanted them to go into effect.

2. Preclearance inhibits States' attempts to comply with federal law.

The 2006 reenactment is also having the ironic effect of making it more difficult for Alabama to move its governmental practices into alignment with *federal* law.

For example, §5 substantially impeded Alabama's attempts to end a web of corruption that had led DOJ to prosecute about a dozen state legislators. *See, e.g.*, Lee Roop, *Schmitz Guilty of Fraud, Loses Seat*, HUNTSVILLE TIMES, Feb. 25, 2009, at 1A, *available at*

2009 WLNR 4117366. For decades, many legislators had received a paycheck from state-run community colleges, creating legitimate concerns that they were peddling their legislative influence for sham jobs. When Alabama sought to ban the practice in 2007, the proponents of the *status quo* lobbied DOJ to object to the proposed change in state law. Their theory that DOJ deem the policy discriminatory was facially meritless: they claimed that many black legislators would either resign or not seek re-election if they were not allowed to simultaneously receive paychecks from the community colleges. DOJ File No. 2007-4397, Letter from Edward Still to John Tanner, Chief, Voting Section (Sept. 18, 2007). Rather than reject the legislators' concerns immediately, DOJ required Alabama to address the issue by submitting detailed historical information and employment statistics by race. *See* DOJ File No. 2007-4397, Letter from John Tanner, Chief, Voting Section to Bradley Byrne, Chancellor (Nov. 2, 2007). A team of state attorneys undertook the stout task of complying with that request, and DOJ eventually did not object. *See* DOJ File No. 2007-4397, "Supplemental Submission Under Section 5, Voting Rights Act of 1965." But in the meantime, the §5 process had stalled, and made much more burdensome, the State's effort to reform a system that DOJ itself believed to be corrupt.

Section 5 also made it harder for Alabama to implement the Help America Vote Act of 2002, 42 U.S.C. §15301 *et seq.* HAVA effectively required 54 of the State's counties and 450 of its municipalities to start using new voting machines, and also required several changes to Alabama's mail-in voter-registration form. *See id.* §15483. But simply complying with those mandates was not enough. Section 5 also required covered jurisdictions to obtain DOJ preclearance before they could use the federally mandated machines and registration form. Alabama and its subdivisions overcame that difficulty, but only after filing several voluminous submissions with DOJ. *See* DOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, 2006-3583 through 2006-3594, 2006-4509.

3. The preclearance mechanism allows DOJ to discriminate between covered States.

Judge Williams rightly noted the "oddity," inherent in §5, of giving the federal government power to block covered States from enforcing the same laws that are in force and fully legal in uncovered States. Pet. App. 102a. The preclearance mechanism also creates a separate, equally troubling potential for disparate treatment. It makes it possible for DOJ to approve a particular state-law reform in some covered States, while objecting to the same in others.

An Alabama-specific example could arise before this Court holds oral argument in this case. The Alabama Legislature has passed a statute, modeled on laws from other States, that requires voters to provide proof of citizenship when they register to vote. *See* ALA. CODE §31-13-28. DOJ precleared a virtually identical Arizona law in 2005. (This Court is set to decide, in *Arizona v. Inter Tribal Council*, No. 12-71, the unrelated issue of whether Arizona's law is preempted as applied to federal elections.) More recently, in 2011, DOJ precleared Georgia's substantially similar law. Yet when Alabama asked DOJ to preclear Alabama's virtually identical enactment, the agency responded by requiring a supplemental submission that may make it impossible for the law to go into effect.

Rather than rely on the law's facially nondiscriminatory nature and previous decisions upholding these laws, the agency has demanded stacks of additional documents. Alabama is to specify, "[f]or each person currently registered to vote in the state," the "year of their initial registration to vote," their "year of birth," their "race," "the method by which they registered to vote," and "whether they have a Spanish surname." DOJ File Nos. 2011-5037 & 2011-5304, Letter from T. Christian Herren, Chief, Voting Section, to Winfield Sinclair, Assistant Attorney General, at 3 (Nov. 27, 2012). Alabama also is to determine "the number of individuals, by race and by Spanish surname," for whom it has issued driver's licenses and certain kinds of specialized ID cards. *Id.* And Alabama is to provide, among other things, "the names, race, and daytime telephone numbers of the persons making comments or suggestions" to the Legislature about the law as well as "[c]opies of any correspondence among or between members of the legislature, other elected officials, employees, consultants, and/or members of the public that addresses the proposed changes." *Id.* at 4.

Complying with these requests will not be easy. DOJ gave the State only 60 days to respond. Doing so will require the State to make dubious individualized, race-focused determinations about millions of people. Much of the information is not readily available in any preexisting database, and some of the information is privileged. Yet DOJ has said that if Alabama does not provide the information by January 27, the agency reserves the right to block the State from adopting the same, facially neutral law that has already been precleared for implementation in two other States. *See id.*

4. Section 5 undermines state sovereignty in unanticipated ways.

The reenactment also makes it harder for state officials to do their jobs in ways no one in Congress likely considered. One recent example arose this past August, when Hurricane Isaac threatened the Gulf Coast, and the governor ordered an evacuation. It just so happened that local elections had been scheduled for that time. As the storm approached the shores, DOJ sent a letter reminding Alabama that any "postponement of elections" due to the hurricane would be subject to its "review under Section 5." Letter from T. Christian Herren, Chief, Voting Rights Section, to Beth Chapman, Secretary of State, and Luther Strange, Attorney General, at 1 (Aug. 27, 2012). To DOJ's credit, it considered and approved the resulting preclearance requests on an expedited track. But at a time when state and local officials should have been focused on more pressing matters, they were seeking approval of their disaster response from the DOJ Voting Rights Section.

This example is extreme, but it underscores just how unnecessary and pervasive the preclearance mechanism has become. Imposing these sorts of burdens on States was a necessary and appropriate exercise of emergency federal power when George Wallace was standing in a Tuscaloosa schoolhouse door and Bull Connor was turning hoses on innocent protestors on Birmingham's downtown streets. It is not a necessary and appropriate exercise of federal power under the different conditions present today.

* * *

Walking down those same Birmingham streets is a different experience now. Signs and monuments on the protestors' former march path document, for those tracing their steps in 2013, the events that happened in the same places six decades before—the courage of the Freedom Riders; the leadership of Dr. King and Rev. Shuttlesworth; the death of four little girls. *See generally* Candice Jackson, *Touring the Civil Rights Trail*, WALL ST. J., Mar. 7, 2009, http://online.wsj.com/article/SB123638803034058571.html. These memorials cannot erase the terrible things that happened in Alabama in the past, and they are not intended to do so. To the contrary, they serve to remind a new generation of Alabamians of the history they have inherited and their obligation to ensure that it does not happen again. In the years to come, the State's leaders will undoubtedly make mistakes in their attempts to help their fellow Americans form a more perfect Union. But the federal reforms of the Civil Rights Era have brought Alabama back to its proper place in the constitutional system, where "[t]he good faith of the States . . . provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" *Alden v. Maine*, 527 U.S. 706, 755 (1999) (quoting U.S. CONST. art. VI). It is time for Alabama and the other covered jurisdictions to resume their roles as equal and sovereign parts of these United States.

CONCLUSION

The Court should reverse the judgment of the D.C. Circuit.

Respectfully submitted,

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January 2, 2013

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, Alabama,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

◆

BRIEF OF ALABAMA LEGISLATIVE BLACK CAUCUS AND ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. For the First Time in History, in 2006 African-American Representatives from All Nine Covered Southern States Participated in Passage of a Voting Rights Act, and the Product of Their Negotiations Is Entitled to Great Respect 3

II. The Historical Context of This Case Weighs Heavily in Favor of Rejecting Alabama's States' Rights Objections To Congress' Efforts to Defend African Americans' Right To Vote 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Carr, 369 U.S. 186 (1962) 5

City of Mobile v. Bolden, 446 U.S. 55 (1980) 11

Civil Rights Cases, 109 U.S. 3 (1883) 9

Dillard v. Chilton County Comm'n, 495 F.3d 1324 (11th Cir. 2007) 11

Dred Scott v. Sandford, 60 U.S. 393 (1857) 9

Fletcher v. Peck, 10 U.S. 87 (1810) 8, 13

Giles v. Harris, 189 U.S. 475 (1903) 10, 12

Giles v. Teasley, 193 U.S. 146 (1904) 10

Jones v. Montague, 194 U.S. 147 (1904) 10

Lynch v. Alabama, ___ F.Supp.2d ___, CA No. 5:08-cv-00450-CLS (N.D. Ala., Nov. 7, 2011), appeal pending, Nos. 11-15464-BB & 11-15789 (11th Cir.) 6

Mills v. Green, 159 U.S. 651 (1895) 10

Minor v. Happersett, 88 U.S. 162 (1874) 9

Plessy v. Ferguson, 163 U.S. 537 (1896) 10

Presley v. Etowah County, 502 U.S. 491 (1992) 11

Shelby County v. Holder, 811 F.Supp.2d 424 (D. D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012) 3, 4

Slaughter-House Cases, 83 U.S. 36 (1873) 9

Williams v. Mississippi, 170 U.S. 213 (1898) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

1965 Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 10

1975 Voting Rights Act. Pub. L. No. 94-73, Title I, § 101, Title II, §§ 201-203, 206, Aug. 6, 1975, 89 Stat. 400-402 4

1982 Voting Rights Act, Pub. L. No. 97-205, at 3, 96 Stat. 131 11

Alabama Constitution of 1901 .... 1, 10

Articles of Cession and Agreement, April 24, 1802, *Territorial Papers*, V 9

Civil Rights Act of 1866, 14 Stat. 27 9

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577 4

Northwest Ordinance of 1787, 1 Stat. 50 .... 8, 9

U.S. Constitution, Amendment XIII 10

U.S. Constitution, Amendment XIV .... *passim*

U.S. Constitution, Amendment XV .... *passim*

U.S. Constitution, Article IV, Section 3 8

Voting Rights Act, § 2, 42 U.S.C. § 1973 11

Voting Rights Act, § 4(b), 42 U.S.C. § 1973b(b) ... 2, 3, 4, 7

Voting Rights Act, § 5, 42 U.S.C. § 1973c .... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS:

Alexander Tsesis, *Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179 (2007) 9

Don E. Fehrenbacher, *The Slave Republic* (2001) 8

James Blacksher, Edward Still et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008) 1

Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005) 9

Sean Wilentz, *The Rise of American Democracy* (2005) 8

INTEREST OF AMICI CURIAE[1]

Amici Curiae are organizations of African-American state and county elected officials, whose members are engaged in the day-to-day struggles to advance the interests of their constituents, particularly black Alabamians, in a social, political and legal environment that is still dominated by vestiges of official racial discrimination and still is governed by the 1901 Alabama Constitution that was adopted for the purpose of disfranchising black citizens and preserving white supremacy. Amici are certain that a decision by this Court ending Alabama's coverage under Section 5 of the Voting Rights Act would open the door for state laws that would suppress the right to vote of African Americans and Latinos and repeal the remedies black Alabamians obtained through federal litigation that provide them equal opportunities to elect members of their state, county and municipal governments. See James Blacksher, Edward Still et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008).

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

Amid the blizzard of factual and legal arguments justifying enactment of the 2006 extension of Sections 4 and 5 of the Voting Rights Act that are set out in the record before Congress and in the courts below, amici African-American elected officials in Alabama, wish to emphasize two important points:

(1) The 2006 Voting Rights Act was the first in history to be enacted with the participation of African-American members of Congress elected from all nine of the covered states in the South. The terms they helped negotiate involve the most fundamental right in American democracy, the right to vote, and their direct role in the Act's passage arguably came as close to inclusion of African Americans in an agreement of constitutional stature as has yet to occur in our history. For a nation founded on the institution of slavery, this grand compromise between the descendants of slaves and all other Americans is entitled to the greatest respect.

(2) There is a long history of decisions by this Court that disregarded the ability of the former Confederate states to suppress the votes of freedmen and their descendants. These decisions frustrated efforts of Congress to advance African Americans' rights to freedom and equality over the sovereignty claims of the Southern states. This dubious legacy should cause the Court to be especially cautious in overruling the judgment of Congress that the prophylactic measures in the 2006 Voting Rights Act are still

appropriate to enforce the Fourteenth and Fifteenth Amendment rights of African Americans. This Court is ill-equipped to assess the realities of continuing vestiges of *de jure* voting discrimination in Alabama and the rest of the South.

◆

ARGUMENT

I. For the First Time in History, in 2006 African-American Representatives from All Nine Covered Southern States Participated in Passage of a Voting Rights Act, and the Product of Their Negotiations Is Entitled to Great Respect.

The coverage formula of Section 4(b) of the Voting Rights Act was designed as a proxy for the Southern states who had defended slavery, seceded from the Union, "redeemed" white state governments from the "black rule" of Reconstruction, mandated segregation of the races, disfranchised their black citizens, conducted all-white Democratic primary elections, and resisted federally ordered desegregation and enforcement of voting rights. *Shelby County v. Holder*, 811 F.Supp.2d 424, 432, 438 (D. D.C. 2011), aff'd, 679 F.3d 848, 855 (D.C. Cir. 2012) (The formula "served only as a proxy for identifying those 'jurisdictions that had a long, open, and notorious history of disenfranchising minority citizens and diluting their voting strength whenever they did manage to register and cast ballots.'") (citations omitted). The formula operated as intended to include all or parts of seven of the eleven former Confederate States of America, including Alabama. Id. Two other former Confederate states, Texas and Florida, are covered by the language provisions of the 1975 Voting Rights Act.

For the first time in the history of the United States, African-American members of Congress elected from all nine covered Southern states participated in the negotiations leading to passage of a federal Voting Rights Act, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577.[2] The only African Americans elected to the House of Representatives from a covered Southern state when Congress previously extended Section 5 of the Voting Rights Act were Barbara Jordan of Texas and Andrew Young of Georgia in 1975 and Mickey Leland of Texas in 1982.[3] These circumstances show that anything approaching full participation by Southern blacks in our state and national legislatures is very recent history, not something that happened in the distant past. They give unique, heightened weight to the argument that the issue in this appeal, whether in enacting the 2006 Voting Rights Act Congress properly exercised its express enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, has all the elements of the kind of political question this Court has said it should avoid deciding. Especially relevant here are a textually demonstrable constitutional commitment of the issue to Congress, a lack of judicially discoverable and manageable standards for resolving it, and an unusual need for unquestioning adherence to a political decision already made. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Speaking for African-American citizens of Alabama in particular, these amicus parties wish to emphasize the importance of giving due respect, at last, to the political voices of representatives sent to Congress by African Americans in the South.

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[2] Artur Davis, Alabama; Corrine Brown, Alcee Hastings, and Kendrick B. Meek, Florida; Sanford D. Bishop, Jr., John Lewis, Cynthia Ann McKinney, and David Scott, Georgia; William J. Jefferson, Louisiana; Bennie Thompson, Mississippi; G.K. Butterfield and Melvin L. Watt, North Carolina; James E. Clyburn, South Carolina; Al Green, Sheila Jackson Lee, and Eddie Bernice Johnson, Texas, and Robert C. Scott, Virginia. The one African-American Senator in 2006, Barack Obama, was from Illinois.

[3] In 1982, another African American, Harold Ford, represented Tennessee, one of the two former Confederate states not covered by Section 4(b).

The special significance of the role played by Congressional representatives of black Southerners in the passage of the 2006 Voting Rights Act is apparent when it is viewed in the light of three centuries of slavery and over a century of segregation, disfranchisement and the many other policies of state-sponsored white supremacy. It is not an exaggeration to say that this was the first time in the history of the United States when representatives of fully enfranchised descendants of North American slaves were not excluded, and actually sat at the table, when Congress took up legislation of such constitutional stature. The position they advanced successfully in this national negotiation is that the vestiges of so many generations of official voting discrimination in the covered jurisdictions of the South have not been eliminated to the full extent practicable.

The government of Alabama opposed the 2006 extension of Section 5 of the Voting Rights Act and our state's continued inclusion in the 1965 coverage formula. It conceded, as it does in its amicus brief in this case, that "Alabama still grapples with race relations issues," but it argued that the effects of its racist past have "faded away," and that the issues of voting discrimination in Alabama "are the same kind of issues every State currently is endeavoring to solve." Alabama Amicus Brief at 1, 2. We and our representatives in Congress vigorously disagreed, pointing out that the culture of white supremacy does not die so easily.

Alabama still clings, for example, to racially discriminatory provisions in its white supremacist Constitution of 1901, as a federal court recently concluded. *Lynch v. Alabama*, ___ F.Supp.2d ___, CA No. 5:08-cv-00450-CLS (N.D. Ala., Nov. 7, 2011), slip op. at 775, appeal pending, Nos. 11-15464-BB & 11-15789 (11th Cir.). The Fourteenth and Fifteenth Amendments gave Congress the power to **eliminate** voting discrimination, not just to make conditions "somewhat better." The constitutional power that "We the People" gave Congress in 1868 and 1870 does not vanish just because the job is partly done. Absent the protection of Section 5 of the Voting Rights Act, we have no doubt that the efforts of majority-white state and local governments to isolate and minimize the political influence of black Alabamians will advance rapidly and far outstrip our resources to combat them.

The point here is that black Southerners and the members of Congress they elected were able to convince the vast majority of other members of Congress that the need for the exercise of power granted Congress by Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment still outweighs the sovereignty objections of the Southern states that the Reconstruction Amendments were intended to overcome. Attempts by others to broaden Section 4(b) coverage to include jurisdictions elsewhere in the United States that have experienced voting discrimination failed. But our representatives successfully advocated for continued coverage of Alabama and other Southern states where voting discrimination against African Americans is most deeply rooted in our history and political culture. That legislative compromise is entitled to great respect.

II. The Historical Context of This Case Weighs Heavily in Favor of Rejecting Alabama's States' Rights Objections To Congress' Efforts To Defend African Americans' Right to Vote.

Section 5 of the Voting Rights Act is necessary because, throughout history, Southern states' claims of sovereignty have repeatedly stymied even the most minimal congressional efforts to protect the rights of

African Americans to freedom and equal rights. The story begins in 1810, nine years before Alabama became a state, when this Court affirmed an agreement between the slaveholding Jefferson Administration and the State of Georgia to extend slavery into the territory Georgia ceded to the United States that would become the states of Alabama and Mississippi. The question of Congress' power under Article IV, Section 3, of the Constitution either to extend or to prohibit slavery in territories belonging to the United States was a hotly contested political issue.[4] In *Fletcher v. Peck*, 10 U.S. 87 (1810), Chief Justice John Marshall affirmed *sub silentio* Congress' power **to extend** slavery into its territories. His reason for deferring to Congress' decision presaged the political question doctrine:

> The question whether the vacant lands within the United States became a joint property or belonged to the separate States was a momentous question which at one time threatened to shake the American Confederacy to its foundation. This important and dangerous contest has been compromised, and **the compromise is not now to be disturbed**.

10 U.S. at 142 (emphasis added). That compromise extended to the western territories ceded by Georgia all the rights and privileges of the 1787 Northwest

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[4] E.g., see Don E. Fehrenbacher, *The Slave Republic* 258-59 (2001); Sean Wilentz, *The Rise of American Democracy* 222-31 (2005).

Ordinance, "that article only excepted which forbids slavery." Articles of Cession and Agreement, April 24, 1802, *Territorial Papers*, V, 142-46. Five decades later, this Court struck down the Missouri Compromise and held that Congress lacked the power **to prohibit** slavery in its territories. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Congress added the enforcement sections of the Fourteenth and Fifteenth Amendments directly in response to this Court's decision in *Dred Scott*.[5] But in the years following passage of the Reconstruction Amendments, this Court undermined much of Congress' efforts, reaffirming, notwithstanding Section 1 of the Fourteenth Amendment, *Dred Scott*'s holding that the power to determine the privileges, immunities, and civil rights of American citizens, including the right to vote, still belonged to the states. *Slaughter-House Cases*, 83 U.S. 36 (1873); *Minor v. Happersett*, 88 U.S. 162 (1874); *Civil Rights Cases*, 109 U.S. 3 (1883).

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[5] E.g., Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005) ("[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.") (cited in Alexander Tsesis, *Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179, 1235 (2007)).

At the turn of the twentieth century, this Court held that neither the Thirteenth Amendment nor the Fourteenth Amendment prohibited the states from segregating the races. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Then, notwithstanding the Fourteenth and Fifteenth Amendments, it held there was no remedy in federal courts for African Americans who were disfranchised by the 1901 Alabama Constitution. *Giles v. Harris*, 189 U.S. 475 (1903).[6] Justice Holmes admonished blacks in Alabama and other Southern states: "Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States." 189 U.S. at 488.

Six decades later, the Voting Rights Act became the modern response to Justice Holmes' advice. African Americans finally obtained some relief from the political department of the United States, after many of them, including Representative John Lewis, were brutally beaten by Alabama police when they attempted to march across the Edmund Pettus Bridge in Selma. Enforcement of the Voting Rights Act of 1965 slowly led to the re-enfranchisement of Southern blacks and to the removal of many election structures that diluted their voting strength.

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[6] See also *Jones v. Montague*, 194 U.S. 147 (1904); *Giles v. Teasley*, 193 U.S. 146 (1904); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Mills v. Green*, 159 U.S. 651 (1895).

This Court, however, slowed that progress by holding that Section 2 of the Voting Rights Act extended no rights beyond those prohibited by the Fifteenth Amendment, and that states were still free to retain old election schemes that denied black voters an equal opportunity to elect candidates of their choice, unless they could prove that the state laws were enacted for an invidious purpose. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Congress countered *Bolden* by including in the 1982 Voting Rights Act a results standard for Section 2, 42 U.S.C. § 1973.

However, this Court narrowed the reach of Section 5, 42 U.S.C. § 1973c, by ruling that it did not prohibit Alabama from denying equal powers to officials who had been elected by African Americans. *Presley v. Etowah County*, 502 U.S. 491 (1992). The voting rights of black Etowah County citizens were not affected, this Court held, when white commissioners voted to give themselves continuing control over the road and bridge shops in their respective districts, while assigning Lawrence C. "Coach" Presley, the sole black commissioner, the duty of supervising the janitorial staff at the courthouse. However practices or procedures with respect to voting are defined, the Etowah County case illustrates the adverse treatment black voters in many Alabama jurisdictions can expect when Section 5 restraints on white-majority control are lifted altogether. E.g., see *Dillard v. Chilton County Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (reversing, solely on grounds that the white challengers lacked standing, dissolution of a consent decree providing election procedures that allow blacks an opportunity to elect a county commissioner of their choice).

Even this abbreviated review of the long history of decisions impacting voting rights in Alabama shows how this Court has too often disregarded the endurance and resiliency of white supremacy and its vestiges in our state. A decision by the Court in this case granting Alabama's request to strike down Section 5 of the Voting Rights Act and/or its coverage formula would once again elevate Alabama's claims of state sovereignty over Congress' efforts to enforce the constitutional rights of African Americans and would be more damaging to blacks' voting rights than any other decision since *Giles v. Harris*.

◆

CONCLUSION

The complex question whether the descendants of American slaves are now full partners in constitutional democracy should be decided through political discourse between the representatives of African Americans and all other American citizens, not through judicial fiat. In the words of Chief Justice Marshall, "the compromise is not now to be disturbed." *Fletcher v. Peck*, 10 U.S. 87, 142 (1810). The judgment below should be affirmed.

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AMICUS
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No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
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v.
ERIC H. HOLDER, JR. ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE STATE OF ALASKA IN SUPPORT OF PETITIONER SHELBY COUNTY, ALABAMA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

ARGUMENT 4

- I. The VRA's Current Bailout Standards are Hopelessly Difficult for States to Meet. 4
  - A. Bailout Is Blocked by the DOJ's Unilateral Decision to Dispatch Federal Observers. 6
  - B. Bailout Is Blocked By a Single DOJ Objection to a Preclearance Submission, Which May Not be Evidence of Discriminatory Effect or Intent. 9
  - C. The Bailout Requirements Hold States Responsible for the Acts and Omissions of Sub-Jurisdictions They Cannot Control. 12
  - D. In Practice, the DOJ has Complete Control Over the Bailout Process. 13
  - E. The DOJ's Discretion to Consent to Bailout Includes Application of Subjective Standards 22
- II. The VRA's Bail-In Provision Does Not Effectively Address the Underinclusiveness of the Coverage Formula. 23

TABLE OF CONTENTS—Continued

Page

III. Alaska's Experience with the VRA Demonstrates Both the Overreach of § 5 Coverage and the Near-Impossibility of Bailout for a State 26

A. Alaska's § 5 Coverage is Not Now, and Never Was, Justified as a Congruent and Proportional Response to Voting Discrimination. 26

B. Bailout Under the 1982 Standards is a Mirage for Alaska. 29

CONCLUSION 34

APPENDIX A: Certification of the Bethel Census Area for Federal Observers (October 10, 2009) 1a

APPENDIX B: Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (September 28, 1993) 2a

APPENDIX C: Letter from Senator Ted Stevens to Governor Bill Sheffield (March 9, 1983) 7a

APPENDIX D: Letter from Paul F. Hancock, Assistant for Litigation, Voting Section, Civil Rights Division, DOJ, to Norman Gorsuch, Alaska Attorney General (June 11, 1984) 10a

TABLE OF CONTENTS—Continued

Page

APPENDIX E: Letter from Lora Tredway, Attorney, Voting Section, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (May 23, 1985).. 21a

APPENDIX F: Letter from Virginia Ragle, Alaska Assistant Attorney General, to Maggie Moran, Legislative Assistant to Senator Ted Stevens (March 14, 1985)........ 23a

TABLE OF AUTHORITIES

REPORTED CASES Page

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) .. 21

City of Boerne v. Flores, 521 U.S. 507 (1997) .. 4, 28

Egan v. Hammond, 502 P.2d 856 (Alaska 1972) 27

In re 2011 Redistricting Cases, No. S-14721, 2012 WL 6721059 (Alaska Dec. 28, 2012) ... 11

Jeffers v. Clinton, 740 F. Supp. 585 (D.N.M. 1990) 25

Luper v. Municipality of Anchorage, 268 F. Supp. 2d 1110 (D. Alaska 2003) 33

MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994) 21-22

Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009) 3, 5

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) .... *passim*

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 3, 4, 29, 31

Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979) ... 28

United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967) .. 7

United States v. City of Philadelphia, No. 2:06cv4592, 2006 WL 3922115 (E.D. Pa. Nov. 7, 2006) 8

PENDING CASES AND CASES DISMISSED WITHOUT OPINION

Alaska v. Holder, No. 1:12-cv-01376-RLW (D.D.C.) 2

Alaska v. United States, No. 84-1362 (D.D.C.) 30, 32

Alta Irrigation District v. Holder, No. 1:11-cv-00758-RJL-DAG-PLF (D.D.C.) 16

Augusta County v. Gonzales, No. 1:05-cv-01885-TFH (D.D.C.) 16

City of Kings Mountain v. Holder, No. 1:11-cv-01153-PLF-DST-TFH (D.D.C.) 16

City of Pinson v. Holder, No. 1:12-cv-00255-CKK-KLH-RBW (D.D.C.) 15

City of Sandy Springs v. Holder, No. 1:10-cv-01502-ESH-JRB-EGS (D.D.C.) 17

City of Winchester, Virginia v. Ashcroft, No. 1:00-cv-03071-ESH-RCL (D.D.C.) 17

Culpeper County, Virginia v. Holder, No. 1:11-cv-01477-JEB-JWR-RLW (D.D.C.) 15

Frederick Couty, Virginia v. Reno, No. 1:99-cv-00941 (D.D.C.) 17

Greene County, Virginia v. Ashcroft, No. 1:03-cv-01877-HHK (D.D.C.) 16

Hootch v. State Operated School System, Civil No. 72-2450 (Super. Ct. Alaska 1973) ... 28

Page

Jefferson County Drainage District No. Seven v. Holder, No. 1:11-cv-00461-DST-RWR-RJL (D.D.C.) 16

King George County, Virginia v. Holder, No. 1:11-cv-02164-BAH-KLH-ESH (D.D.C.) 15, 19

Merced County v. Holder, No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C.) 15, 19

New Hampshire v. Holder, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C.) 17-18, 21

Nick v. Bethel, No. 3:07-cv-0098-TMB (D. Alaska) 7, 8

Nix v. Holder, No. 12-81 (U.S. 2012 term) 11

Northwest Austin Municipal Utility Disrict No. One v. Holder, No. 1:06-cv-10384-PLF-EGS-DST (D.D.C.) 13-14

Prince William County v. Holder, No. 1:12-cv-00014-ESH-TBG-JEB (D.D.C.) 15

Pulaski County, Virginia v. Gonzales, No. 1:05-cv-1265-RBW (D.D.C.) 16

Roanoke County, Virginia v. Reno, No. 1:00-cv-01949-RMU-JR (D.D.C.) 17, 18

Rockingham County, Virginia v. Ashcroft, No. 1:02-cv-00391-ESH-EG (D.D.C.) 16

Samuelsen v. Treadwell, No. 3:12-cv-0018-RRB-AK-JKS (D. Alaska) 33

Sanchez v. Anaya, No. 82-0067M (D.N.M.) 24

Shenandoah County, Virginia v. Reno, No. 1:99-cv-00992-PLF (D.D.C.) 17

Page

Warren County, Virginia v. Ashcroft, No. 1:02-cv-01736-EGS (D.D.C.)........................ 16

UNITED STATES CONSTITUTION

U.S. Const. amend. XIV................................*passim*

U.S. Const. amend. XV ....*passim*

CURRENT STATUTES

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)):

42 U.S.C. § 1973a ....*passim*

42 U.S.C. § 1973a(a).................................. 6

42 U.S.C. § 1973a(c) 1, 24, 25

42 U.S.C. § 1973b ....*passim*

42 U.S.C. § 1973b(a)(1)............................... 1

42 U.S.C. § 1973b(a)(1)(A).........................5, 12, 22

42 U.S.C. § 1973b(a)(1)(B).........................5, 12, 22

42 U.S.C. § 1973b(a)(1)(C).........................5, 12, 22

42 U.S.C. § 1973b(a)(1)(D) 5, 12, 18, 19, 22

42 U.S.C. § 1973b(a)(1)(E)....................5, 9, 12, 22

42 U.S.C. § 1973b(a)(1)(F).........................5, 12, 22

42 U.S.C. § 1973b(a)(1)(F)(ii)-(iii)................ 23

42 U.S.C. § 1973b(a)(3)................................ 21

42 U.S.C. § 1973b(a)(5)................................ 5

Page

42 U.S.C. § 1973b(b) 1

42 U.S.C. § 1973b(f)(3) 27

42 U.S.C. § 1973c ....*passim*

42 U.S.C. § 1973f(a)(2) 6, 7

FORMER STATUTES

Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (amended 1970, 1975, 1982, 2006) 4

Voting Rights Amendments of 1975, Pub. L. No. 94-73, tit. II, § 201, 89 Stat. 400 (amended 1982, 2006) 29

REGULATIONS

28 C.F.R. § 51.52(a) (2011) 9

28 C.F.R. § 51.52(c) (2011) 9

28 C.F.R. § 51.64 (1987) 19

28 C.F.R. § 55.5(a) (1976) 27

ALASKA CONSTITUTION

Article V, § 1 (amended 1970) 27

LEGISLATIVE HISTORY

H.R. Rep. No. 109-478 (2006) 13

S. Rep. No. 94-295 (1975) 28

S. Rep. No. 417 *reprinted in* S. Rep. 97-417, 1982 U.S.C.C.A.N. 177 .... 19-20, 21

Page

Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Comm. on the Judiciary, U.S. Congress, 89th Cong. 12 (1965) 26

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About Federal Observers and Election Monitoring, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/examine/activ_exam.php 6

AML Municipal Members, ALASKA MUNICIPAL LEAGUE, http://www.akml.org/Members.html 12

Certification of the Bethel Census Area for Federal Observers (October 10, 2009) 7

J. Gerald Hebert, *Process of Obtaining a Bailout*, in AM. VOTES! GUIDE TO MODERN ELECTION L. & VOTING (Benjamin E. Griffith ed. 2008) 14

John Boucher and Kristen Trombley, *Federal Agencies Prominent Despite Downsizing*, ALASKA ECONOMIC TRENDS, Sept. 1996 27

Letter from James P. Turner, Acting Assistant Attorney General, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (September 28, 1993) .. 10

TABLE OF AUTHORITIES—Continued

Page

Letter from Lora Tredway, Attorney, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (May 23, 1985) 32

Letter from Paul F. Hancock, Assistant for Litigation, DOJ, to Norman Gorsuch, Alaska Attorney General (June 11, 1984) 30-31

Letter from Senator Ted Stevens to Governor Bill Sheffield (March 9, 1983) .. 29-30

Letter from Virginia Ragle, Alaska Assistant Attorney General, to Maggie Moran, Legislative Assistant to Senator Ted Stevens (March 14, 1985) 32

Lisa Handley, *A Voting Rights Analysis of the Alaska Amended Proclamation State Legislative Plan* (May 25, 2012), *available at* http://www.akredistricting.org/dojsubmission/May%2025,%202012%20Submission/Volume%2010/Folder%2004%20-%20Report%20of%20Dr.%20Lisa%20Handley/Dr.%20Handley's%20Report.pdf. 10

Michael Krauss, *Alaska Native Languages: Past, Present, and Future*, ALASKA NATIVE LANGUAGE CENTER RESEARCH PAPERS NO. 4 (1980) 28

Section 4 of the Voting Rights Act, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/misc/sec_4.php 12, 13

TABLE OF AUTHORITIES—Continued

Page

Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010) 24

INTEREST OF *AMICUS CURIAE*

The State of Alaska is a covered jurisdiction under the formula described in § 4 of the Voting Rights Act (VRA). 42 U.S.C. § 1973b(b). As a result, § 5 of the VRA prohibits the State from implementing any changes to its election practices and procedures without prior permission of the Department of Justice (DOJ) or the federal district court in Washington, D.C. § 1973c. Alaska is also the only state ever to bail out of § 5 coverage. Indeed, it has bailed out twice—after it was captured by the original coverage formula of the 1965 VRA, and again after it was recaptured by the Act's 1970 renewal. But since it was captured for the third time by the 1975 amendments—because it failed to provide written election materials in languages that almost no one could read—it has been ineligible to bail out. Thus, although Alaska has no history of voting discrimination, it nevertheless bears § 5's scarlet letter.

In its opinion below, the D.C. Circuit upheld the constitutionality of § 4's coverage formula by relying on the twin saviors of bailout and bail-in, §§ 1973b(a)(1), 1973a(c). *Shelby Cnty., Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012). The court believed that although the original conditions that justified § 5's intrusions have changed, Congress' "liberaliz[ation]" of bailout in 1982 preserves § 5's constitutionality today, stating that "[t]he importance of this significantly liberalized bailout mechanism cannot be overstated." *Id.* at 882. But even with no history of voting discrimination, Alaska cannot bail out under the supposedly liberalized standard enacted in 1982. The D.C. Circuit dismissed such concerns, advising that "[i]f something about the bailout criteria themselves or how the Attorney General is applying them is preventing jurisdictions with clean records from escaping section 5 preclearance, those criteria can be challenged in a separate action brought by any adversely affected jurisdiction." *Shelby Cnty.*, 679 F.3d at 882. Alaska has recently brought such an action, challenging the constitutionality of §§ 4 and 5. *Alaska v. Holder*, No. 1:12-cv-01376-RLW (D.D.C.).

Alaska has repeatedly suffered the "extraordinary federalism costs" of §§ 4 and 5. *Shelby Cnty.*, 679 F.3d at 884. These provisions nearly derailed Alaska's 2012 elections, when the State was sued to stop election preparations under an interim redistricting plan ordered by the Alaska Supreme Court and submitted to the DOJ for preclearance. Although DOJ's eventual preclearance mooted the lawsuit, the damage to the state's sovereignty was done. Because Alaska has a strong interest in ending the extraordinary and unwarranted infringement of its sovereignty imposed by §§ 4 and 5 of the VRA, it submits this amicus brief in support of the petitioner, Shelby County, Alabama.

INTRODUCTION

Alaska exists at the margin of § 5 coverage. The State twice bailed out under the original bailout provision, but now stands unable to bail out because the amended standards are nearly impossible for states to meet. The D.C. Circuit's heavy reliance on the bailout and bail-in provisions to correct the imperfections of the basic formula reflects a serious misunderstanding about the operation of those provisions. Upholding the 2006 reauthorization of the VRA's coverage formula, the D.C. Circuit was satisfied that the covered jurisdictions deserved § 5's extraordinary burden because (1) jurisdictions covered by § 4 would bail out if they had "a clean voting record as defined in section 4(a)," and (2) jurisdictions not covered by § 4 "but which nonetheless have serious, recent records of voting discrimination, may be 'bailed in'—i.e., subjected to section 5 preclearance—pursuant to section 3(c)." *Shelby Cnty.*, 679 F.3d at 873-74.

While the D.C. Circuit noted that Congress had before it "little or no evidence of current problems" in Alaska, *id.* at 881, it nevertheless upheld the statute's current reach, presumably relying on bailout to cure the overbreadth. But although Alaska's history does not justify § 5 coverage, bailout cannot save it; the State exemplifies what Justice Thomas observed in *Northwest Austin Municipal Utility District No. One v. Holder*—that bailout is little more than a "mirage." 557 U.S. 193, 215 (2009) (Thomas, J., concurring in part and dissenting in part). Nor does bail-in combat the fundamental inequality of sovereigns created by the coverage formula, because it does not impose upon guilty jurisdictions the same burdens endured by those covered under § 5.

The D.C. Circuit also relied on the analysis in *South Carolina v. Katzenbach*, 383 U.S. 301, 332 (1966) to justify the formula's inaccuracies, explaining that while "the coverage formula's fit is not perfect[,] . . . the fit was hardly perfect in 1965." *Shelby Cnty.*, 679 F.3d at 880. But in 1965—and 1966 when this Court upheld the coverage formula—the Act imposed only a five-year sentence on the covered jurisdictions and bailout functioned as an effective error-correction device. As the Court noted in *Katzenbach*, "an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings." *Katzenbach*, 383 U.S. at 332. In contrast, the 2006 reauthorization imposed a twenty-five-year sentence with an arbitrary and punitive bailout provision, in which a single "isolated instance" that may not even reflect voting discrimination bars escape for an additional decade.

Enough is enough. The Court should hold that § 5, applied to what is now a haphazard assortment of jurisdictions, is neither congruent nor proportional to the problems of voting discrimination in the 21st century. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

ARGUMENT

I. The VRA's Current Bailout Standards are Hopelessly Difficult for States to Meet.

Congress originally designed the VRA's bailout provision to correct errors in the reach of the coverage formula. In 1965, bailout required only a showing that the formula had wrongly captured the jurisdiction, meaning that it had not used a test or device with the purpose or effect of discriminating against voters on the basis of race or color. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (amended 1970, 1975, 1982, 2006). In contrast, the current standard, introduced in the 1982 VRA reauthorization, takes a more remedial approach, offering bailout to jurisdictions that can demonstrate the requisite improvement in their records on voting discrimination. In theory this new standard offers an incentive to eliminate discrimination and enhance minority access to the electoral process. Indeed, the D.C. Circuit noted that "[s]ignificantly for the issue before us, the 1982 version of the Voting Rights Act made bailout substantially more permissive." *Shelby Cnty.*, 679 F.3d at 856. But the current bailout standard is only "more permissive" in the sense that it theoretically allows jurisdictions to earn release. In practice, it set the bar unreasonably high—at least for states—and it thus severed any meaningful connection between the conduct of the jurisdiction and the severity of the penalty, § 5's "strong medicine." *Id.* at 873.

The new standard requires a jurisdiction both to achieve perfection and to cross its fingers that factors beyond its control will not frustrate bailout. To qualify, a jurisdiction now must show that during the previous ten years: (A) it has not used a test or device with the purpose or effect of denying or curtailing the right to vote because of race, color, or minority language status; (B) no federal court has found that the right to vote has been denied or curtailed anywhere in the jurisdiction because of race, color, or minority language status; (C) federal examiners have not been certified to the jurisdiction; (D) the jurisdiction has complied with § 5, including submitting all voting changes for preclearance; and (E) the DOJ has not objected to any preclearance submission. 42 U.S.C. §§ 1973b(a)(1)(A)-(E). In addition, a covered jurisdiction must meet "subjective criteria," *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in part and dissenting in part), requiring a showing that it has "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process" and has "engaged in constructive efforts" to expand voting opportunities. § 1973b(a)(1)(F). Even after meeting this standard, the jurisdiction must maintain a record free of voting discrimination for an additional ten years under a "clawback" provision to secure permanent bailed-out status. § 1973b(a)(5).

Two aspects of this test render it ineffective to cure the coverage formula's overreach. First, on its face the statute requires a perfect record over twenty years—with not a single court finding of voting discrimination; not a single federal examiner; every voting change submitted for preclearance; and not a single DOJ objection to a preclearance submission. The severity of § 5's treatment is strikingly disproportionate to the slight imperfection that will frustrate bailout. Second, even a state's best possible efforts to achieve this perfection may not succeed because some of the criteria rely on unreviewable decisions of the DOJ and attribute to the State the behavior of others it cannot control.

A. Bailout Is Blocked by the DOJ's Unilateral Decision to Dispatch Federal Observers.

The DOJ's decision to dispatch federal observers is an example of an unreviewable decision that will prevent bailout. Federal observers may be sent to monitor elections either by order of a federal court, 42 U.S.C. § 1973a(a), or upon certification by the Attorney General, § 1973f(a)(2). According to the DOJ, courts have ordered federal observers only twelve times in the VRA's history. *See About Federal Observers and Election Monitoring,* UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/examine/activ_exam.php (last viewed December 27, 2012). By contrast, the Attorney General has certified 152 jurisdictions for observers. *Id.* To justify dispatching federal observers to a § 5 jurisdiction, the Attorney General must certify that he "has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the [language assistance] guarantees . . . are likely to occur"; or that in his judgment, "the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment." 42 U.S.C. § 1973f(a)(2).

This standard for certification of observers means little, because the Attorney General's decision is unreviewable and therefore his discretion is unchecked. *See United States v. Louisiana,* 265 F. Supp. 703, 715 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967) ("[T]he appointment of observers is a matter of executive discretion and is not subject to judicial review."). With no oversight or review to guide the exercise of the Attorney General's judgment, the assignment of federal observers may not accurately measure a jurisdiction's voting record. In fact, Alaska's example demonstrates that a covered jurisdiction hoping to maintain a perfect record for bailout may have that record blemished without explanation.

The Attorney General certified Alaska's Bethel Census Area for federal observers in October 2009. He justified his decision by reciting the statutory standard, explaining only that "in my judgment the appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States." *See* Certification of the Bethel Census Area for Federal Observers (October 1, 2009) (attached as Appendix A). This certification was apparently in response to allegations made by opposing counsel in litigation then pending against the State and Bethel. *See Nick v. Bethel,* No. 3:07-cv-0098-TMB (D. Alaska) (challenging the State's voter language assistance program). The Attorney General made his certification without informing the State that he had received a complaint or allowing the State to respond. Thus, it is difficult to understand how he could have determined that the complaint was "meritorious" or that observers were "necessary to enforce the guarantees of the Fourteenth or Fifteenth amendment."

Even more troubling, the *Nick* plaintiffs had tried and failed to obtain a court order for federal observers just a year before. Order re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants at 11, *Nick v. Bethel,* No. 3:07-cv-0098-TMB (D. Alaska July 30, 2008), ECF No. 327. Unlike the DOJ, courts place an "onerous burden" on plaintiffs seeking appointment of federal observers. *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2006 WL 3922115, at *6 (E.D. Pa. Nov. 7, 2006) (holding that plaintiff had "not met its onerous burden to demonstrate that it is entitled to extraordinary relief in the form of federal observers"). Because the DOJ could easily give the *Nick* plaintiffs what the federal court would not, plaintiffs complained to the DOJ instead of renewing their request with the court, and federal observers were sent to Bethel for local elections in 2009 without any opportunity for the State to respond or appeal. This restarted Alaska's bailout clock. In 2010, the Attorney General notified the State that federal observers would again be dispatched to Bethel, again at the request of opposing counsel in the *Nick* litigation and before the State knew of any complaint. The DOJ has never given the State any feedback from the observers or notified it that any observed practices were improper.

Because the process by which the DOJ decides to dispatch observers is secret and unreviewable, their presence is a poor gauge of whether § 5 oversight is justified. As Alaska's experience shows, the presence of election observers demonstrates only that someone has contacted the DOJ and made allegations of improper election practices. Because bailout can be so easily and arbitrarily blocked, it cannot save the coverage formula.

B. Bailout Is Blocked By a Single DOJ Objection to a Preclearance Submission, Which May Not be Evidence of Discriminatory Effect or Intent.

To achieve the perfect record needed for bailout, a jurisdiction also must have received no DOJ objections to any preclearance submission by the jurisdiction or "any governmental unit within its territory" for ten years prior to the bailout request. 42 U.S.C. § 1973b(a)(1)(E). Because a DOJ objection does not demonstrate actual discrimination sufficient to justify continued § 5 coverage, this requirement also keeps bailout from functioning as a meaningful cure for the overreach of the coverage formula.

A DOJ objection to preclearance is not a finding of discriminatory effect or intent. The DOJ must object to a proposed change whenever "the Attorney General is unable to determine that the change is free of discriminatory purpose and effect," 28 C.F.R. § 51.52(c) (2011), and the burden of proving otherwise lies with the submitting jurisdiction, § 1973c; 28 C.F.R. § 51.52(a) (2011). The D.C. Circuit recognized that a DOJ objection did not necessarily signal intentional voting discrimination, and that "to sustain [the 2006 reauthorization of] section 5, the record [before Congress] must contain 'evidence of a pattern of constitutional violations.'" *Shelby Cnty.*, 679 F.3d at 866. But the court failed to recognize the impact of this insight on the effectiveness of the bailout as a savings clause. Because a DOJ objection is at best only circumstantial evidence even of discriminatory effect, much less intent, a rule that bars a jurisdiction from bailout for another ten years due to a single objection cannot rationalize the coverage formula.

Nor is it apparent that the DOJ applies a uniform, predictable standard to preclearance submissions. The only objection that the DOJ has ever made to a preclearance submission by Alaska was to a 1993 redistricting plan, on the ground that it reduced the Alaska Native voting age population in a house district from 55.7 percent to 50.6 percent. *See* Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (September 28, 1993) (attached as Appendix B). But a jurisdiction that is covered by § 5 only because of the minority language assistance formula should be not forced to engage in race-conscious redistricting to comply with the VRA. Moreover, in later rounds of redistricting, the DOJ has precleared plans with effective Alaska Native districts with less than 50 percent Native voting age population.[1] Without clear guidance as to how the DOJ will apply the retrogression standard, jurisdictions attempting to redistrict are flying blind. *Cf. In re 2011 Redistricting Cases*, No. S-14721, 2012 WL 6721059, at *17 n.44 (Alaska Dec. 28, 2012) (Matthews, J. dissenting) ("Underlying this uncertainty [whether redistricting plan would be precleared] is the fact that it is difficult to determine just what is forbidden by section 5 of the Voting Rights Act."). And the failure of jurisdictions to intuit what might be acceptable to the DOJ is not a useful signal of discriminatory intent.

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[1] Lisa Handley, A Voting Rights Analysis of the Alaska Amended Proclamation State Legislative Plan 8 (May 25, 2012), *available at* http://www.akredistricting.org/dojsubmission/May%2025,%202012%20Submission/Volume%2010/Folder%2004%20-%20Report%20of%20Dr.%20Lisa%20Handley/Dr.%20Handley's%20Report.pdf.

Similarly, the recent preclearance of a voting change in the City of Kinston, North Carolina, described in the Brief for Respondents Holder *et al.* in Opposition at 4-12, *Nix v. Holder*, No. 12-81 (Sept. 24, 2012) also demonstrates that DOJ objections often reflect only a failure of proof on the part of the jurisdiction. In the Kinston example, the DOJ unilaterally reversed course and precleared a proposal to which it had objected two years before, purportedly based on additional information it received from another source. Whatever its reasons for doing this, the DOJ's change of heart demonstrates that its earlier objection did not actually indicate that the city would have instituted a discriminatory change absent § 5. Nevertheless that objection alone would have barred Kinston from bailing out for ten years.

Because the bailout provision is based on such unreliable indicators of discrimination, it cannot ensure the congruence and proportionality of the coverage formula.

C. The Bailout Requirements Hold States Responsible for the Acts and Omissions of Sub-Jurisdictions They Cannot Control.

The impossibility of the bailout standard is aggravated for states and other larger jurisdictions because it attributes to them the conduct of political subdivisions and governmental units within their territories. 42 U.S.C. §§ 1973b(a)(1)(A)-(F). The larger the jurisdiction seeking bailout, the more devastating this requirement is. In Alaska, for example, the municipal league alone has approximately 160 members.[2] The State's eligibility for bailout depends on each subdivision maintaining a perfect record for ten years; none, facing litigation over a voting change, can decide to settle without jeopardizing the State's bailout prospects. § 1973b(a)(1)(B). And yet the State has no control over the actions of these subdivisions—either over their election practices or their litigation decisions. Moreover, the subjective criteria in § 1973b(a)(1)(F) demand that a jurisdiction seeking bailout compile an extensive documentary record over a ten-year period, for itself and "all governmental units within its territory." To imagine that a state could organize and maintain that kind of recordkeeping for all sub-jurisdictions within its territory for ten years is little more than a fantasy. Indeed, of the thirty-eight jurisdictions that have bailed out under the 1982 standard, none is larger than a County.[3]

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[2] The list of Alaska Municipal League members is available at *AML Municipal Members*, ALASKA MUNICIPAL LEAGUE, http://www.akml.org/members.html (last visited Dec. 30, 2012).

[3] The list of bailouts is available at *Section 4 of the Voting Rights Act*, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL

D. In Practice, the DOJ has Complete Control Over the Bailout Process.

Given these onerous bailout standards, it is unsurprising that few jurisdictions have been able to take advantage of the bailout opportunity. And a close look at those that have raises further questions. The D.C. Circuit believed that § 5 was constitutional in large part because the bailout mechanism operated to ensure that the statute's reach was congruent and proportional. This view assumed that bailout was a workable mechanism to allow covered jurisdictions with clean records to escape the reach of § 5, as it placed "covered status . . . within the control of the jurisdiction." *Shelby Cnty.*, 679 F.3d at 882 (citing H.R. Rep. No. 109–478, at 25 (2006)). Instead, the process is so permeated by the DOJ's exercise of unfettered discretion that it neither functions consistently as an escape hatch for worthy jurisdictions nor prevents the bailout of jurisdictions that are not legally entitled to it.

In practice, bailout cannot be achieved without the DOJ's consent. Since the effective date of the 1982 bailout revisions, thirty-eight jurisdictions have bailed out. *See* Bailout List, *supra* note 3. All of these bailouts were accomplished by consent decree, and in none of them was the bailout criteria actually litigated. Instead, in all but one, the parties filed a proposed consent decree very shortly after the initiation of the litigation. (In the sole exception, *Northwest Austin*, the consent decree was entered shortly after this Court's remand. Consent Judgment and Decree, *Northwest Austin Municipal Utility District*

RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited December 23, 2012) [hereinafter Bailout List].

No. One v. Holder, No. 1:06-cv-10384-PLF-EGS-DST (D.D.C. Nov. 3, 2009), ECF No. 171. On remand, as in the other thirty-seven bailouts, the meaning, scope, and interpretation of the bailout criteria were never litigated.) Accordingly, these actions have generated neither judicial interpretations of the bailout criteria nor any published judicial opinions addressing their meaning or application. Nor has the DOJ promulgated any regulations elaborating on the bailout standards.

Thus, in practice, jurisdictions that obtain the DOJ's consent can bail out; those who do not are likely to be barred, even if their claims might have merit. Indeed, a bailout guide written by J. Gerald Hebert—an expert bailout attorney formerly with the DOJ's Voting Rights Section who has represented thirty of the thirty-eight bailed-out jurisdictions in their bailout actions—advises that jurisdictions interested in bailout should obtain the DOJ's blessing before filing suit because it would be expensive and likely impossible to obtain bailout without it:

> [T]he best course of action is to first seek the Attorney General's consent to bailout before petitioning the court. If a bailout lawsuit is filed before consulting with DOJ, and DOJ raises objections, the two choices available at that point for the jurisdiction are not good: either take on DOJ in contested litigation (costly and what is perhaps a losing cause), or withdraw the suit while the jurisdiction attempts to work out its differences with DOJ.

J. Gerald Hebert, *Process of Obtaining a Bailout*, § 16.III, *in* AM. VOTES! GUIDE TO MODERN ELECTION L. & VOTING (Benjamin E. Griffith ed. 2008). Thus, the DOJ, not the courts, effectively controls bailout.

The practical result of the DOJ's discretion is remarkable: its power stretches so far that it commonly agrees to bailouts for jurisdictions that are not legally entitled to receive them. In eighteen of the thirty-eight bailouts that have been granted under the post-1982 bailout standards, the consent decrees expressly indicate that the jurisdictions did not actually meet the statutory standards for bailout because they did not have perfect preclearance records for ten years preceding the bailout application. *See* Consent Judgment and Decree at 9, *Merced Cnty. v. Holder*, No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C. Aug. 31, 2012), ECF No. 11 (noting that "several potential voting changes had not previously been submitted to the Attorney General over the preceding ten years"); Consent Judgment and Decree at 15, *City of Pinson v. Holder*, No. 1:12-cv-00255-CKK-KLH-RBW (D.D.C. April 20, 2012), ECF No. 11 (noting that city "failed to submit three 2008 unpopulated annexations to the Attorney General for review under Section 5 prior to implementation"); Consent Judgment and Decree at 12, *Prince William Cnty. v. Holder*, No. 1:12-cv-00014-ESH-TBG-JEB (D.D.C. April 10, 2012), ECF No. 9 (describing six changes enforced without preclearance, including salary increases, a special election, and the use of paper ballots); Consent Judgment and Decree at 9, *King George Cnty., Virginia v. Holder*, No. 1:11-cv-02164-BAH-KLH-ESH (D.D.C. April 5, 2012), ECF No. 10 (describing un-precleared changes involving an appointment to fill a vacancy and a change of boundary lines between counties); Consent Judgment and Decree at 8, *Culpeper Cnty., Virginia v. Holder*, No. 1:11-cv-01477-JEB-JWR-RLW (D.D.C. Oct. 3, 2011), ECF No. 5 (describing county's failure to submit for preclearance for a special election, an appointment to fill a vacancy, and tax referenda); Consent Judgment and Decree at 10, *City of Kings Mountain v. Holder*, No. 1:11-cv-01153-PLF-DST-TFH (D.D.C. Oct. 22, 2011), ECF No. 7 (noting that city failed to submit for preclearance two annexations); Consent Judgment and Decree at 8, *Alta Irrigation Dist. v. Holder*, No. 1:11-cv-00758-RJL-DAG-PLF (D.D.C. July 15, 2011), ECF No. 9 (noting that three proceedings were carried out without preclearance); Consent Judgment and Decree at 12, *Jefferson Cnty. Drainage Dist. No. Seven v. Holder*, No. 1:11-cv-00461-DST-RWR-RJL (D.D.C. June 6, 2011), ECF No. 7 (noting existence of two un-precleared decisions to cancel elections); Consent Judgment and Decree at 5, *Augusta Cnty. v. Gonzales*, No. 1:05-cv-01885-TFH (D.D.C. Nov. 30, 2005), ECF No. 7 (noting that county seeking bailout had enforced three voting changes prior to preclearance); Consent Judgment and Decree at 6, *Pulaski Cnty., Virginia v. Gonzales*, No. 1:05-cv-1265-RBW (D.D.C. Sept. 27, 2005), ECF No. 8 (noting that county enforced fourteen voting changes without preclearance); Consent Judgment and Decree at 4, *Greene Cnty., Virginia v. Ashcroft*, No. 1:03-cv-01877-HHK (D.D.C. Jan. 19, 2004), ECF No. 10 (noting enforcement of one voting change without preclearance); Consent Judgment and Decree at 6, *Warren Cnty., Virginia v. Ashcroft*, No. 1:02-cv-01736-EGS (D.D.C. Nov. 26, 2002), ECF No. 9 (noting seven un-precleared changes, including a special election, several annexations and boundary changes, and alterations to the methods for selecting school board members); Consent Judgment and Decree at 6, *Rockingham Cnty., Virginia v. Ashcroft*, No. 1:02-cv-00391-ESH-EGS (D.D.C. May 21, 2002), ECF No. 6 (noting enforcement of one voting change without preclearance); Consent Judgment and Decree at 5, *City of Winchester, Virginia v. Ashcroft*, No. 1:00-cv-03071-ESH-RCL (D.D.C. May 31, 2000), ECF No. 14 (describing an un-precleared agreement to suspend all annexations); Consent Judgment and Decree at 8-9, *Roanoke Cnty., Virginia v. Reno*, No. 1:00-cv-01949-RMU-JR (D.D.C. Jan. 24, 2001), ECF No. 6 (describing numerous voting changes for which preclearance was not obtained, including six annexations and boundary changes, and two amendments to the town charter regarding filling vacant seats for elected officials); Consent Judgment and Decree at 5, *Shenandoah Cnty., Virginia v. Reno*, No. 1:99-cv-00992-PLF (D.D.C. Oct. 15, 1999), ECF No. 12 (describing un-precleared changes including a special election and "various" annexations); *cf.* Consent Judgment and Decree at 5, *Frederick Cnty., Virginia v. Reno*, No. 1:99-cv-00941 (D.D.C. Sept. 9, 1999), ECF No. 13 (noting the parties' disagreement as to whether voting changes were enforced without preclearance). One recently-incorporated city lacked a ten-year history of any VRA compliance. Consent Judgment and Decree at 10, *City of Sandy Springs v. Holder*, No. 1:10-cv-01502-ESH-JRB-EGS (D.D.C. Oct. 26, 2010), ECF No. 8. And the DOJ recently consented to a bailout action by ten covered towns and townships in New Hampshire despite its acknowledgement that "several potential voting changes had not previously been submitted to the Attorney General over the preceding ten years," [Proposed] Consent Judgment and Decree at 14, *New Hampshire v. Holder*, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 21, 2012), ECF No. 10-1, even in the face of opposition from New Hampshire voters concerned about the jurisdictions' obvious ineligibility for preclearance, Memorandum of Points and Authorities in Support of Motion to

Intervene at 4-9, *New Hampshire v. Holder*, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 5, 2012), ECF No. 6.

Thus, even though a ten-year compliance record is a specific requirement of 42 U.S.C. § 1973b(a)(1)(D), the DOJ has nevertheless approved bailouts to numerous jurisdictions that did not meet this requirement. Indeed, had the law been followed, only twenty jurisdictions would have bailed out in the past three decades, demonstrating that the bailout provisions are unreasonably strict. Under these circumstances, the bailout criteria are not functioning as the escape hatch for jurisdictions with clean records that the D.C. Circuit postulated and that Congress intended. Instead, bailout has often occurred in spite of the law, not because of it.

Nor can the Act be saved by the willingness of the DOJ and courts to overlook the rules. The consent decrees of the eighteen ineligible jurisdictions cited above suggest that the DOJ is attempting to make bailout more widely available by bending the rules. For example, the decrees identify un-precleared changes that were implemented in violation of § 5, but then note that the DOJ later—apparently in anticipation of the bailout litigation—approved the changes as non-discriminatory. *E.g.*, Consent Judgment and Decree at 9, *Roanoke Cnty., Virginia v. Reno*, No. 1:00-cv-01949-RMU-JR (D.D.C. Jan. 24, 2001), ECF No. 6 (explaining that numerous un-precleared changes, at least one eight years old, were submitted for preclearance "immediately before the present action was filed"). The decrees therefore craft a "post-clearance" exception to § 5's preclearance requirement, under which some lucky jurisdictions can receive the DOJ's blessing for bailout despite preclearance violations. The consent decrees also often note that the jurisdictions' § 5 failures were "inadvertent," or cite the jurisdictions' good-faith, but incorrect, belief that a change did not require preclearance. *See, e.g.*, Consent Judgment and Decree at 9, *Merced Cnty. v. Holder*, No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C. Aug. 31, 2012), ECF No. 11 (explaining that failure to seek preclearance "was inadvertent or based on a good faith belief that the changes were not covered by Section 5"); Consent Judgment and Decree at 9, *King George Cnty., Virginia v. Holder*, No. 1:11-cv-02164-BAH-KLH-ESH (D.D.C. April 5, 2012), ECF No. 10 (explaining that county's failure to comply with § 5 was "inadvertent").

But the VRA does not permit relaxation of the bailout standards. It unambiguously provides that bailout is available only if a requesting jurisdiction has completely "complied with section 1973c of this title, including compliance with the requirement that *no change* covered by section 1973c of this title has been enforced without preclearance under section 1973c." 42 U.S.C. § 1973b(a)(1)(D) (emphasis added). The DOJ's regulations are in accord, lacking any exceptions to the full-compliance requirement. 28 C.F.R. § 51.64 (1987) ("Among the requirements for bailout is compliance with Section 5, as described in Section 4(a), during the ten years preceding the filing of the bailout action and during its pendency.").

Congress carefully crafted the bailout standards, intending that each of its provisions be strictly enforced: "Each and every requirement of the bailout is minimally necessary to measure a jurisdiction's record of non-discrimination in voting." S. Rep. No. 97-417, at 59, *reprinted in* 1982 U.S.C.C.A.N. 177, 238; *see also id.* at 222 ("This bailout was carefully crafted to preserve the essential protections of section 5. The provisions work as an integrated complementary whole; removing any element would seriously undermine the entire structure.").

Congress could have allowed "post-clearance" to substitute for preclearance, but it did not. Instead, as the language of the statute conveys, Congress intended that absolute and complete compliance with the preclearance requirement was a prerequisite to any jurisdiction's ability to bail out:

> Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law . . . . Prospectively, if bail-out were not made dependent on a record of timely submissions, there would be no incentive for jurisdictions to take seriously that requirement. This would further undermine the justice department's ability to enforce the act in the future.

Id. at 225-26. In fact, Congress specifically rejected the idea that "post-clearance" could ever substitute for preclearance, explaining that "[t]he rights of voters under the Voting Rights Act are violated not only when the voting change is first enforced without preclearance, but thereafter while it remains in force without having been precleared. Therefore, this requirement applies even if the voting change, when ultimately submitted, was not found objectionable." *Id.* at 226.

Similarly, the statutory language does not support the idea that inadvertent failure to comply with the preclearance requirement is excusable. And again, Congress expressly rejected the argument that "bailout should not be denied for 'inadvertence'" in failing to comply with the preclearance mandate, explaining that "[f]or many years the submission requirements of section 5 have been well understood" and that any jurisdiction unclear as to its obligations should seek advice from its "state attorney general's office." *Id.*

The DOJ recently asserted that it has authority to excuse preclearance failures. It argued in the New Hampshire township bailout action that 42 U.S.C. § 1973b(a)(3) grants it discretion to waive the bailout requirements. *See* Attorney General's Opposition to Motion to Intervene at 15-17, *New Hampshire v. Holder*, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 19, 2012), ECF No. 9. This argument is unsupported by the language of the Act. Subsection (a)(3) prohibits bailout to a jurisdiction that does not possess a clean ten-year record of compliance with other federal, state, and local laws regarding voting discrimination, but softens that requirement with an exception if the jurisdiction shows that its violations of other voting discrimination laws were "trivial, were promptly corrected, and were not repeated." § 1973b(a)(3). On its face, this exception does not reach back to apply to subsection (a)(1)'s requirements for bailout. If anything, the existence of this exception in subsection (3) highlights the absence of any similar leniency in subsection (1).

In light of this unambiguous statutory language and legislative history, the DOJ may not simply decline to enforce portions of the VRA to help favored jurisdictions bail out. Rather, the DOJ must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The DOJ is entitled to no deference when it makes "radical or fundamental change[s]" to the VRA, *MCI Telecomms.*

Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994), by creating exceptions, loopholes, and leniency where Congress intended none to exist.

Rather than applying the law that Congress enacted, the DOJ bestows indulgences, applying its own, unwritten criteria in the form of negotiated consent decrees that forgive prior improprieties. Other jurisdictions, however, are not the recipients of this largesse. How the DOJ decides which jurisdictions can bail out despite their disqualifying records is unclear. Nor is it known how many jurisdictions, unaware of this option, have not sought bailout because their internal investigations revealed that the plain terms of the statute made them ineligible.

The Court should therefore reject any suggestion that the DOJ's actions can save the constitutionality of § 5. Congress did not intend that non-qualifying jurisdictions could bail out, or that the DOJ would have discretion to decide which non-qualifying jurisdictions to pardon. And even if it did, such a discretionary bailout standard would not make § 5 into a congruent and proportional response to modern problems of voting discrimination. A "standard" this arbitrary and unknowable is by definition neither congruent nor proportional, whatever the problem might be.

E. The DOJ's Discretion to Consent to Bailout Includes Application of Subjective Standards.

In addition to the objective criteria set forth in 42 U.S.C. §§ 1973b(a)(1)(A)-(E), the bailout statute also contains subjective criteria that a jurisdiction must satisfy before it may bail out. § 1973b(a)(1)(F). A state must show that it and all governmental bodies within its borders "have engaged in constructive efforts to eliminate intimidation and harassment" of voters, and "have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process." §§ 1973b(a)(1)(F)(ii)-(iii). No regulations elucidate the meaning and extent of the "constructive efforts" or the "expanded opportunity" that might qualify.

Especially in an area of law where decisions are made by consent decree, these subjective criteria increase the potential for inequities between jurisdictions that the DOJ favors and those it does not. As with the DOJ's practice of waiving the "objective" statutory criteria for certain jurisdictions, the subjective criteria allow the DOJ to exercise expansive discretion, determining for unexplained reasons whether a particular jurisdiction has made sufficient efforts. This again suggests that bailout is not a fair escape hatch that any meritorious jurisdiction can access, but rather is a favor that the DOJ can give or withhold as it chooses.

II. The VRA's Bail-In Provision Does Not Effectively Address the Underinclusiveness of the Coverage Formula.

Just as bailout does not tailor § 5's coverage to only the jurisdictions that deserve its extraordinary burdens, bail-in does little to cure the coverage formula's underinclusiveness. The D.C. Circuit discusses bail-in as if it worked in tandem with the bailout provisions to correct the inaccuracies of the coverage formula, but that is not so. Bail-in is extremely rare, suggesting that non-covered jurisdictions are likely to escape it, regardless of how unfavorably their election practices compare to covered jurisdictions. And even when bail-in does happen, it is markedly different than § 5 coverage. It has a short lifespan, and it neither subjects a jurisdiction to § 5's requirements nor imposes the difficult standards for bailing out.

In the forty-seven year history of the VRA, federal courts have applied the bail-in provision a mere eighteen times. And on sixteen of those occasions, the bailed-in jurisdiction signed a consent decree submitting to coverage, often to avoid the cost of extended litigation. Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L. J. 1992, 2015-16 (2010).

More importantly, "bail-in" is a misnomer. The statute does not give courts authority to turn a non-covered jurisdiction into a covered one. Instead, the bail-in provision creates a third category of jurisdictions, subject to shorter, gentler hybrid coverage. Section 4 coverage lasts indefinitely, but bail-in coverage lasts only "for such period as [the court] may deem appropriate." § 1973a(c). Thus, a bailed-in jurisdiction need not meet the VRA's standards for bailout in order to escape coverage; bail-in coverage expires naturally, when the court-imposed period ends. *See, e.g.*, Consent Decree at 8, *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (requiring preclearance of redistricting plans for ten years).

And although the statute appears to require bailed-in jurisdictions to preclear changes to *any* "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting," in practice courts have limited the bail-in preclearance obligation to changes related to the triggering litigation. *See, e.g.*, *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (D.N.M. 1990) (holding that "any further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State must be subjected to the preclearance process"). Moreover, while § 4 coverage demands that a jurisdiction go hat in hand either to the DOJ or to the district court in Washington, D.C., a bailed-in jurisdiction can seek preclearance from the local district court, familiar with local conditions and realities. § 1973a(c).

Finally, bail-in fails to address the unequal sovereignty of the states under the VRA because it is triggered only by a finding that "violations of the fourteenth or fifteenth amendment justifying equitable relief *have occurred*." § 1973a(c) (emphasis added). While § 4 coverage is imposed by a formula that uses broad presumptions as a proxy for voting discrimination—encompassing jurisdictions like Alaska with no history of constitutional or statutory violations of voting rights—bail-in requires a court to find that the jurisdiction has *actually violated* the guarantees of the Fourteenth or Fifteenth Amendments. And indeed, in the only decision to discuss the bail-in provision in detail, the court held that multiple violations were required to trigger bail-in. *Jeffers*, 740 F. Supp. at 600. In so holding, that court noted that "it would be strange if a single infringement could subject a State to such strong medicine." *Id.* Yet a single misstep—even one providing no evidence of discriminatory effect, much less intent—subjects a State covered under § 4 to at least ten more years of § 5's "strong medicine."

Bail-in, therefore, is a temporary, narrowly-tailored remedy to rectify identified, repeated constitutional violations. It lacks the symmetry with § 5 coverage necessary to function as a meaningful equalizer of the coverage formula.

III. Alaska's Experience with the VRA Demonstrates Both the Overreach of § 5 Coverage and the Near-Impossibility of Bailout for a State.

Alaska's experience demonstrates both the over-inclusiveness of § 4's coverage formula and the ineffectiveness of bailout to cure the unconstitutionality of the preclearance regime. Alaska has never been found in violation of either constitutional guarantees of voting rights or statutory prohibitions against voting discrimination, yet it has carried the stigma of § 5 coverage and labored under the yoke of federal oversight of its election laws and procedures for more than thirty-five years. And Alaska still has no realistic prospect of bailout.

A. Alaska's § 5 Coverage is Not Now, and Never Was, Justified as a Congruent and Proportional Response to Voting Discrimination.

Alaska was swept up by the coverage formula despite having no history of voting discrimination, let alone the kind of history necessary to justify § 5's extraordinary burden. The 1965 formula presumed that a jurisdiction had discriminatory election practices if it used a test or device as a prerequisite for voting and had low voter turnout. *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Comm. on the Judiciary*, U.S. Congress, 89th Cong. 12 (1965) (Testimony of Nicholas Katzenbach). Bailout was intended to release from § 5 coverage jurisdictions such as Alaska: in 1966 and 1972 when the State sought bailout, the DOJ agreed that Alaska had not discriminated based on race or color.

Alaska was covered in 1965 and 1970 because its constitution required that a voter speak or read English, Alaska Constitution, article V, section 1 (amended 1970), and because a third of its labor force was uniformed military personnel who generally did not vote in Alaska, pushing voter participation rates below the 50% threshold. *See* John Boucher and Kristen Trombley, *Federal Agencies Prominent Despite Downsizing*, ALASKA ECONOMIC TRENDS, September 1996, at 8; *Egan v. Hammond*, 502 P.2d 856, 862 (Alaska 1972) (Boochever, J., dissenting). Because Alaska's constitutional provision did not actually have the purpose or effect of denying the right to vote on account of race or color, the Attorney General consented to its bailout in 1966 and 1972. At that time, the bailout system worked.

But the 1975 amendments again ensnared Alaska. Although in 1970 Alaskans had repealed the Alaska Constitution's requirement that voters read or speak English, Alaska was covered in 1975 because the formula was expanded to include jurisdictions that provided "registration and election materials . . . only in English," on November 1, 1972, *see* 28 C.F.R. § 55.5(a) (1976) (interpreting 42 U.S.C. § 1973b(f)(3)), and that had a sufficient population of a "single language minority." § 1973b(f)(3).

This was an absurd basis for pulling Alaska back into § 5 coverage. The "single language minority group" that made up more than five percent of Alaska's voting age citizens was not a single group at all; instead, approximately twenty distinct Alaska Native languages were spoken by different Alaska Native groups spread across Alaska's vast territory. *See* Michael Krauss, ***Alaska Native Languages: Past, Present, and Future***, ALASKA NATIVE LANGUAGE CTR. RES. PAPERS NO. 4 at 33-52 (1980). Until recently, these languages had no widely-read orthographies, and few, if any, Alaska Natives were able to read them but unable also to read English. Section 5 therefore covered Alaska because it failed to print election materials in languages that no one would have been able to read, except a handful of people who also could read English.

The type of evidence that justified § 5 coverage for racial discrimination in the South in 1965 and 1970 simply did not exist for voting discrimination against Alaska Natives in 1975. Congress' apparent basis for including Alaska as a covered jurisdiction was a 1972 lawsuit alleging that the State violated the equal protection rights of Native teens by failing to provide local high schools in remote villages (it provided boarding school education). *See Hootch v. State Operated School System*, Civil No. 72-2450 (Super. Ct. Alaska 1973) (cited in S. Rep. No. 94-295 at 29 (1975)). The state entered into a consent decree in 1976, agreeing to build 126 high schools in small villages. *See Tobeluk v. Lind*, 589 P.2d 873, 875 (Alaska 1979). But long-distance schooling had nothing to do with voting discrimination, and even if it had, § 5 was not a congruent and proportional response to the targeted discrimination. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Indeed, § 5's preclearance requirement does not impact a state's educational spending at all.

English-only elections in certain areas were not the same kind of "exceptional conditions" that initially made § 5's extraordinary burden constitutionally permissible. Congress had no evidence in 1975 that Alaska Natives in general were denied the right to vote; unlike the jurisdictions covered in 1965 and 1970, Alaska's voting practices had never violated voters' constitutional rights. And Alaska was covered despite never even violating voters' *statutory* rights, because it repealed its English-speaking requirement five years before language-based voting laws became illegal in 1975. Congress had no reason to believe that without § 5, Alaska or other states would repeatedly devise "unremitting and ingenious" new ways to make voting difficult for non-English-speaking citizens. *Katzenbach*, 383 U.S. at 309.

And the 1975 revisions to the bailout provision ensured that Alaska would be burdened by § 5 coverage for at least ten years. Alaska's repeal of its English-speaking requirement went into effect in 1972, so Alaska could not demonstrate until 1982 that it had not used this test or device for ten years. *See* Voting Rights Amendments of 1975, Pub. L. No. 94-73, tit. II, § 201, 89 Stat. 400, 401 (amended 1982, 2006).

B. Bailout Under the 1982 Standards is a Mirage for Alaska.

Even though § 5 coverage for Alaska was not constitutionally warranted in 1975, at least Alaska had the expectation that it would be able to bail out ten years later. But just as the ten-year period expired in 1982, Congress changed the bailout criteria so that, in the words of Alaska's Senator Ted Stevens, bailout became "difficult, if not impossible" for Alaska. *See* Letter from Senator Ted Stevens to

Governor Bill Sheffield 8a (March 9, 1983) (attached as Appendix C). The new bailout standard was touted as a liberalization because it allowed jurisdictions with histories of discrimination to redeem themselves with ten years of compliance, instead of tying bailout to a fixed calendar date that was pushed further into the future with each amendment to the VRA. But the new bailout standards had the reverse impact for states; they "require[d] states subject to the Act's special provisions to meet a more difficult standard for termination of the Act's coverage." Memorandum of Three-Judge Panel at 2, *Alaska v. United States,* No. 84-1362 (D.D.C. June 4, 1985). As Senator Stevens pointed out, for a state like Alaska, which "should have never been recaptured by the Voting Rights Act's preclearance provisions," bailout would be forever blocked by "technical violations, especially those in Alaska's small second class municipalities." *See* App. C at 8a. Senator Stevens urged Alaska to attempt to bail out before the 1982 amendments became effective on August 5, 1984. *Id.*

Alaska tried. It filed suit on May 1, 1984, requesting bailout under the 1975 Act's standards. But the DOJ asked the State for a volume and scope of specific information that was mostly unavailable and would have taken years to compile. Letter from Paul F. Hancock, Assistant for Litigation, Voting Section, Civil Rights Division, DOJ, to Norman Gorsuch, Alaska Attorney General (June 11, 1984) (attached as Appendix D). For example, it requested that the State break into four levels of English proficiency all the speakers in Alaska for each of eleven "primary" Native languages, and provide the number of persons of voting age and the number of registered voters who spoke each of these eleven languages. *Id.* at 11a. This was not information collected by the United States Census—nor did Alaska conduct its own census—and the speakers of these languages lived almost exclusively in remote villages spread across a state nearly as wide and high as the lower forty-eight states combined.

The DOJ also asked Alaska to demonstrate how it informed voting age members who spoke each of these languages about every aspect of elections, listing seventeen separate categories of information, including the requirements and procedures of conducting voter registration drives; the location of election district boundaries and changes in locations or realignment of districts; the requirements and procedures for designating and regulating candidates' poll watchers; and rules applicable to candidates' financial disclosure and campaign finance statements. And because the bailout standards applied to all of the subdivisions within the state, the DOJ further requested that the State "identify every jurisdiction in the state that independently conducts elections" and for "each such jurisdiction . . . obtain and provide the information that is requested . . . above." *Id.* at 19a.

This request was a far cry from the DOJ's representation to this Court in 1966 that bailing out would be a simple matter of submitting affidavits from voting officials and refuting any evidence of discrimination adduced by the DOJ. *Katzenbach*, 383 U.S. at 332. Nevertheless, with the assistance of a number of Alaska Native organizations, the State gave the DOJ a lengthy report, attempting to provide the requested information. Despite the State's efforts, the DOJ alleged to the court that Alaska had applied a test or device with the purpose or effect of denying or abridging language minorities' right to vote during the previous ten years. Without giving Alaska a chance to litigate the issue, the DOJ moved to dismiss the bailout complaint because Alaska had not successfully obtained a judgment before the August 5, 1984 effective date of the amendments. The three-judge panel agreed that Alaska could proceed with bailout only under the new standards. Memorandum of Three-Judge Panel at 7, *Alaska v. United States*, No. 84-1362 (D.D.C. June 4, 1985). The DOJ then propounded ninety-seven interrogatories spanning fifty-four pages and asked that the State provide answers pertaining not only to the State, but also to each municipality and educational system subdivision in Alaska. Letter from Lora Tredway, Attorney, Voting Section, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (May 23, 1985) (attached as Appendix E). Faced with this oppressive discovery burden—a clear signal that the DOJ would not consent to bailout—Alaska dismissed its case.

Alaska has never again been eligible for bailout because it has not maintained the ten-year perfect record required under the 1982 amendments. Bailout was unavailable for a decade because Alaska "enforced" the repeal of its statute providing for a presidential primary election before receiving DOJ's preclearance letter. *See* Letter from Virginia Ragle, Alaska Assistant Attorney General, to Maggie Moran, Legislative Assistant to Senator Ted Stevens 24a (March 14, 1985) (attached as Appendix F). Bailout was then precluded by the DOJ's 1993 objection to the state's redistricting plan after the 1990 census. *See supra*, p. 10. Not quite ten years later, the clock was reset again by the failure of the Municipality of Anchorage, which is not under the

State's control, to preclear a change to its mayoral election rules. *See generally Luper v. Municipality of Anchorage*, 268 F. Supp. 2d 1110 (D. Alaska 2003). In 2009 and 2010, the DOJ assigned federal observers to Bethel, restarting the clock yet again. Then, as the State attempted to prepare for the 2012 elections using an interim redistricting plan ordered by the Alaska Supreme Court—the only way it could hold the 2012 election on time—it was sued for violating § 5 because the plan had not yet been precleared. *See Samuelsen v. Treadwell*, No. 3:12-cv-0018-RRB-AK-JKS (D. Alaska). Although that lawsuit was mooted by the DOJ's preclearance of the plan, if the state of the law remains unchanged, it is an open question whether this disqualifies Alaska from bailing out until 2022.

If it does, by the time Alaska becomes eligible for bailout again, the State will have been subject to the extraordinary and intrusive federal oversight imposed by § 5 for forty-seven years, despite the fact that no federal court has ever issued a judgment finding that Alaska has violated either the guarantees of voting rights in the federal constitution or the VRA.

As this history shows, as a result of overreaching by Congress and the DOJ, Alaska is now indefinitely locked into § 5 coverage. Congress applied § 5 to Alaska by virtue of the Fourteenth Amendment without any finding that it was engaging in voting discrimination, and the perfection required to bail out has left the State without any real hope that this will change.

* * *

For these reasons, this Court should reverse the judgment of the Circuit Court and should find that Congress' 2006 reauthorization of § 5 of the VRA under the pre-existing coverage formula exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the United States Constitution.

Respectfully submitted,

MICHAEL C. GERAGHTY
Attorney General
MARGARET PATON WALSH
Counsel of Record
JOANNE M. GRACE
RUTH BOTSTEIN
THE STATE OF ALASKA
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-6612
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Counsel for Amicus
The State of Alaska

APPENDIX

APPENDIX A

[Seal omitted]

Office of the Attorney General
Washington, D.C. 20530

Billing Code 4410-13

UNITED STATES DEPARTMENT OF JUSTICE

Attorney General

CERTIFICATION OF THE ATTORNEY GENERAL

BETHEL CENSUS AREA, ALASKA

In accordance with Section 8 of the Voting Rights Act, as amended, 42 U.S.C. § 1973f, I hereby certify that in my judgment the appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States in the Bethel Census Area, Alaska. This area is included within the scope of the determinations of the Attorney General and the Director of the Census made under Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), and published in the Federal Register on October 22, 1975 (40 Fed. Reg. 49,422).

/s/ Eric H. Holder
ERIC H. HOLDER JR.
Attorney General of the United States

Dated: 10-1-09

APPENDIX B

[Seal omitted] U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

September 28, 1993

Virginia B. Ragle, Esq.
Assistant Attorney General
State of Alaska
P.O. Box 110300 – State Capitol
Juneau, Alaska 99811-0300

Dear Ms. Ragle:

This refers to the 1993 redistricting plans for the state House and Senate in Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on June 4, 1993; on August 3, 1993, we informed you that our receipt on July 30, 1993 of material supplemental information extended our deadline for making a determination to September 28, 1993. Additional supplemental information was received on September 21 and 27, 1993.

We have considered carefully the information you have provided, as well as comments and information from other persons. The Interim Plan ordered into effect by the Alaska state courts and precleared on July 8, 1992 serves as the benchmark for our analysis. *State of Texas v. United States*, 785 F.Supp. 201, 205 (D.D.C. 1992); see the Procedures for the Administration of Section 5 (28 C.F.R. 51.54(b)).

The proposed plan reduces the Alaskan Native share of the voting age population in House District 36 from 55.7 percent to 50.6 percent. It moves approximately 700 residents of the Lake and Peninsula Borough (among whom 70 percent are Alaskan Native) from District 36 to District 40, and moves approximately 1,080 residents (among whom over 90 percent are white) from the Copper River Valley into District 36 from District 35. Senate District R, which includes House District 36, declines from 33.5 percent to 30.5 percent in Alaskan Native voting age population, due to the removal of the majority-Native areas in the Lake and Peninsula Borough and the addition of approximately 2,150 persons (among whom over 90 percent are white) from the Palmer area. Athabascan Indians are the predominant minority language group in House District 36 and Senate District R.

Although the state courts do not appear specifically to have identified any changes to House District 36 or Senate District R that are required as a matter of state law, we have considered the state's contention that unification of the Lake and Peninsula Borough is a primary consideration under state law. Our analysis indicates that even if removal of the Lake and Peninsula Borough population from District 36 is required as a matter of state law, such a change does not require the reduction in Alaskan Native percentage occasioned by the proposed addition of population to District 36 from the Copper River Valley area.

Several areas with significantly greater Alaskan Native populations than the Copper River area, including the Nenana area and two villages in the Kuskokwim River area, were included in District 36 in one or more alternative plans considered by the Board. Indeed, the Nenana area had been included in Native-majority Interior districts under prior state redistricting plans. The information available to us indicates that the inclusion of one or more of these areas in House District 36 could have lessened or eliminated the reduction in the Alaskan Native share of the population in that district. Although your submission has provided evidence of opposition to placing Nenana into District 36, there appears to have been significant support for such a change, particularly within the Athabascan Indian community.

The state also contends that it has a significant interest in placing all residents of the Copper River Valley into District 36. Unlike the Lake and Peninsula Borough, however, the Copper River Valley is not an organized political subdivision. Nor does it appear that the objective of uniting specific communities along the length of the Copper River Valley required the addition of the entire region to House District 36.

In addition, the state contends that the proposed reductions in the Alaskan Native percentage in House District 36 and Senate District R are not significant because the 1992 election results show that voting in not radically polarized in the areas encompassed by those districts. However, our analysis indicates that although Alaskan Native candidates who were the preferred candidates among Alaskan Native voters were elected in 1992 to both House District 36 and Senate District R, there appears to have been a pattern of racially polarized voting in elections involving these districts, in which white voters' preferences differed from those of Alaskan

Native voters. In these circumstances, the proposed reduction in the Alaskan Native voting strength would appear to diminish the ability of Alaskan Native voters to elect candidates of their choice.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the proposed redistricting plans for the state Senate and House to the extent that each incorporates the proposed configuration for House District 36 discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1993 redistricting plans continue to be legally unenforceable. *Clark v. Roemer*, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10, 51.11, and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the state plans to take concerning this matter. If you have any questions, you should call Robert A. Kengle (202-514-6196), an attorney in the Voting Section.

Sincerely,
/s/ James P. Turner
James P. Turner
Acting Assistant Attorney General
Civil Rights Division

APPENDIX C

United States Senate
Committee on Appropriations
Washington, D.C. 20510

March 9, 1983

The Honorable Bill Sheffield
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Dear Bill:

Last summer you may recall that Congress extended and revised the Voting Rights Act of 1965.

Alaska has been covered by the Act several times, mostly for technical reasons. The State has managed to bring actions which removed Alaska from the Act's coverage, particularly its election law pre-clearance provisions. *See Alaska v. United States*, C.A. No. 101-66 (D.D.C. Aug. 17, 1966); *Alaska v. United States*, C.A. No. 2122-21 (D.D.C. Mar. 10, 1972).

Alaska is still under the Act, and has been since the U.S. Attorney General and Director of Census determined that Alaska was recaptured under the 1975 Voting Rights Amendments. The State again filed another bail-out suit after the 1975 amendments were enacted, but abandoned the action. The U.S. Attorney General would not consent to an entry of judgment in favor of the state, since the Attorney General denied that "no test or device has been used anywhere in the state of Alaska during the ten years preceding the filing of this action for the purpose or with the effect of denying or abridging the right of citizens of the United States to vote because they were members of language minority groups." *See Alaska v. United States*, C.A. No. 78-0484 (D.D.C. May 14, 1979) (stipulated dismissal of action).

In my judgment, the state should seriously consider renewing a bail-out action before the 1982 Voting Rights Act Amendments take effect on August 5, 1984. It has been over ten years since the State had an English language speaking requirement in its Constitution, and I believe that the state now has its best opportunity to prove that no other test or devices have been used in the last ten years to deny language minorities the right to vote. Alaska is still eligible to bail out from under the Act's pre-clearance provisions as the law presently stands. If the State waits to bail out under the new criteria after August of 1984, it will be very difficult, if not impossible, to do so.

When the 1982 Voting Rights Act Amendments were considered on the Senate floor, I attempted to offer my own amendments which would have made the bail-out criteria fairer to states like Alaska. The amendments would have prevented technical violations, especially those in Alaska's small second class municipalities, from disallowing the State to bail out. Unfortunately, the bail-out criterion was not modified, and if Alaska chooses to attempt its fourth bail-out action after August 5, 1984, it will in all likelihood be unsuccessful. Therefore, you and the Attorney General may want to consider commencing an action before that date. It's my firm belief that Alaska should have never been recaptured by the Voting Rights Act's pre-clearance provisions. We are the *only* state to even successfully bail out of this

Act, not just once, but twice. If a bail-out suit is commenced, it is my hope that it will be our last one.

If you should have any further questions, please do not hesitate to contact me or Mark Barnes of my staff.

Thanks again, Bill, for your attention to this matter.

With best wishes,

Cordially,

/s/ Ted Stevens
TED STEVENS

APPENDIX D

[Seal omitted] U.S. Department of Justice

PFH:RSB:LLT:sw
DJ 166-6-4

Washington, D.C. 20530

June 11, 1984

Honorable Norman C. Gorsuch
Attorney General, State of Alaska
Department of Law
Pouch K - State Capitol
Juneau, Alaska 99811

Re: *Alaska v. United States,* No. 84-1362 (D.D.C.)

Dear Mr. Attorney General:

We have been informed by Assistant Attorney General Virginia Ragle that your office is willing to provide, on an informal basis, factual information concerning elections in the State of Alaska to assist us in determining whether to consent to judgment in the above-referenced action. We appreciate your efforts to provide the information, and I write this letter to describe the factual information that we believe to be necessary.

As you will note from the inquiries below, we are attempting to obtain a complete description of the election structure and practices of the State of Alaska, and also are attempting to learn the precise steps taken by the state to enable members of the state's language minority groups to participate effectively in the electoral process. Although the "language minority" groups of the State of Alaska are classified broadly in the Voting Rights Act as Alaskan Natives, we are aware that this broad category includes groups of persons who speak distinct languages. Thus, it would be helpful to our investigation if you would subdivide the responses for, or include information relevant to, each language spoken. To the best of our knowledge, the primary languages spoken are the following:

> Aleut, Inupiaq, Central Yupik, Siberian Yupik, Sugcestun Aleut, Tlingit, Upper Kuskokwim, Upper Tanana, Koyukon, Kutchin, and Ingalik.

It also would be helpful if you would provide the source of your response to each inquiry so that we may know who to contact for any necessary additional information.

The information we request is the following:

1. Describe the geographic boundaries of the areas into which the state has been divided for the conduct of elections (statewide and local). If the state's election districts are coterminous with the boroughs and census areas designated in the 1980 Census, please so indicate.

2. For the state as a whole and for each area described in the response to item 1, please list:

   a) the total population and the number of persons who are members of each language minority group;

   b) the total voting age population and the number of persons of voting age who are members of each language minority group; and

c) the total number of registered voters and the number of registered voters who are members of each language minority group.

If exact figures are unavailable, please estimate and state the basis for any estimated figures.

3. For each language minority group identified in response to items 2(a) and 2(b), please list the approximate number of persons who speak the particular language:

a) as a primary language and have little or no ability in English;

b) as a primary language and have difficulty with English;

c) as a primary language and are bilingual in English; and

d) as a secondary language with English as a primary language.

If exact figures are unavailable, please estimate and state the basis for any estimated figures. Please also identify the Native Alaskan languages that have been reduced to a written form, and indicate the extent to which the written form is used by the applicable language minority groups listed in response to items 2(a) and 2(b).

4. During previous litigation with the state in *Alaska v. United States*, No. 78-0484 (D.D.C. 1979), the United States deposed Dr. Michael Krause, Chief Linguist of the Alaskan Native Language Center. In his testimony, a copy of which is attached, Dr. Krause described the literacy in the English language of Alaskan Natives in various areas of the state. We

would appreciate your reviewing the deposition and indicating whether you believe that Dr. Krause's description accurately portrays the English-comprehension ability of Alaskan Natives during the past ten years.

If you disagree with Dr. Krause's conclusions, please provide the basis for your belief and your source(s) of authority. Also, if you believe Dr. Krause's views are incorrect, please describe the English-comprehension ability for each language minority group by age groups 18-24, 25-39, 40-55, and over 55, and indicate the source(s) of authority. Indicate how, if at all, the English-comprehension ability of each group has changed during the past ten years.

5. Describe any publicity that the state initiated after 1970 to inform the electorate that the English-only voting provision had been repealed. Indicate whether announcements of this change in the law were made to language minority groups. Please provide a copy of any such announcement and an English translation, and describe the method by which the announcement was conveyed to each language minority group.

6. Please provide an explanation of state programs or procedures to enable members of applicable language minority groups to participate effectively in all aspects of the electoral process. At a minimum, please include information for each area of voting-connected activity listed below, and indicate how far in advance of any relevant deadline or scheduled election the information is provided both in English and in the applicable minority languages. Where appropriate, please distinguish between primary and general elections. Also indicate the date that any

bilingual program or procedure was initially instituted or implemented, and, if relevant, the date when any program or procedure was discontinued, along with the rationale for such discontinuance.

a) Describe the manner in which both English-speaking and non-English-speaking persons are informed of the requirements and procedures for registering to vote and for conducting voter registration drives, and describe how such persons are informed of the location and hours of operation at registration locations.

b) Describe the bilingual assistance that is offered in the voter registration process.

c) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the location of polling places and of election district boundaries, as well as of any changes in locations or realignment of districts.

d) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the requirements and procedures to qualify as a candidate for public office, both by political party and as an independent.

e) Describe the manner in which, prior to an election, both English-speaking and non-English-speaking electors are provided information regarding the contents of the ballot, including the content of referenda or other special provisions or matters.

f) Describe what bilingual announcements are made of election dates and hours of polling.

g) Both prior to an election and at the polls, describe the manner in which both English-speaking and non-English-speaking electors are informed of the procedure for balloting.

h) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the requirements and procedures for designating candidates' poll watchers and the restrictions placed on the use of such watchers.

i) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the procedure for obtaining and casting an absentee ballot.

j) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the qualifications and procedure for receiving assistance in voting, especially bilingual assistance.

k) Describe what bilingual assistance is offered to non-English-speaking voters in the balloting process.

l) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the requirements and procedures for contesting or challenging an election.

7. Please indicate whether the state disseminates information to the electorate regarding the following:

a) requirements and criteria for establishing political parties and any standards such new parties must satisfy in order to place a candidate on the election ballot;

b) requirements for filing candidates' personal financial disclosure statements, campaign financing statements, or similar documents, and the sanctions for non-compliance;

c) regulations regarding paid political advertisements and of restrictions on the use of campaign materials generally or on campaign activities within the vicinity of a polling place, including the use of sample ballots by electors.

If so, please describe the manner in which both English-speaking and non-English-speaking electors are provided such information.

8. Please provide a copy of the English and minority language electoral publications or forms that are provided to the electorate, including (but not limited to) the state's official election handbook or pamphlet containing pictures and statements by candidates regarding their qualifications; voter registration forms; ballots; absentee voting materials, including applications and ballots; and any notices or instructions. Also, please include a tape, along with an English translation, of the oral dissemination of that electoral information in the applicable minority languages.

9. In connection with the Section 4 declaratory judgment action of 1978-79, the United States deposed Margaret Sirilo, an Eskimo and resident of Bethel who had served several years as an election

judge. In her testimony, a copy of which is attached, Mrs. Sirilo stated that her first language was English and that she also spoke Yupik (Upik). Mrs. Sirilo testified that she had provided bilingual assistance – without benefit of any translation supplied by the state – to voters who had difficulty comprehending the English-only ballot. She indicated that translating the ballot into Yupik was difficult even for those election officials who spoke both languages.

We would appreciate your reviewing the deposition and indicating whether you believe that Mrs. Sirilo's account accurately describes the activities and experience of an election judge in providing bilingual assistance. If you disagree with Mrs. Sirilo's statements and observations, please provide the basis for your belief and your source(s) of authority. Please describe the manner in which the state ensures that bilingual voter registrars and election officials are capable of providing appropriate and adequate bilingual assistance in the applicable minority languages.

10. If not provided in your response to item 9 above, please describe any program that the state conducts to train or educate voter registrars, election officials, and other persons regarding bilingual assistance to electors or to persons desiring to participate in the electoral process.

11. It is our understanding that the state has access to the broadcast media or to telecommunications systems for public service programming. Please describe in detail such media or systems, including area of the state that can be reached. If not provided in your response to item number 6, describe what uses the state has made of such media or systems, including use in the electoral process.

12. Indicate whether the state has conducted any studies or surveys regarding the following:

a) the need for providing bilingual information or procedures to electors or persons desiring to participate in the electoral process;

b) the availability of bilingual information or procedures to electors or person desiring to participate in the electoral process; and

c) the use and effectiveness of any bilingual procedures that have been provided.

Please provide a copy of each such study or survey that is identified, along with the following information, if it is not included in the actual publication: the dates, sponsor, and methodology; the portion of the electoral process that was the subject matter; and recommendations made and actions undertaken, as a result of the findings.

13. Other than electoral information, indicate whether the state has provided information to state residents in any Native Alaskan language. Describe the information that is provided in the Native Alaskan languages and explain the reasons for using the language.

14. Describe any persons and groups, whether formally or informally organized, that the state considers to be representative of the interests and concerns of language minority groups, or any of them, especially in electoral matters. Please provide the name of an officer of any group so identified, along with a current address and telephone number.

15. Describe in detail what contact the state has had or maintained with each person or group identi-

fied in item 14 concerning the dissemination of electoral information in the applicable minority languages or concerning the effective participation of such persons in the electoral process.

16. Please describe in detail any constructive efforts by the state to achieve the following:

a) the elimination of voting procedures, including English-only elections, that inhibit equal access by Alaskan Natives to the electoral process;

b) the expansion of opportunities for convenient registration and voting for electors who are Alaskan Natives;

c) the appointment of Alaskan Natives as election officials at every level in the state and at all stages of the registration and election processes.

17. As you are aware, the standards for the state to bailout from coverage under Section 4 apply not only to the state as an entity, but also to all of the subdivisions within the state. Therefore, please identify every jurisdiction in the state that independently conducts elections. For each such jurisdiction, please obtain and provide the information that is requested in items 1-16 above.

18. Please feel free to provide any additional information that you believe to be relevant to this litigation.

As mentioned previously, these inquiries are designed to obtain a complete understanding of the bilingual election program that the state offers. In asking these questions, we have attempted to avoid being too general and, at the same time, being so specific that you are limited in your responses. We are prepared to discuss these matters with you so that the factual development may proceed promptly. If you have any questions, please contact either Robert S. Berman at 202-724-3100 or Lora L. Tredway at 202-724-3113.

Sincerely,
/s/ Paul F. Hancock
Paul F. Hancock
Assistant for Litigation
Voting Section
Civil Rights Division

Attach.

APPENDIX E

[Seal omitted] U.S. Department of Justice
Civil Rights Division

LLT:sw
DJ 166-6-4

Washington, D.C. 20530

May 23, 1985

Virginia Ragle, Esq.
Assistant Attorney General
State of Alaska
Department of Law, State Capitol
Pouch "K"
Juneau, Alaska 99811

Dear Ms. Ragle:

Enclosed please find the United States's first set of interrogatories directed to the State of Alaska pursuant to Rule 33 of the Federal Rules of Civil Procedure. As you will note, the interrogatories are structured into three parts in order to obtain certain basic information concerning, first, the state; second, each of the state's municipalities; and, finally, each of the state's educational system subdivisions. In each of the three parts, we in essence have repeated the same questions, merely directing them to a different level of government.

The interrogatories request a substantial amount of information, but we believe that all of the information sought is relevant to the factors that must be established to obtain bailout. We recognize that it may be difficult for the state to complete its responses within the thirty-day period provided under the Federal Rules of Civil Procedure. Therefore, we will agree to a reasonable extension of time in which to complete the answers; any objections should be filed within the thirty-day period. Also, we recognize that it will be necessary to obtain information from the individual municipalities and school districts, and we would have no objection to each such jurisdiction completing a separate response. We do request, however, that a state-level official review any such responses to assure uniformity and completeness.

We would appreciate your reviewing the interrogatories at your earliest convenience and telling us whether such initial review reveals any particular problems. We are willing to cooperate with state officials in obtaining the information, and, if you believe that any interrogatory is unduly burdensome, we will consider suggestions of alternate means of obtaining the information. In sum, we are willing to seek a voluntary resolution of any problems that may arise in answering the interrogatories.

If you have any questions, please feel free to contact me at (202) 724-3113.

Sincerely,
/s/ Lora L. Tredway
Lora L. Tredway
Attorney, Voting Section
Civil Rights Division

cc: Martha Fox, Esq.

APPENDIX F

March 14, 1985

Ms. Maggie Moran
Legislative Assistant to
Senator Ted Stevens
522 Hart Building
Washington, D.C. 20510

Re: *Alaska v. United States*,
No. 84-1362 (D.D.C.)
Voting Rights Act preclearance bailout

Dear Ms. Moran:

You have requested further information concerning the state's action for declaratory judgment to "bail-out" of the preclearance requirements of the Voting Rights Act. That action was filed on May 1, 1984. Every possible effort was made, with the cooperation of Senator Stevens' office and a number of Native organizations throughout the state, to provide the U.S. Department of Justice with the information it needed to consent to judgment. Nevertheless, in its answer filed on July 24, 1984, the department denied that the state had applied no test or device for the purpose or with the effect of denying or abridging the right to vote on account of membership in a language minority group during the 10 years preceding the filing of the action.

On August 5, 1984, new provisions of the Voting Rights Act became effective, which greatly increased the burden that must be met by the state in a bailout action. One of the additional requirements is that the state must prove that, for the past 10 years, no change in any voting practice or procedure by the state or any of its political subdivisions has been enforced without having first been precleared.

The state has amended its complaint to allege, in one count, compliance with the bailout standards in effect before August 5, 1984, and in a second count, compliance with the bailout standards in effect on and after August 5, 1984. The Department of Justice has moved to dismiss Count I of the complaint. In opposition to that motion we have cited legislative history that indicates that Congress did not intend the new standards to apply to pending actions (*see United States v. Marengo County Commission*, 731 F.2d 1546, 1554 (11th Cir. 1984)), and have argued that application of the new standards to this action would be manifestly unjust.

If the court grants the Department of Justice's motion to dismiss, the state will have to prove the facts necessary to entitle it to bailout under the new standards. This we cannot do. The Department of Justice is well aware that, last year, the state "enforced" the repeal of the statute providing for a presidential primary election before receiving the preclearance letter from the Department of Justice.

When the Department of Justice refused to consent to judgment last year, we requested that Senator Stevens explore the possibility of a legislative solution. The solution that seemed least disruptive of the Voting Rights Act was an amendment clarifying that the standards in effect on the date of filing would be applied in determining a bailout action. This amendment would affect only the State of Alaska, since no other bailout action was pending on August

5, 1984. The governor has renewed the request for this amendment.

In July, we sent Senator Stevens a copy of the three volume report and appendices we provided to the Department of Justice in support of the action. Enclosed for your further information, are copies of the state's second amended complaint, the Department of Justice's motion to dismiss Count I and the state's opposition to the motion to dismiss.

Please do not hesitate to call if we can provide you with any further information concerning this action.

Very truly yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:

Virginia B. Ragle
Assistant Attorney General

VBR/pjg

AMICUS
CURIAE
BRIEF

No. 12-96

In The

Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

AMICI CURIAE BRIEF OF THE ALASKA FEDERATION OF NATIVES, ALASKA NATIVE VOTERS AND TRIBES IN SUPPORT OF RESPONDENTS

◆

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801 B Street, Suite 401
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(907) 276-0680

Counsel for Amici

February 1, 2013

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act (VRA) under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

- I. A Facial Challenge To Section 4(b) Is Contrary To The Principle Of Judicial Restraint And Ignores The Localized Appraisal Of Discrimination Described In *NAMUDNO* 4
- II. Alaska Became Covered Under Section 4(b) Because Its Educational Discrimination Depressed Native Participation In Elections, Which Persists Today 7
  - A. In 1975, Congress found that Alaska's discriminatory schooling resulted in high Native limited-English proficiency and illiteracy rates and depressed political participation 8
  - B. In 2006, Congress found that educational discrimination continues to result in high LEP and illiteracy rates and low Alaska Native turnout 14
  - C. Post-enactment Native turnout remains far below the statewide average 18
- III. Pre- And Post-Enactment Evidence Reveals Alaska Still Has First Generation Barriers 20

TABLE OF CONTENTS – Continued

Page

- A. In 2006, Congress considered substantial evidence of first generation barriers to voting by Alaska Natives 20
- B. Post-enactment evidence confirms Congress properly reauthorized Section 5 coverage for Alaska 25

IV. Section 5 Remains A Necessary And Appropriate Prophylactic Measure To Prevent Voting Discrimination Against Alaska Natives 29

- A. Alaska often fails to comply with Section 5 30
- B. Alaska's one objection was very significant 32
- C. More Information Requests prevent voting discrimination by Alaska 34

V. The Broadened Bailout Standard Adopted By The Court In *NAMUDNO* Limits Section 4(b) Coverage To Jurisdictions Like Alaska That Need It 37

CONCLUSION 40

APPENDIX

Table 1. Rates of Limited-English Proficiency and Illiteracy in Alaska Census Areas and Boroughs Covered under Section 203 of the Voting Rights Act ....App. 1

TABLE OF CONTENTS – Continued

Page

Table 2. Rates of Limited-English Proficiency, Illiteracy, and Turnout in Alaska Native Villages Covered under Section 203 of the Voting Rights Act, Compared to the Statewide Turnout Rate in the November 2012 Presidential Election .... App. 2

Order Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants, *Nick v. State*, case no. 3:07-cv-00098-TMB, docket no. 327 (D. Alaska July 30, 2008) ...... App. 12

Letter of July 14, 2008 from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, included in Brief of Amici Curiae Alaska Native Voters and Tribes in Support of Appellees App. 1-5, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815235 at *1a .... App. 32

Letter of August 1, 2008 from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, included in Brief of Amici Curiae Alaska Native Voters and Tribes in Support of Appellees App. 6-13, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815235 at *6a .... App. 37

Page

Letter of September 10, 2008 from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, included in Brief of Amici Curiae Alaska Native Voters and Tribes in Support of Appellees App. 14-15, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815235 at *14a .... App. 45

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Holder, case no. 1:12-cv-001376 (RLW) (D.D.C. 2012) 1

Alaska Democratic Party v. Fenumiai, case no. 3AN-10-11621 (Alaska Super. Ct. 2010) 31

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 5

Brown v. Board of Education, 347 U.S. 483 (1954) 11

City of Littleton v. Z.J. Gifts D-4, LLC, 541 U.S. 774 (2004) 5

Doe v. Reed, 130 S.Ct. 2811 (2010) 5

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 5

Gaston County v. United States, 395 U.S. 285 (1969) 16

Hickel v. Southeast Conference, 846 P.2d 38 (Alaska 1992) 33

Hootch v. State Operated School System, case no. 72-2450 CIV (Alaska Super. Ct. 1973) 10, 11

Kasayulie v. State, case no. 3AN-97-3782 CIV (Alaska Super. Ct. 1999) 14

Katzenbach v. Morgan, 384 U.S. 641 (1966) 16

Moore v. State, case no. 3AN-04-9756 CIV (Alaska Super. Ct. 2007) 14, 15

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 26

Page

Nick v. State, case no. 3:07-cv-00098-TMB (D. Alaska 2007) .... *passim*

Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) ... *passim*

Oregon v. Mitchell, 400 U.S. 112 (1970) 16

Rudolph, et al. v. Fenumiai, case no. 3:10-cv-00243-RRB (D. Alaska 2010) 31

Samuelsen v. Treadwell, case no. 3:12-cv-00118-RRB-AK-JKS (D. Alaska 2012) 32

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 7

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 6, 16

Tennessee v. Lane, 541 U.S. 509 (2004) 26

Tobeluk v. Lind, case no. 72-2450 CIV (Alaska Super. Ct. 1976) 10, 11

United States v. Salerno, 481 U.S. 739 (1987) 5

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 5, 40

Woods v. Cloyd W. Miller Company, 333 U.S. 138 (1948) 26

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. XV 6, 7, 40

8 U.S.C. § 1401(b) 12

42 U.S.C. § 1973 (Section 2 of VRA) 23, 24

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1973b(a) 38

42 U.S.C. § 1973b(b) (Section 4(b) of VRA) ..... *passim*

42 U.S.C. § 1973b(f)(1) 8

42 U.S.C. § 1973b(f)(3) 9

42 U.S.C. § 1973b(f)(4) 22, 25, 28, 29, 37

42 U.S.C. § 1973c (Section 5 of VRA) ..... *passim*

42 U.S.C. § 1973k (Section 13 of VRA) 39

42 U.S.C. § 1973l(c)(3) 8

42 U.S.C. § 1973aa-1a (Section 203 of VRA) ..... *passim*

42 U.S.C. § 1973aa-6 (Section 208 of VRA) 21, 25, 26

48 U.S.C. § 51 (repealed) 12

Act of March 3, 1927, c. 363, § 1, 44 Stat. 1392, 1393 12

Indian Citizenship Act of June 2, 1924, 43 Stat. 253 12

Pub. L. No. 91-285, 84 Stat. 314 (1970) 13

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARAA"), Pub. L. No. 109-246, 120 Stat. 577 (2006) 30

ALASKA CONST. art. V, § 1 (1959) 12

H.J. Res. 51, 6th Leg., Reg. Sess. (Alaska Aug. 25, 1970) 13

Page

Federal Register

U.S. Department of Justice, Voting Rights Act Amendments of 1975, Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1975) 9

U.S. Census Bureau, Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011) .... App. 1, 2

U.S. Census Bureau, 2011 Voting Rights Determination File, 76 Fed. Reg. 63,602 (Oct. 13, 2011) .... App. 1, 2

Legislative History

121 Cong. Rec. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards) 8

152 Cong. Rec. S7962 (daily ed. July 20, 2006) (statement of Sen. Specter) 17

S. Rep. No. 94-295, *reprinted in* 1975 U.S.C.C.A.N. 774 (1975) 9, 10, 12, 13

H.R. Rep. No. 102-655, *reprinted in* 1992 U.S.C.C.A.N. 766 (1992) 16

H.R. Rep. No. 109-478, *reprinted in* 2006 U.S.C.C.A.N. 651 (2006) .... *passim*

Page

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Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess. (2006) .... *passim*

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U.S. CENSUS BUREAU, STATISTICAL MODELING METHODOLOGY FOR THE VOTING RIGHTS ACT SECTION 203 LANGUAGE ASSISTANCE DETERMINATIONS (Dec. 2011) 19

U.S. CENSUS BUREAU, CENSUS 2000 36

U.S. GEOLOGICAL SURVEY, GEOGRAPHIC NAMES INFORMATION SYSTEM 36

STATE OF ALASKA, DIVISION OF ELECTIONS, 2012 GENERAL ELECTION RESULTS, STATEMENT OF VOTES CAST—OFFICIAL 19

JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS (2009) 9, 10

Page

Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistance to the Voter*, 28 Alaska L. Rev. 1 (June 2011)........31

Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. Law. 379 (1985)........39

Gordon S. Harrison, *Alaska's Constitutional "Literacy Test" and the Question of Voting Discrimination*, 22 Alaska Hist. 23 (Spring/Fall 2007)........13

Stephen Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 Alaska Hist. 16 (Winter 1986-1987)........12

Pat Forgey, *Election, redistricting diminishes Natives' power in Alaska Legislature*, Alaska Dispatch, Dec. 6, 2012........24

Order Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants, *Nick v. State*, case no. 3:07-cv-00098-TMB, docket no. 327 (D. Alaska July 30, 2008)........App. 27, 40

Letter of May 19, 2008 from Christopher Coates, Acting Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 293-14 (D. Alaska July 3, 2008)........35

Page

Letter of July 14, 2008 from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, included in Brief of Amici Curiae Alaska Native Voters and Tribes in Support of Appellees App. 1-5, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815235 at *1a ....App. 35, 36, 37

Letter of August 1, 2008 from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, included in Brief of Amici Curiae Alaska Native Voters and Tribes in Support of Appellees App. 6-13, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815235 at *6a ....App. 30, 31, 35

Letter of September 10, 2008 from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, included in Brief of Amici Curiae Alaska Native Voters and Tribes in Support of Appellees App. 14-15, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815235 at *14a ....App. 37

Order on Review of 2009 Submissions, *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. March 1, 2010)..15

TABLE OF AUTHORITIES – Continued

Page

Settlement Agreement, *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. Jan. 2012) 15

Brief of Amicus Curiae the State of Alaska in Support of Petitioner Shelby County, Alabama ("Alaska Amicus"), *Shelby County, Alabama v. Holder*, No. 12-96 (Jan. 2, 2013)......10, 16, 27, 38, 39

STATEMENT OF INTEREST[1]

The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional Native corporations, and 12 regional nonprofit and tribal consortiums. AFN's mission is to enhance and promote the cultural, economic, and political voice of Alaska Natives, including advocacy in election laws and voting. Its membership includes numerous tribes and villages covered by Sections 4(b), 5, and 203 of the VRA, which have a direct interest in this case's outcome.

Emmonak Tribal Council, Kasigluk Traditional Council, Levelock Village Council, Togiak Traditional Council, Willie Kasayulie, Anna Nick, Vicki Otte, and Mike Williams are Applicants for Intervention in Alaska's recent facial and as-applied challenge to Section 5 in the District Court for the District of Columbia, *Alaska v. Holder,* case no. 1:12-cv-001376 (RLW), which has been stayed pending this case. All Applicants are registered voters or, in the case of the tribes, represent registered voters in Alaska who are impacted by the State's failure to comply with the VRA and have a direct interest in the outcome in this case.

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[1] All parties have consented to the filing of this brief, as provided by Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, its members, or its counsel, made a monetary contribution to its preparation or submission.

◆

SUMMARY OF ARGUMENT

Amici submit this brief for two reasons: (1) to correct Petitioner's misrepresentations about Alaska in support of its argument that the coverage formula is inappropriate, and (2) to respond to Alaska's amicus brief that falsely claims it has no history of voting discrimination and thus Section 5 is not a congruent and proportional response. Indeed, even the Court of Appeals seemed unaware of Alaska's substantial record of discrimination. Thus, Amici—who are or have been parties in voting rights cases against the State of Alaska—correct the record here. The unvarnished truth is that Alaska is a textbook case for why the coverage formula remains valid and Section 5 remains a necessary response to widespread educational and voting discrimination against Alaska Native citizens.

Amici make five points First, a facial challenge to Section 4(b) is contrary to the longstanding principle of judicial restraint. Such a challenge is also inappropriate in light of this Court's recent holding in *Northwest Austin Mun. Util. Dist. No. One* (*NAMUDNO*) *v. Holder*, 557 U.S. 193, 203 (2009), that Section 4(b) must be assessed with reference to a covered jurisdiction's own unique record of discrimination.

Second, Alaska was not accidentally "swept in" to Section 5 but became covered because of its long history of educational discrimination, resulting in a legacy in which thousands of Alaska Natives cannot understand college-level English used on ballots and voting information. The gulf between statewide turnout and Native turnout has barely narrowed since 1975, largely because of Alaska's violations of the VRA. Today, seven years after reauthorization, Alaska Native turnout is 17 percent below the statewide average, and some places with a higher Limited English Proficiency ("LEP") population are more than 30 percent below.

Third, during reauthorization Congress had substantial evidence of *first generation* barriers to voting in Alaska, many of which persist today. Thus it is not accurate to assert, as Petitioner does, that Congress based its decision solely on second generation barriers. Indeed, most evidence about Alaska in the record demonstrated that it never complied with the mandates of the VRA, Section 203 in particular.

Fourth, although there are few objections and More Information Requests (MIRs) in Alaska's record, they have been critical in preventing retrogression and voter disenfranchisement. Therefore, Section 5 remains critically important to prevent voting discrimination against Alaska Natives.

Finally, Alaska's amicus brief focuses on the bailout standard, which it calls "a mirage." Bailout may be a mirage for Alaska, not because the standard is too high, but because Alaska's discrimination is unrelenting. Violations are often ignored for years, or even decades in the case of Section 203. The broadened bailout standard adopted by this Court in *NAMUDNO* properly limits 4(b) coverage to jurisdictions that truly deserve it—jurisdictions like Alaska.

◆

ARGUMENT

I. A Facial Challenge To Section 4(b) Is Contrary To The Principle Of Judicial Restraint And Ignores The Localized Appraisal Of Discrimination Described In *NAMUDNO*.

The Question Presented is not limited to whether Congress acted within the scope of its broad constitutional authority in covering Petitioner under Section 4(b). Instead, it asks more generally whether Congress did so when it reauthorized "the pre-existing coverage formula of Section 4(b)" in 2006. The Question Presented thereby suggests a facial challenge to the coverage formula. Such a consideration would mark a significant departure from the Court's reluctance to entertain facial challenges. It also would ignore the Court's earlier admonition that a geographic trigger such as Section 4(b) must be assessed with reference to a covered jurisdiction's own particular record of discrimination.

The Court has repeatedly emphasized that "facial challenges to legislation are generally disfavored," *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990), *overruled on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004), and are to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). As the Chief Justice has observed, facial challenges are "contrary to the fundamental principle of judicial restraint." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). "They 'often rest on speculation,' can lead courts unnecessarily to anticipate constitutional questions or formulate broad constitutional rules, and may prevent governmental officers from implementing laws 'in a manner consistent with the Constitution.'" *Doe v. Reed*, 130 S.Ct. 2811, 2838 (2010) (Thomas, J., dissenting) (quoting *Washington State Grange*, 552 U.S. at 450-51). Consequently, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*" *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added).

These principles apply with particular force to the Court's present consideration of whether Section 4(b) is constitutional. When the Court last confronted the constitutionality of the reauthorized Section 5 in *NAMUDNO*, it was "keenly mindful" of its "institutional role" in determining whether to review legislation enacted by a "coequal branch of government."

557 U.S. at 204-05. It acknowledged that the "Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is intended to enforce it." *Id.* at 205 (citation omitted). It found that "Congress amassed a sizable record in support of its decision to extend the preclearance requirements" including what the District Court found was "document[ed] contemporary racial discrimination in covered states." *Id.* (citation omitted). Therefore, the Court exercised the principle of constitutional avoidance and limited itself to a construction of the VRA's bailout provisions. *Id.* at 205-06.

NAMUDNO emphasized that the VRA's "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.* at 203. It is permissible to make distinctions between states if remedies are necessary for "'*local* evils which have subsequently appeared.'" *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966)) (emphasis in original). That "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *NAMUDNO*, 557 U.S. at 203. Application of the preclearance requirements to one State may be "unconstitutional in another." *Id.* Each of these points weighs heavily against a facial challenge, particularly for reauthorization of a statutory provision the Court has upheld repeatedly, *see id.* at 200 (collecting citations), and which Congress supported with a substantial record of local discrimination including, as described herein, Alaska. *Id.* at 204.

II. Alaska Became Covered Under Section 4(b) Because Its Educational Discrimination Depressed Native Participation In Elections, Which Persists Today.

Alaska did not become covered by Section 5 by chance. Nor was Alaska "swept in" to coverage despite "little or no evidence of current problems," as the Court of Appeals stated in dictum. *Shelby Cnty., Alabama v. Holder*, 679 F.3d 848, 881 (D.C. Cir. 2012). These statements stand in marked contrast to the well-developed record of discrimination considered by Congress in amending Section 4 in 1975 and in reauthorizing it in 2006. In addition, they highlight the danger posed by the Third Branch's consideration of a facial challenge to Section 4(b)'s coverage formula. Departing from what the Court has described as its limited "institutional role," such categorical conclusions would substitute the Court's judgment for that of Congress, the branch charged with enforcing the guarantees of the Fifteenth Amendment. *NAMUDNO*, 557 U.S. at 204-05. They also neglect evidence of the "*local* evils" identified by Congress in covering Alaska. *Id.* at 203 (emphasis in original). Alaska's continuing record of educational discrimination and first generation voting barriers necessarily must limit Petitioner to an as-applied challenge.

A. In 1975, Congress found that Alaska's discriminatory schooling resulted in high Native limited-English proficiency and illiteracy rates and depressed political participation.

In 1975, Congress amended the Section 4(b) coverage formula to address the "pervasive" problem of "voting discrimination against citizens of language minorities." 42 U.S.C. § 1973b(f)(1). Coverage was extended to minority citizens "from environments in which the dominant language is other than English." *Id.* Those citizens had "been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language." *Id.* Congress found that "language minority citizens are excluded from participating in the electoral process" where elections are conducted "only in English." *Id.* In many areas, that exclusion was "aggravated by acts of physical, economic, and political intimidation." *Id.* Therefore, the term "test or device" in Section 4(b) was amended to be "virtually identical" to the original trigger, except it was expanded to "also mean the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population is comprised of members of any single language minority group."[2] 121 CONG. REC. H4716 (daily ed. June 2,

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[2] "Language minorities" include "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973l(c)(3).

1975) (statement of Rep. Edwards); *see* 42 U.S.C. § 1973b(f)(3).

"[T]he purpose of suspending English-only and requiring bilingual elections [was] not to correct the deficiencies of prior educational inequality. It [was] to permit persons disabled by such disparities to vote now." S. REP. NO. 94-295 at 34 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 800. The prohibition would "fill that hiatus until genuinely equal educational opportunities are afforded language minorities" allowing them to understand election information in English. *Id.* The amendment to Section 4(b)'s formula resulted in statewide coverage in Alaska for Alaska Natives and in Arizona and Texas for persons of Spanish Heritage. Nineteen political subdivisions of six states remain covered by Section 4(b) for language minority citizens.[3] *See* U.S. Department of Justice, Voting Rights Act Amendments of 1975, Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1975).

In 1975, Congress identified "substantial" evidence of discriminatory practices against Alaska Natives. S. REP. NO. 94-295 at 31, *reprinted in* 1975 U.S.C.C.A.N. at 797. That evidence came in four forms. First, Alaska Natives suffered from severe and systemic educational discrimination. The Senate

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[3] Originally, 24 political subdivisions were covered for language minorities. By 1978, five covered counties in two states, New Mexico and Oklahoma, bailed out. *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS 74-75 (2009) (hereinafter "TUCKER").

Report described Alaska's practice of offering only non-Native children "public secondary schools in their own communities." *Id.* at 29-30, *reprinted in* 1975 U.S.C.C.A.N. at 795-96 (citing *Hootch v. State Operated Sch. Sys.*, case no. 72-2450 CIV (Alaska Super. Ct. 1973)); *see also* TUCKER, at 235-57 (summarizing Alaska's history of educational discrimination).

Alaska subsequently settled *Hootch*, making several admissions. It acknowledged the pervasiveness of a century of segregated schooling.[4] *See* Settlement Agreement at ¶¶ 9-30, *Hootch*, *settled sub nom*, *ex rel. Tobeluk v. Lind*, case no. 72-2450 CIV (Alaska Super. Ct. Sept. 13, 1976) ("*Hootch* Settlement"), *available at* http://www.alaskool.org/native_ed/law/tobeluk.html. It was premised upon "resentment [that] grew among the relatively few whites over emphasis on education for Natives and a belief that integrated schools would give only inferior education." *Id.* at ¶ 9. In 1959, the year of statehood, only six out of 34 public secondary schools were in communities where at least half the population was Native. *Id.* at ¶ 12. By the mid-1970s, there were 2,783 secondary school-age children who lived in villages without daily access to a secondary school. Over 95 percent were Native; statewide, only 120 non-Native children had no access to a secondary school. *Id.* at ¶ 19. If Native children did not "wish to leave home, [were] not able to leave home, or refuse[d] to leave home to attend boarding school . . . they [were] denied secondary school education," resulting in "a highly disproportionate number of Alaska Natives . . . not . . . attending secondary schools." First Amended Complaint at ¶ 51, *Hootch*, case no. 72-2450 CIV (Alaska Super. Ct. Oct. 5, 1972). *Hootch* was not settled until 1976, when Alaska agreed to establish a public secondary school in all 126 Native villages that wanted one. *Hootch* Settlement, *Hootch,* case no. 72-2450 CIV. The schools were not completed until the mid-1980s, nearly three decades after *Brown v. Board of Education*, 347 U.S. 483 (1954).

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[4] Alaska euphemistically refers to this as "long-distance schooling." Brief of Amicus Curiae the State of Alaska in Support of Petitioner Shelby County, Alabama at 28, *Shelby Cnty., Alabama v. Holder*, No. 12-96 (Jan. 2, 2013) (*hereinafter* "Alaska Amicus").

Second, Alaska Natives suffered from illiteracy rates rivaling rates of southern Blacks. According to the 1960 Census, 38.6 percent of Alaska's Native population age 25 years and older failed to complete the fifth grade, rendering them illiterate, higher than the rates for Black voters in Alabama, Florida, North Carolina, and Virginia. *See Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Const'l Rts. of the Senate Comm. on the Judiciary* ("1975 Senate Hearings"), 94th Cong., 1st Sess., at 664 (1975) (Ex. 23 to the statement of J. Stanley Pottinger). Conversely, only 1.2 percent of non-Natives were illiterate. *Id.* By 1970, Alaska Natives' illiteracy rate was "approximately 36 percent," exceeding the rate for Black voters in *every state* covered by Section 5. *Id.*

Third, the illiteracy of Natives was exacerbated by their high LEP rates. Thousands of LEP Native voters spoke over 18 languages including Central Yup'ik, Inupiaq, Siberian Yup'ik, Suypiaq, Tlingit, and Tutchone. 1975 Senate Hearings at 531 (statement of Sen. Mike Gravel). Most required an interpreter. *Id.* at 526. But lack of English proficiency or literacy was an insufficient reason to disenfranchise them, *id.*, which largely resulted from state-sponsored educational discrimination. S. REP. NO. 94-295 at 28-29, *reprinted in* 1975 U.S.C.C.A.N. at 794-95.

Fourth, Congress considered Alaska's constitutional literacy test and its impact on Native voters. The Alaska Voters' Literacy Act of 1925 was enacted to disenfranchise Natives newly granted citizenship by the federal government. *See* Indian Citizenship Act of June 2, 1924, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)). The Act achieved its purposes by requiring voters to demonstrate they were "able to read and write the English language." Stephen Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 16, 17, 28-30 (Winter 1986-1987). Non-Natives later lobbied Congress to enact the law for the Territory. *See* Act of Mar. 3, 1927, c. 363, § 1, 44 Stat. 1392, 1393 (codified at 48 U.S.C. § 51) (repealed). Alaska adopted this literacy test in its state constitution, providing that applicants must "read or speak the English language" to vote. ALASKA CONST. art. V, § 1 (1959). "[M]any Alaskans, Natives and non-Natives alike" viewed the literacy test as "an affront" with "its racist overtones." Gordon S. Harrison, *Alaska's Constitutional "Literacy Test" and the Question of Voting Discrimination*, 22 ALASKA HIST. 23, 30 (Spring/Fall 2007). High LEP rates among Alaska Natives made even a requirement to speak English a significant barrier to voting. 1975 Senate Hearings at 526, 531 (statement of Sen. Gravel). Senator Gravel acknowledged there was "some evidence" of discrimination because "this provision did creep into law," which facilitated "the possibility of disenfranchising people." *Id.* at 525-26, 529. Alaska did not repeal its constitutional literacy test until two months after Congress amended the VRA to ban all literacy tests nationwide. *See* Pub. L. No. 91-285, 84 Stat. 314 (June 22, 1970); H.J. Res. 51, 6th Leg., Reg. Sess. (Alaska Aug. 25, 1970).

Alaska's discrimination against Natives profoundly affected their ability to participate in its English-only elections. Alaska was covered under Section 5 statewide in 1965 and again in certain areas in 1970 because voter turnout was below fifty percent in 1964 and 1968. S. REP. NO. 94-295 at 12-13, *reprinted in* 1975 U.S.C.C.A.N. at 777-78. In 1968, Alaska's voter turnout was 49.9 percent, lower than every southern state except Georgia, South Carolina, and Texas. *See* 1975 Senate Hearings at 717-18 (Ex. 40 to the statement of J. Stanley Pottinger). In 1972, Alaska's voter turnout decreased to 48.2 percent, comparable to low participation rates in the South. *See id.*

B. In 2006, Congress found that educational discrimination continues to result in high LEP and illiteracy rates and low Alaska Native turnout.

When Section 4(b) was reauthorized in 2006, Congress considered substantial evidence of ongoing educational discrimination against Native voters. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARAA"), Pub. L. No. 109-246, 120 Stat. 577 (2006). Court decisions found "degraded educational opportunities" for Alaska Natives, resulting in graduation rates lagging far behind non-Natives. H.R. REP. NO. 109-478, at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. Congress cited to *Kasayulie v. State*, which found in 1999 that Alaska had "discrepancies in funding made available to Native and non-Native students." *Id.* at 51, *reprinted in* 2006 U.S.C.C.A.N. 651 (citing Order Granting Plaintiffs' Motions for Partial Summary Judgment on Facilities Funding, *Kasayulie v. State,* case no. 3AN-97-3782 CIV (Alaska Super. Ct. Sept. 1, 1999)). Despite "the affirmative duty on the State to provide public education," funding discrepancies between non-Native urban areas and the Native villages "unconstitutionally discriminated against Alaska Natives." H.R. REP. NO. 109-478, at 51, *reprinted in* 2006 U.S.C.C.A.N. 651. There also was evidence of ongoing funding disparities in *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. 2007), which was pending during reauthorization. *See Voting Rights Act:*

Evidence of Continued Need, Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary (*"Continued Need"*), 109th Cong., 2d Sess., at 1336 (2006).

In *Moore*, Alaska was found to have violated its "constitutional responsibility to maintain a public school system" by failing to oversee the quality of secondary education in Alaska Native villages and to provide a "meaningful opportunity to learn the material" on a graduation exam. Decision and Order at 194-95, *Moore*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. June 21, 2007). Nearly three years later, the Alaska superior court found the State still had not demonstrated that its remedial steps would "result in compliance with this constitutional responsibility." Order on Review of 2009 Submissions, *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. March 1, 2010). The case was not settled until 2012. *See* Settlement Agreement, *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. Jan. 2012), *available at* http://www.eed.state.ak.us/news/releases/2012/moore_settlement_signed.pdf.

Alaska's continued educational discrimination profoundly affected the ability of Native voters to read election materials. In 2004, only 47.5 percent of all Native students graduated from high school compared to the statewide average of 62.9 percent. H.R. REP. NO. 109-478 at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. In 2005, just 19.5 percent of all Native seniors statewide "were proficient in reading comprehension" in a high school graduation test.

Continued Need, 109th Cong., 2d Sess., at 1335; *Modern Enforcement of the Voting Rights Act, Hearing Before the Senate Comm. on the Judiciary* (*"Modern Enforcement"*), 109th Cong., 2d Sess., at 79 (2006).

Notwithstanding this substantial evidence, Alaska now questions what educational discrimination has to do with voting and its coverage under Section 4(b). Alaska Amicus at 28, *Shelby Cnty.*, No. 12-96. The Court has answered this question on several occasions, finding that Congress reasonably exercised its authority in Section 4 to remedy the effects of English literacy tests on voters suffering from educational discrimination. *See Oregon v. Mitchell*, 400 U.S. 112, 134-35 (1970) (unanimously upholding the nationwide ban on literacy tests); *Gaston Cnty. v. United States*, 395 U.S. 285, 291-92 (1969) (upholding the Section 4 formula, which used voting rates to identify jurisdictions with "racially disparate school systems"); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding suspension of New York's literacy test for Puerto Rican voters educated in Spanish); *South Carolina v. Katzenbach*, 383 U.S. at 314, 327-30 (upholding the Section 4 trigger to identify jurisdictions with a "significant danger" of voting discrimination, as documented by "a low voting rate").

Congress developed a strong link between educational discrimination and low voter participation by Alaska Natives. Where education barriers are present, they have "a deleterious effect on the ability of language minorities to become English proficient and literate." H.R. REP. NO. 102-655 at 6, *reprinted in*

1992 U.S.C.C.A.N. 766, 770. In 2006, Congress considered the effects of unequal educational opportunities on Alaska Natives. According to census data, the average LEP rate among Native voters in 59 villages and regions was 22.6 percent. *See Continued Need,* 109th Cong., 2d Sess., at 2169. Forty percent of all Native areas had LEP rates "greater than 50 percent." *Id.* Among LEP Native voters, 28.3 percent were illiterate, nearly 21 times the national illiteracy rate. *Id.* at 2163, 2170. There was a strong correlation between limited-English proficiency and illiteracy, with 40 percent of Native areas having "illiteracy rates greater than 50 percent." *Id.* at 2170.

Congress determined that because of Alaska's discrimination, Native voters continued "to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates . . . particularly among the elders." H.R. REP. NO. 109-478, at 45-46, *reprinted in* 2006 U.S.C.C.A.N. 650-51. Those barriers contributed to Native voter turnout of 44.8 percent in the 2004 election, compared to non-Native turnout of 68.4 percent. 152 CONG. REC. S7962 (daily ed. July 20, 2006) (statement of Sen. Arlen Specter). This substantial record of Alaska's educational discrimination establishes the constitutionality of the State's continued coverage under Section 4(b).

C. Post-enactment Native turnout remains far below the statewide average.

In *NAMUDNO*, the Court observed that in some covered jurisdictions, turnout among white and minority voters is nearly equal. 557 U.S. at 201. That is not true in the seven regions of Alaska with large numbers of Native voters. In the 2012 Presidential Election, among 100 Native villages required to provide language assistance under Section 203 of the VRA, just *four* achieved turnout rates at or above the statewide rate of 59.6 percent.[5] *See* Appendix 1-11. Over three-quarters had turnout more than 10 percent lower than the statewide turnout rate. *See* Appendix 2-11. Fifty-nine villages had turnout over 15 percent lower. *See* Appendix 2-11.

The gulf in voter turnout was greatest in Native villages with the highest LEP and illiteracy rates, a pattern repeated across the State. In Bethel, voter turnout was 25.7 percent below the statewide rate; 41.8 percent of voters there are LEP in Yup'ik, with an illiteracy rate of 33.9 percent. *See* Appendix 3. In Barrow, turnout was 22.8 percent below the statewide rate; there, 20.4 percent of voters are LEP in Inupiat, with an illiteracy rate of 12.5 percent. *See* Appendix 3. The turnout in all 44 Native villages with LEP rates exceeding 10 percent fell far below statewide turnout. *See* Appendix 2-11. On average, 16.1 percent of LEP voters in those villages were illiterate, nearly fourteen times the national illiteracy rate among all voting-age citizens of 1.16 percent. *See* Appendix 2-11; U.S. CENSUS BUREAU, STATISTICAL MODELING METHODOLOGY FOR THE VOTING RIGHTS ACT SECTION 203 LANGUAGE ASSISTANCE DETERMINATIONS 35 (Dec. 2011). The 44 villages had average turnout of just 39.9 percent, about 20 percent lower than the statewide rate of 59.6 percent. *See* Appendix 2-11; STATE OF ALASKA, DIVISION OF ELECTIONS, 2012 GENERAL ELECTION RESULTS, STATEMENT OF VOTES CAST—OFFICIAL, *available at* http://www.elections.alaska.gov/results/12GENR/index.shtml (listing the results of all races appearing on the ballot by district and precinct). Statewide, in the 104 villages located in seven regions covered for language assistance under Section 203, turnout among nearly 30,000 Native voters was just 41.8 percent, or 17.8 percent below statewide turnout. *See id.*

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[5] The Census Bureau identified 104 Native villages covered by Section 203. Election data is unavailable for four villages. *See* Appendix 2-11.

The 2012 Election demonstrates that "dramatic improvements" have not occurred in Native voting. *NAMUDNO*, 557 U.S. at 201. Educational discrimination is not the only barrier. LEP voters denied equal schooling are confronted with election practices imposing the sort of English literacy tests or devices the VRA was intended to eradicate, along with other discrimination. H.R. REP. NO. 109-478 at 52, *reprinted in* 2006 U.S.C.C.A.N. 652-53.

III. Pre- And Post-Enactment Evidence Reveals Alaska Still Has First Generation Barriers.

A. In 2006, Congress considered substantial evidence of first generation barriers to voting by Alaska Natives.

Congress developed a voluminous record of discrimination against Alaska Natives when reauthorizing Section 4(b) in 2006. Petitioner ignores that record, contending that few "first generation" barriers to voting remained and that reauthorization rested on only "second generation" barriers. Brief for Petitioner at 41, 45, *Shelby Cnty.*, No. 12-96 (Dec. 26, 2012). Compounding that error, Petitioner argues the coverage formula is not "rational" because it does not correlate with results from "second generation" lawsuits (Section 2 claims) in covered jurisdictions. *Id.* at 40-48. The record showed that first generation barriers remain widespread in Alaska, affecting tens of thousands of Native voters.

The House Report observed that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." *NAMUDNO*, 557 U.S. at 201 (citing H.R. Rep. No. 109-478, at 12). That may be true in some jurisdictions, but not in Alaska. The Alaska Native population still experiences:

- Unequal voter registration opportunities, including English-only registration materials and poll workers who fail to register voters;

- Unequal access to election materials, including information available only via the Internet, which is inaccessible to most rural Natives;
- Unequal access to election information through lack of voting assistance in Native languages, except for one census area recently under a court-ordered remedial program;
- Unequal early voting opportunities, offered nearly exclusively in non-Native urban areas and not in Native villages;
- Unequal polling place access, through closures and "precinct realignments" that would require some Natives to travel more than 70 miles by plane to vote;
- Unequal in-person voting opportunities, including designation of villages with high LEP rates as "Permanent Absentee Voting" sites with no election workers; and
- Unequal voter assistance, denying voters with physical limitations or illiteracy assistance from their person of choice, contrary to Section 208 of the VRA.

Congress considered evidence of these first generation barriers during the 2006 Reauthorization. The record for Alaska alone was substantial. *See Continued Need,* 109th Cong., 2d Sess., at 1308-62; *Modern Enforcement*, 109th Cong., 2d Sess., at 18-20, 25-27, 29-30, 73-81, 124-26. In the 31 years since the 1975 amendments, Alaska *never* complied with many provisions of the VRA. *Modern Enforcement*, 109th Cong., 2d Sess., at 18, 26, 30, 77-78, 126. Alaska still conducted English-only elections in heavily-LEP regions despite the clear mandate to provide assistance in Native languages pursuant to Sections 4(f)(4) and 203, with elections in English functioning like "an old-fashioned literacy test" or a "test or device." *Id.* at 77-79, 125-26. Alaska's entire language assistance "program" was that "minority voters in Alaska may ask for oral assistance with translation of English ballot measures, and assistance may or may not be available at that time." *Id.* at 79. The complete lack of translated information even caused many Alaska Native LEP voters to mistakenly vote *for* an English-only Constitutional amendment because they could not understand the ballot language. *Id.* at 26-27. Untranslated ballot language written at a twelfth grade level or higher was virtually incomprehensible in Yup'ik-speaking areas, where the illiteracy rate was 16 times or more the national average. *Id.* at 78-79.

Other first generation barriers impacted Alaska Native voters. In the 2004 Election, 24 Alaska Native villages did not even have polling places. Some that did sometimes had to cut voting hours short to haul their one voting machine to the other side of a river or to the next village so other people could vote. *Id.* at 124. Turnout in Native villages varied but was as low as 12 percent in some places. *Id.* at 73. Given these many barriers, it was no surprise that, as of 2000, no Native candidate had "been elected to office from a majority white district." *Id.* at 34. The lack of white support resulted "in a disparity between the number of white elected officials and the number" of Alaska Natives elected to office. *Id.* In sum, the congressional record refutes Petitioner's unfounded claim that there was no evidence of first generation barriers presented during the 2006 Reauthorization.

Because Petitioner ignores the evidence of first generation barriers in Alaska, its criticisms of the coverage formula rely on Section 2 lawsuits elsewhere. Brief for Petitioner at 41, 47-48, 50, *Shelby Cnty.*, No. 12-96. Employing this metric, Petitioner singles out Alaska as not having "a single reported Section 2 suit" or "a single reported suit with a finding of racially polarized voting." *Id.* at 47-48. Petitioner fails to mention that unlike other covered jurisdictions, Alaska has few organized governmental bodies. Its statewide legislative redistricting plan is the only one in the State that includes significant numbers of Native and non-Native voters.[6] Prior to the latest round of redistricting, Alaska's legislative redistricting plan was the product of a very significant Section 5 objection.[7]

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[6] Alaska has a single congressional representative elected at-large and no congressional redistricting plan.

[7] The unconstitutional interim plan currently in place further degraded Native representation, so that Alaska's legislature is now 90 percent white, even though Alaska is only

(Continued on following page)

Moreover, while successful Section 2 suits may be one indicator of ongoing problems, it does not follow that their absence reflects a lack of violations, as Petitioner contends. Brief for Petitioner at 47-48, *Shelby Cnty.*, No. 12-96. Meritorious litigation is often not brought because voting litigation is complex, expensive, and labor-intensive. As voting rights attorney Robert McDuff explained:

> Voting rights is intensely complex litigation that is both costly and time-consuming. To be appropriately presented, these cases require costly experts including historians, social scientists and statisticians, among others. . . . there are not enough lawyers who specialize in this area to carry the load. . . . [I]t is incredibly difficult for minority voters to pull together resources needed to push private challenges under the Act. Without the mechanism of Section 5 in place to bar retrogressive voting changes from implementation, we will likely witness the resurgence of discriminatory voting changes that will not be adequately or evenly addressed by private litigation under Section 2.

Modern Enforcement, 109th Cong., 2d Sess., at 96. That is particularly true in Alaska, where the violations are numerous and ongoing. Post-enactment,

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67 percent white. *See* Pat Forgey, *Election, redistricting diminishes Natives' power in Alaska Legislature*, ALASKA DISPATCH, Dec. 6, 2012, http://www.alaskadispatch.com/article/election-redistricting-diminishes-natives-power-alaska-legislature.

four LEP Alaska Native voters and four Alaska tribes in just one census area sued election officials for violating Sections 4(f)(4), 5, 203 and 208 of the VRA. The case took almost three years, two million dollars in attorney time, $250,000 in out-of-pocket costs, and nearly 700 docket entries. Settlement Agreement and Release of All Claims Under §§ 203, 4(f)(4), 5 and 208 of the VRA, *Nick v. State*, case no. 3:07-cv-00098-TMB, docket no. 787-2 (D. Alaska Feb. 16, 2010). The time and costs were prohibitive and demonstrate why voting discrimination lawsuits are not more common, even in a scofflaw jurisdiction like Alaska.

B. Post-enactment evidence confirms Congress properly reauthorized Section 5 coverage for Alaska.

The 2006 Reauthorization was a watershed moment for Alaska. It shed light on many problems that had festered for decades and prompted voting litigation that continues to this day. Federal court supervision over Alaska election official's fledgling efforts to begin complying with Sections 4(f)(4), 203, and 208 of the VRA in just one census area ended only one month ago. Enforcement efforts may soon commence in other regions. Those areas have suffered not only from decades of neglect by Alaska's election officials, but also by seemingly benign policies that result in unequal treatment of Natives in diminished registration and voting opportunities. Although post-enactment, this evidence is highly relevant to showing why Congress concluded that continued coverage of Alaska under Section 4(b) was necessary.

The Court has recognized repeatedly that post-enactment evidence is relevant to Congress's exercise of its broad powers under the Reconstruction Amendments. *See Tennessee v. Lane*, 541 U.S. 509, 524-25 & nn.6-8, 11, 13-14 (2004); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-34 & nn.6-9 (2003); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143 n.6 (1948). Therefore, the evidence Congress considered during reauthorization is not the only important factor. For Alaska, the post-enactment evidence is especially relevant because it grew out of evidence in the Congressional record.

Alaska was keenly aware of the widespread problems identified to Congress yet it did nothing to remedy them. Less than a year after reauthorization, four LEP Yup'ik-speaking Native voters and four federally recognized Alaska Native tribes sued Alaska's Division of Elections in *Nick v. State* for violating Sections 5, 203, and 208 of the VRA in the Bethel Census Area. The region's population was 85.5 percent American Indian and Alaska Native. First Amended Complaint at ¶ 25, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 201 (D. Alaska May 22, 2008). Among citizen voting-age population, 20.8 percent were LEP. *Id.* at ¶ 34. Almost a quarter of LEP voters were illiterate, nearly sixteen times the national illiteracy rate. *Id.*

The literacy barriers the plaintiffs faced were not the result of happenstance but the product of Alaska's educational discrimination. Each individual Plaintiff had been denied a public school education because Alaska did not provide middle or high schools in their individual villages until the 1980s. Plaintiff Anna Nick left home briefly to attend school but only reached the fifth grade. *Id.* at ¶ 6. The remaining individual plaintiffs completed the second, third, and fourth grades. *Id.* at ¶¶ 7-9. There are thousands of Alaska Native voters just like them. *See* Appendix 1-11. More than 30 years after the VRA was extended to language minorities, and just one year after reauthorization, those LEP Native voters were still subjected to English-only elections.

Tellingly, Alaska omits any mention of the *Nick* case in its brief, instead misleading the Court by asserting it has "no history of voting discrimination." Alaska Amicus at 26, *Shelby Cnty.*, No. 12-96. A federal court found otherwise in *Nick* in 2008, citing the State's lack of responsiveness in remedying discrimination against Alaska Natives and enjoining further violations of the Act. *See* Appendix 12-31. The evidence revealed that Alaska provided all voter registration and voting information in English-only, despite its use of touch-screen voting units capable of "speaking" eight different languages. Plaintiffs' Motion for a Preliminary Injunction at 10-11, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 202 (D. Alaska May 22, 2008). Between 2000 and 2007, translators generally were unavailable and untrained.

Id. at 11-14. Alaska provided no Yup'ik translations, forcing poll workers to translate ballots written in college-level English "on the spot." *Id.* at 7. That led to widely diverging translations that denied plaintiffs and other Native voters effective language assistance even when translators were available. *Id.* at 7, 15-16.

In July 2008, a federal court issued a preliminary injunction to bar Alaska from further violations of the VRA. The court found the Plaintiffs met their burden and demonstrated they were likely to succeed on the merits of their 203 and 4(f)(4) claims:

> The State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate; or require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.

Appendix 22-23. The court was troubled that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," during reauthorization but their "efforts to overhaul the language assistance program did not begin in earnest until after this litigation." Appendix 23. The court cited three reasons for its injunction: (1) Alaska had been covered by Section (4)(f)(4) "for many years"; (2) "the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters"; and (3) Alaska's post-litigation efforts to come into compliance were "relatively new and untested." Appendix 23-24. The court concluded "the evidence of past shortcomings justifies the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections." Appendix 24. The *Nick* injunction remained in place until December 31, 2012.[8]

IV. Section 5 Remains A Necessary And Appropriate Prophylactic Measure To Prevent Voting Discrimination Against Alaska Natives.

Section 5 is a "vital prophylactic tool" protecting Amici "from devices and schemes that continue to be employed" in Alaska, which is covered statewide for Alaska Natives. H.R. REP. NO. 109-478 at 21, *reprinted in* 2006 U.S.C.C.A.N. 631. Preclearance has protected Alaska Natives from discriminatory redistricting practices, closure of necessary polling sites, and retrogressive language assistance procedures. Section 5's importance cannot be measured just by the number of objections, but also "the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24, *reprinted in* 2006 U.S.C.C.A.N. 633. Its "deterrent effect" is "substantial." *Id.* In renewing Section 5, Congress examined evidence of "continued discrimination" including interposed objections, "requests for more information submitted followed by voting changes withdrawn from consideration," and Alaska's lack of compliance. VRARAA, Pub. L. No. 109-246, § 2(b)(4)(A), 120 Stat. 577. Alaska is unique not because it has numerous objections, but because it fails to submit critical changes for preclearance at all.

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[8] Although federal court oversight has expired, the procedures cannot be changed without Section 5 preclearance. Consequently, the *Nick* plaintiffs and other Native voters rely upon Section 5 to keep their fragile victory intact.

A. Alaska often fails to comply with Section 5.

Alaska has fewer objections and More Information Requests (MIR) because it has often failed to submit voting changes for preclearance. For example, when the State submitted new language assistance procedures for preclearance during the *Nick* litigation, the U.S. Department of Justice observed that the "last precleared bilingual election procedures" for Alaska Natives were under a plan "precleared by letter dated October 5, 1981." Appendix 38. However, Department officials noted that discovery in *Nick*, "admissions by State elections officials," and assertions by officials in a letter withdrawing the changes indicated that "Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures." Appendix 38. The Department requested that Alaska indicate its planned action "to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance." Appendix 44. State officials ignored the Department's request. The *Nick* plaintiffs were compelled to pursue their Section 5 claim against Alaska, which were ultimately settled in early 2010.

Alaska has been sued twice in recent years for implementing voting changes before those changes were precleared under Section 5. In the 2010 General Election, Alaska's Division of Elections provided poll workers with a list of write-in candidates and their political affiliations, something it had never done before. *See* Complaint, *Alaska Democratic Party v. Fenumiai,* case no. 3AN-10-11621 (Alaska Super. Ct. Oct. 24, 2010); Complaint for Declaratory and Injunctive Relief, *Rudolph, et al. v. Fenumiai,* 3:10-cv-00243-RRB (D. Alaska Nov. 1, 2010). Notably, incumbent Senator Lisa Murkowski ran as a write-in candidate in that election, and the Division's move was widely viewed as an attempt to help Senator Murkowski, whose surname was difficult for illiterate and LEP voters to spell. *See* Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistance to the Voter*, 28 ALASKA L. REV. 1 (June 2011). In 2012, the Division of Elections began implementing an entire redistricting plan without preclearance. Complaint at ¶ 26, *Samuelsen v. Treadwell,* case no. 3:12-cv-00118-RRB-AK-JKS, docket no. 1 (D. Alaska June 7, 2012). Before submitting the plan, election officials opened and closed candidate qualifying, and sent notices to voters. Both incidents reveal that Alaska's election officials treat Section 5 coverage as an afterthought that can be freely ignored.

B. Alaska's one objection was very significant.

A Section 5 objection does not just stop enforcement of the discriminatory voting change at issue, it often discourages State officials from enforcing similar discriminatory changes in the future. The Attorney General's objection to the 1990s statewide redistricting plan illustrates the lasting deterrent effect that a Section 5 objection has in Alaska. The State's initial plan, which was prepared in secret, diluted the voting strength of Alaska Natives. *See Continued Need,* 109th Cong., 2d Sess., at 1345-46. Several Native groups complained to the Justice Department about the "anti-Native" plan. *Id.* at 1346-47. The Department responded by sending an MIR asking that Alaska address concerns such as: the plan's reduction of the number of Alaska Native majority districts; the retrogressive effects of at least one district on Native voting strength; the "extraordinary" deference towards incumbent legislators' districts except those of Native legislators, whose districts had been combined; and the State's preparation of the redistricting plan without public input. *Id.* at 1347.

A State trial court subsequently rejected the original redistricting plan as unconstitutional and the Alaska Supreme Court ordered implementation of an interim plan. *Id.* In *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992), the State's highest court struck down 11 districts in the interim plan, but left intact State District 36, which reduced the voting strength of Yup'iks. *Continued Need,* 109th Cong., 2d Sess., at 1347. In 1993, the Attorney General interposed an objection to the retrogression in District 36 and its companion Senate District R, which reduced the Native voting age population from 55.7 percent to 50 percent despite the presence of extremely racially polarized voting there. *Id.* at 1348. Section 5 thereby served as the only line of defense between the retrogressive redistricting plan and its discriminatory impact on Alaska Natives. *Id.*

The 1993 objection compelled Alaska to take "an entirely different approach to the process" in the 2000 redistricting cycle. *Modern Enforcement*, 109th Cong., 2d Sess., at 81. It "hired a national voting rights expert to ensure that its proposed plan did not violate the VRA or reduce the ability of Alaska Natives to elect candidates of their choice." *Id.* State officials adopted a plan that did not "reduce the ability of Alaska Natives to elect candidates of their choice" and appointed a Native to the redistricting board to represent the nearly 20 percent of the State's population excluded from the 1990 redistricting process. *Id.*; *see Continued Need,* 109th Cong., 2d Sess., at 1318-19, 1350-51. That one "objection was felt statewide and continues to have an impact today." *Modern Enforcement*, 109th Cong., 2d Sess., at 81.

C. More Information Requests prevent voting discrimination by Alaska.

More Information Requests also play an important role in preventing voting discrimination against Alaska Natives. MIRs are an "administrative mechanism" used by the Department of Justice to obtain additional information needed to determine whether preclearance of a voting change is warranted under Section 5. H.R. REP. NO. 109-478 at 40, *reprinted in* 2006 U.S.C.C.A.N. 645. Their use forces "covered jurisdictions to take action" that can include withdrawing "a proposed change from consideration because it is discriminatory," submitting "a new or amended non-discriminatory voting plan," or simply not making a change at all. *Id.*

Alaska routinely withdraws discriminatory voting changes after receiving an MIR, a pattern that has continued since reauthorization. In March 2008, Alaska attempted to circumvent the language claims brought in the *Nick* litigation. State officials made a short submission of a language plan without any explanation for their failure to implement the plan precleared by the Department in 1981. *See* First Amended Complaint at Attachments B-C, *Nick*, case no. 3:07-cv-00098-TMB, docket nos. 201-3, 201-4 (D. Alaska May 22, 2008). In May 2008, the Justice Department issued a detailed MIR letter identifying 16 categories of facts suggesting the absence of enforcement of the prior plan. *See* Letter of May 19, 2008 from Christopher Coates, Acting Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 293-14 (D. Alaska July 3, 2008). Instead of responding, the State abruptly withdrew its submission, preventing implementation of its retrogressive procedures. *See* Appendix 37-44. In the process, Alaska derided the request, arguing that "DOJ's questions on past practices are inappropriate." Opposition to Motion for Preliminary Injunction at 9 n.19, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 249 (D. Alaska May 22, 2008). State officials later attempted to circumvent the MIR by submitting the State's changes piecemeal, which the Department of Justice also rejected. According to the Department, it was necessary to review the entire plan together to determine whether it provided effective equal registration and voting opportunities to Alaska Natives. *See* Appendix 39-40.

In recent years, Section 5 has prevented Alaska from implementing a number of discriminatory polling place changes. In May 2008, the State submitted for preclearance a plan to eliminate precincts in several Native villages. *See* Appendix 32-36. State officials proposed to (1) "realign" Tatitlek, a community in which about 85 percent of the residents are

Alaska Native, to the predominately white community of Cordova, located over 33 miles away and not connected by road; (2) consolidate Pedro Bay, where a majority of residents are Alaska Native, with Iliamna and Newhalen, located approximately 28 miles away, are not connected by road, and were the subject of a critical initiative on the August 2008 ballot; and (3) consolidate Levelock, in which about 95 percent of residents are Alaska Native, with Kokhanok, approximately 77 miles apart and not connected by road.[9] In sum, Alaska was attempting to combine precincts accessible to one another only by air or boat with high concentrations of Alaska Native voters.

The Department of Justice responded with a MIR letter requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters. Appendix 32-36. The Department inquired about "the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct" asking that if there were no roadways connecting them that the State "indicate how voters will get to the consolidated location." Appendix 34. The MIR suggested that Alaska's election officials had not consulted with Native voters about the changes and requested a "detailed description" of efforts "to secure the views of the public, including members of the minority community, regarding these changes." Appendix 34-35. Finally, the MIR documented that when Department of Justice personnel communicated with State officials, they learned that Alaska also was taking steps to implement an unsubmitted voting change designating "specified voting precincts" as "permanent absentee by-mail precincts." Appendix 35. Rather than responding and submitting the additional voting changes for Section 5 review, the State abruptly withdrew the submission two weeks later. *See* Appendix 45-46.

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[9] Population data from the 2000 Census can be found at http://www.census.gov/. Distance data is calculated using the U.S. GEOLOGICAL SURVEY, GEOGRAPHIC NAMES INFORMATION SYSTEM. *See* http://www.infoplease.com/atlas/calculate-distance.html.

The MIRs issued to Alaska may be few in number in recent years, but they were significant. They prevented the State from circumventing the federal courts in its efforts to remedy the State's violations of Sections 203 and 4(f)(4), and they prevented the "realignment" of precincts requiring Native voters to fly to vote. Section 5 has prevented many voting changes that would have disenfranchised Alaska Native voters.

V. The Broadened Bailout Standard Adopted By The Court In *NAMUDNO* Limits Section 4(b) Coverage To Jurisdictions Like Alaska That Need It.

In *NAMUDNO*, the Court broadened eligibility for jurisdictions to be removed from Section 4(b) coverage, concluding that "piecemeal bailout is now permitted" under the VRA following the 1982 Amendments. 557 U.S. at 211. In particular, the Court held that "all political subdivisions . . . are eligible to file a bailout suit." *Id.*

Nevertheless, Alaska complains bailout remains too difficult, referring to it as "a mirage." Alaska Amicus at 29, *Shelby Cnty.*, No. 12-96. That may be true for Alaska, not because the standard is too difficult but because its discrimination continues. If the day arrives when Alaska's record is clean, it should apply for a bailout of coverage, just as it can do if it wants to terminate federal observer coverage in the Bethel region. These points highlight why a facial challenge of Section 4(b) is improper; jurisdictions each have unique records and numerous ways to lessen or remove the "yoke of federal oversight," as Alaska calls it. *Id.* at 26. Individual jurisdictions simply must have a record to support it.

Alaska has twice attempted to bailout from Section 5 since being covered in 1975. It dropped both lawsuits without being denied bailout. "In 1982, Congress amended the bailout provision to encourage jurisdictions to end their discriminatory practices and to integrate minority voters into the electoral process." H.R. REP. NO. 109-478 at 25, *reprinted in* 2006 U.S.C.C.A.N. 634. The bailout standard requires that jurisdictions demonstrate that they have been free of voting discrimination for ten years. *See* 42 U.S.C. § 1973b(a). In 1978 and again in 1984, Alaska dismissed its lawsuits after the evidence showed that the State denied equal electoral opportunities to

Native voters. *See* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 403, 415 (1985). Strangely, Alaska now contends it dismissed the actions because discovery was too burdensome. Alaska Amicus at 30-31, *Shelby Cnty.*, No. 12-96. However, Alaska's covered status "has been and continues to be within the control of the jurisdiction." H.R. REP. NO. 109-478 at 25, *reprinted in* 2006 U.S.C.C.A.N. 634. Its ongoing violations are not those of a jurisdiction with "a genuinely clean record" for which coverage can be terminated now. Nevertheless, once Alaska makes the VRA's unfulfilled promise of equal access a reality for Alaska Native voters, bailout would be appropriate. *Id.* Until that day arrives, the bailout mechanism is functioning exactly as it should in maintaining Alaska's coverage.

Alaska also argues bailout is more difficult since federal observers were appointed in 2009. Alaska Amicus at 7, *Shelby Cnty.*, No. 12-96. However this argument fails on two points. First, the appointment of observers is not "unreviewable," as Alaska maintains. Alaska Amicus at 6-7, *Shelby Cnty.*, No. 12-96. Section 13 of the VRA provides a jurisdiction may terminate coverage by petitioning the Attorney General or by bringing a declaratory judgment action in the District of Columbia. *See* 42 U.S.C. § 1973k. Alaska has done neither, making its complaints ring hollow. Second, the Attorney General's certification was derived from statutory violations of voting in the

Bethel region, which Alaska knew about and failed to remedy. Appendix 12-31. Far from "arbitrary," the certification was based on a court's detailed findings, most of which were based on Alaska's own evidence.

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CONCLUSION

The Court should exercise "judicial restraint" and limit its review of Petitioner's challenge to whether Section 4(b), as applied to Petitioner, is constitutional. *Washington State Grange*, 552 U.S. at 450. That approach properly balances the substantial deference owed to Congress in exercising its broad powers under the Fifteenth Amendment, *see NAMUDNO*, 557 U.S. at 204, while permitting covered jurisdictions to pursue their own challenges, as Alaska has already begun to do.

Alaska's rhetoric to the contrary is refuted by the reality of its sad legacy of excluding Native voters. There is a substantial record of "*local* evils" of educational and voting discrimination in Alaska supporting its continued coverage under Section 4(b). *Id.* at 203 (citation omitted). Ignoring that record, as Petitioner and Alaska suggest, would depart from the Court's "institutional role" and mark a serious encroachment into powers properly exercised by a "coequal branch of government." *Id.* at 204-05. Amici respectfully submit that the Court should decline that invitation.

Respectfully submitted,

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Table 1. Rates of Limited-English Proficiency and Illiteracy in Alaska Census Areas and Boroughs Covered under Section 203 of the Voting Rights Act.

Source: U.S. Census Bureau, 2011 Voting Rights Determination File, *available at* http://www.census.gov/rdo/data/voting_rights_determination_file.html (providing data for Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011)).

Legend:

"Language" refers to the Alaska Native or American Indian language in the Census Area or Bureau that is covered under Section 203. "CVAP" refers to the number of U.S. citizens who 18 years of age or older (voting age). "CVAP that is LEP" refers to the number of voting-age U.S. citizens who are Limited-English Proficient in the covered language. "CVAP % that is LEP" refers to the percentage of all U.S. citizens of voting-age who are LEP in the covered language. "% LEP CVAP that is illiterate" refers to the percentage of U.S. citizens of voting-age who are LEP in the covered language and have not completed more than the fifth primary grade.

Census Area or Borough	Language	CVAP	CVAP that is LEP	CVAP % that is LEP	% LEP CVAP that is illiterate
Bethel	All languages	10700	3350	31.30%	11.60%
Bethel	Inupiat	300	70	23.30%	14.30%
Bethel	Yup'ik	7435	3110	41.80%	11.60%
Dillingham	All languages	3225	415	12.90%	30.10%
Dillingham	Yup'ik	2050	375	18.30%	32.00%
Nome	All languages	6185	585	9.50%	13.70%
Nome	Inupiat	2725	240	8.80%	16.70%
Nome	Yup'ik	1195	265	22.20%	11.30%
North Slope	All languages	7025	830	11.80%	12.00%
North Slope	Inupiat	2710	575	21.20%	11.30%
North Slope	Alaska Native – Unspecified	605	130	21.50%	23.10%
Northwest Arctic	All languages	4835	475	9.80%	11.60%
Northwest Arctic	Inupiat	3420	420	12.30%	10.70%
Wade Hampton	All languages	4335	610	14.10%	22.10%

Census Area or Borough	Language	CVAP	CVAP that is LEP	CVAP % that is LEP	% LEP CVAP that is illiterate
Wade Hampton	Inupiat	470	70	14.90%	28.60%
Wade Hampton	Yup'ik	3195	515	16.10%	21.40%
Yukon-Koyukuk	All languages	4010	195	4.90%	15.40%
Yukon-Koyukuk	Athabascan	2665	170	6.40%	14.70%

Table 2. Rates of Limited-English Proficiency, Illiteracy, and Turnout in Alaska Native Villages Covered under Section 203 of the Voting Rights Act, Compared to the Statewide Turnout Rate in the November 2012 Presidential Election.

Sources: U.S. Census Bureau, 2011 Voting Rights Determination File, *available at* http://www.census.gov/rdo/data/voting_rights_determination_file.html (providing data for Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011)); State of Alaska, Division of Elections, Election Results for the Nov. 2012 Presidential Election, *available at* http://www.elections.alaska.gov (last visited Jan. 27, 2013).

Legend:

"CVAP % that is LEP" refers to the percentage of all U.S. citizens of voting-age who are LEP in the covered language. "% LEP CVAP that is illiterate" refers to the percentage of U.S. citizens of voting-age who are LEP in the covered language and have not completed more than the fifth primary grade. "Turnout % of Reg. Voters in 2012 Pres. Election" refers to the percentage of registered voters in the Alaska Native village who voted in the 2012 Presidential Election. "% above or below Statewide Turnout %" refers to the percentage that the village's turnout in the 2012 Presidential Election was above or below the statewide turnout rate of 59.6 percent.

Blank fields indicate that the Census Bureau has suppressed data for privacy reasons and/or that turnout data is unavailable because the Native village does not have its own polling place.

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Akiachak	Bethel	American Indian	39.7%	10.3%	36.0%	-23.6%
Akiachak	Bethel	Yup'ik	42.0%	10.3%	36.0%	-23.6%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Akiak	Bethel	American Indian, Yup'ik			52.3%	-7.3%
Alakanuk	Wade Hampton	American Indian	15.1%	18.2%	47.6%	-12.0%
Alakanuk	Wade Hampton	Yup'ik	15.6%	20.0%	47.6%	-12.0%
Aleknagik	Dillingham	American Indian, Yup'ik			33.6%	-26.0%
Algaaciq (St. Mary's)	Wade Hampton	American Indian, Yup'ik			34.7%	-24.9%
Allakaket	Yukon-Koyukuk	American Indian, Athabascan			33.6%	-26.0%
Ambler	Northwest Arctic	American Indian, Inupiat			46.0%	-13.6%
Anaktuvuk Pass	North Slope	American Indian, Inupiat			36.0%	-23.6%
Andreafsky (St. Mary's)	Wade Hampton	American Indian, Yup'ik			34.7%	-24.9%
Aniak	Bethel	American Indian	34.7%	11.8%	40.6%	-19.0%
Aniak	Bethel	Yup'ik			40.6%	-19.0%
Atmautluak	Bethel	American Indian, Yup'ik			39.1%	-20.5%
Atqasuk	North Slope	American Indian, Inupiat			38.1%	-21.5%
Barrow	North Slope	American Indian	20.4%	12.5%	36.8%	-22.8%
Barrow	North Slope	Inupiat	21.4%	10.3%	36.8%	-22.8%
Beaver	Yukon-Koyukuk	American Indian, Athabascan			44.4%	-15.2%
Bethel	Bethel	American Indian	32.1%	12.4%	33.9%	-25.7%
Bethel	Bethel	Yup'ik	41.8%	11.6%	33.9%	-25.7%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Brevig Mission	Nome	American Indian	9.8%	20.0%	50.2%	-9.4%
Brevig Mission	Nome	Inupiat	7.5%	26.7%	50.2%	-9.4%
Buckland	Northwest Arctic	American Indian	11.1%	16.0%	25.7%	-33.9%
Buckland	Northwest Arctic	Inupiat	12.5%	16.0%	25.7%	-33.9%
Chefornak	Bethel	American Indian	41.7%	10.0%	43.1%	-16.5%
Chefornak	Bethel	Yup'ik	42.6%	10.0%	43.1%	-16.5%
Chevak	Wade Hampton	American Indian	14.6%	26.7%	42.8%	-16.8%
Chevak	Wade Hampton	Inupiat	14.6%	30.8%	42.8%	-16.8%
Chuathbaluk	Bethel	American Indian, Yup'ik			35.9%	-23.7%
Clarks Point	Dillingham	American Indian, Yup'ik			31.7%	-27.9%
Crooked Creek	Bethel	American Indian, Yup'ik			45.7%	-13.9%
Deering	Northwest Arctic	American Indian, Inupiat			41.0%	-18.6%
Dillingham	Dillingham	American Indian	15.1%	30.0%	45.2%	-14.4%
Dillingham	Dillingham	Yup'ik	18.2%	32.0%	45.2%	-14.4%
Eek	Bethel	American Indian, Yup'ik			41.7%	-17.9%
Ekwok	Dillingham	American Indian, Yup'ik			45.6%	-14.0%
Emmonak	Wade Hampton	American Indian	15.4%	21.4%	43.4%	-16.2%
Emmonak	Wade Hampton	Yup'ik	15.9%	21.4%	43.4%	-16.2%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Fort Yukon	Yukon-Koyukuk	American Indian	6.8%	16.0%	38.2%	-21.4%
Fort Yukon	Yukon-Koyukuk	Athabascan	5.9%	20.0%	38.2%	-21.4%
Galena	Yukon-Koyukuk	American Indian	6.7%	26.7%	71.7%	12.1%
Galena	Yukon-Koyukuk	Athabascan			71.7%	12.1%
Gambell	Nome	American Indian	22.1%	11.8%	48.1%	-11.5%
Gambell	Nome	Yup'ik	23.0%	11.8%	48.1%	-11.5%
Golovin	Nome	American Indian, Inupiat			70.6%	11.0%
Goodnews Bay	Bethel	American Indian	40.0%	6.7%	40.5%	-19.1%
Goodnews Bay	Bethel	Yup'ik			40.5%	-19.1%
Grayling	Yukon-Koyukuk	American Indian, Athabascan			48.7%	-10.9%
Holy Cross	Yukon-Koyukuk	American Indian, Athabascan			41.1%	-18.5%
Hooper Bay	Wade Hampton	American Indian	12.0%	20.0%	41.9%	-17.7%
Hooper Bay	Wade Hampton	Yup'ik	16.1%	21.4%	41.9%	-17.7%
Hughes	Yukon-Koyukuk	American Indian, Athabascan			70.0%	10.4%
Huslia	Yukon-Koyukuk	American Indian, Athabascan			57.8%	-1.8%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Inalik (Diomede)	Nome	American Indian, Inupiat			34.7%	-24.9%
Kaktovik	North Slope	American Indian, Inupiat			47.3%	-12.3%
Kalskag	Bethel	American Indian, Yup'ik			57.3%	-2.3%
Kaltag	Yukon-Koyukuk	American Indian, Athabascan			43.9%	-15.7%
Kasigluk	Bethel	American Indian	40.3%	12.0%	30.4%	-29.2%
Kasigluk	Bethel	Yup'ik	41.7%	12.0%	30.4%	-29.2%
Kiana	Northwest Arctic	American Indian	12.5%	16.0%	33.9%	-25.7%
Kiana	Northwest Arctic	Inupiat	13.5%	16.0%	33.9%	-25.7%
Kipnuk	Bethel	American Indian	40.8%	10.3%	36.8%	-22.8%
Kipnuk	Bethel	Yup'ik	42.0%	10.3%	36.8%	-22.8%
Kivalina	Northwest Arctic	American Indian	11.6%	16.0%	43.3%	-16.3%
Kivalina	Northwest Arctic	Inupiat	11.6%	16.0%	43.3%	-16.3%
Kobuk	Northwest Arctic	American Indian, Inupiat			41.5%	-18.1%
Kongiganak	Bethel	American Indian	41.2%	9.5%	43.8%	-15.8%
Kongiganak	Bethel	Yup'ik	41.7%	10.0%	43.8%	-15.8%
Kotlik	Wade Hampton	American Indian	15.4%	20.0%	43.5%	-16.1%
Kotlik	Wade Hampton	Yup'ik	16.1%	22.2%	43.5%	-16.1%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Kotzebue	Northwest Arctic	American Indian	10.7%	11.4%	37.9%	-21.7%
Kotzebue	Northwest Arctic	Inupiat	12.2%	10.0%	37.9%	-21.7%
Koyuk	Nome	American Indian	8.6%	26.7%	50.0%	-9.6%
Koyuk	Nome	Inupiat	9.1%	26.7%	50.0%	-9.6%
Koyukuk	Yukon-Koyukuk	American Indian, Athabascan			53.6%	-6.0%
Kwethluk	Bethel	American Indian	41.0%	11.8%	40.7%	-18.9%
Kwethluk	Bethel	Yup'ik	41.3%	12.1%	40.7%	-18.9%
Kwigillingok	Bethel	American Indian, Yup'ik			42.7%	-16.9%
Kwinhagak (Quinhagak)	Bethel	American Indian	41.6%	12.5%	37.7%	-21.9%
Kwinhagak (Quinhagak)	Bethel	Yup'ik	42.1%	12.5%	37.7%	-21.9%
Lower Kalskag	Bethel	American Indian, Yup'ik			55.3%	-4.3%
Manokotak	Dillingham	American Indian	17.9%	30.0%	47.5%	-12.1%
Manokotak	Dillingham	Yup'ik			47.5%	-12.1%
Marshall	Wade Hampton	American Indian	11.4%	16.0%	46.5%	-13.1%
Marshall	Wade Hampton	Yup'ik	16.7%	16.0%	46.5%	-13.1%
Mekoryuk	Bethel	American Indian, Inupiat			52.5%	-7.1%
Minto	Yukon-Koyukuk	American Indian, Athabascan			42.7%	-16.9%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Mountain Village	Wade Hampton	American Indian	15.4%	21.4%	41.5%	-18.1%
Mountain Village	Wade Hampton	Yup'ik	16.7%	21.4%	41.5%	-18.1%
Napakiak	Bethel	American Indian	41.9%	11.1%	35.0%	-24.6%
Napakiak	Bethel	Yup'ik	40.5%	11.8%	35.0%	-24.6%
Napaskiak	Bethel	American Indian	41.3%	10.5%	40.8%	-18.8%
Napaskiak	Bethel	Yup'ik			40.8%	-18.8%
Nenana	Yukon-Koyukuk	American Indian, Athabascan			47.3%	-12.3%
New Koliganek	Dillingham	American Indian, Yup'ik			46.0%	-13.6%
New Stuyahok	Dillingham	American Indian	17.2%	30.0%	44.6%	-15.0%
New Stuyahok	Dillingham	Yup'ik	17.5%	30.0%	44.6%	-15.0%
Newtok	Bethel	American Indian, Yup'ik			42.8%	-16.8%
Nightmute	Bethel	American Indian	36.7%	7.3%	50.4%	-9.2%
Nightmute	Bethel	Yup'ik	42.3%	7.3%	50.4%	-9.2%
Noatak	Northwest Arctic	American Indian	12.1%	11.4%	49.3%	-10.3%
Noatak	Northwest Arctic	Inupiat	12.5%	11.4%	49.3%	-10.3%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Noorvik	Northwest Arctic	American Indian	12.0%	8.9%	39.0%	-20.6%
Noorvik	Northwest Arctic	Inupiat	12.3%	8.9%	39.0%	-20.6%
Nuiqsut	North Slope	American Indian, Inupiat, Unspecified Alaska Native			43.5%	-16.1%
Nulato	Yukon-Koyukuk	American Indian	5.6%	40.0%	42.3%	-17.3%
Nulato	Yukon-Koyukuk	Athabascan	5.6%	40.0%	42.3%	-17.3%
Nunam Iqua	Wade Hampton	American Indian, Yup'ik			55.8%	-3.8%
Nunapitchuk	Bethel	American Indian	33.9%	10.5%	38.5%	-21.1%
Nunapitchuk	Bethel	Yup'ik	42.2%	10.5%	38.5%	-21.1%
Oscarville	Bethel	American Indian, Yup'ik				
Pilot Station	Wade Hampton	American Indian	15.4%	20.0%	50.5%	-9.1%
Pilot Station	Wade Hampton	Yup'ik	15.9%	20.0%	50.5%	-9.1%
Pitkas Point	Wade Hampton	American Indian, Yup'ik				
Platinum	Bethel	American Indian, Yup'ik				
Point Hope	North Slope	American Indian	21.5%	11.8%	39.8%	-19.8%
Point Hope	North Slope	Inupiat	20.5%	12.5%	39.8%	-19.8%
Point Lay	North Slope	American Indian, Inupiat			32.0%	-27.6%
Ruby	Yukon-Koyukuk	American Indian, Athabascan			35.9%	-23.7%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Russian Mission	Wade Hampton	American Indian, Yup'ik			51.8%	-7.8%
St. Michael	Nome	American Indian	7.1%	26.7%	34.7%	-24.9%
St. Michael	Nome	Yup'ik			34.7%	-24.9%
Savoonga	Nome	American Indian	21.4%	11.1%	57.3%	-2.3%
Savoonga	Nome	Yup'ik	22.8%	11.1%	57.3%	-2.3%
Scammon Bay	Wade Hampton	American Indian	15.2%	28.6%	53.0%	-6.6%
Scammon Bay	Wade Hampton	Yup'ik	15.6%	28.6%	53.0%	-6.6%
Selawik	Northwest Arctic	American Indian	11.4%	8.0%	37.6%	-22.0%
Selawik	Northwest Arctic	Inupiat	12.0%	8.0%	37.6%	-22.0%
Shageluk	Yukon-Koyukuk	American Indian, Athabascan			49.2%	-10.4%
Shaktoolik	Nome	American Indian, Inupiat			54.7%	-4.9%
Shishmaref	Nome	American Indian	8.1%	16.0%	57.4%	-2.2%
Shishmaref	Nome	Inupiat	8.3%	16.0%	57.4%	-2.2%
Shungnak	Northwest Arctic	American Indian, Inupiat			51.7%	-7.9%
Sleetmute	Bethel	American Indian, Yup'ik			49.2%	-10.4%
Stebbins	Nome	American Indian	20.7%	6.7%	36.7%	-22.9%
Stebbins	Nome	Yup'ik	22.2%	6.7%	36.7%	-22.9%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Stony River	Bethel	American Indian, Yup'ik				
Tanana	Yukon-Koyukuk	American Indian, Athabascan			48.1%	-11.5%
Teller	Nome	American Indian	7.4%	40.0%	38.6%	-21.0%
Teller	Nome	Inupiat			38.6%	-21.0%
Togiak	Dillingham	American Indian	17.6%	31.3%	36.2%	-23.4%
Togiak	Dillingham	Yup'ik	18.6%	31.3%	36.2%	-23.4%
Toksook Bay	Bethel	American Indian	40.4%	13.0%	47.8%	-11.8%
Toksook Bay	Bethel	Yup'ik	41.8%	13.0%	47.8%	-11.8%
Tuluksak	Bethel	American Indian	41.3%	10.5%	29.8%	-29.8%
Tuluksak	Bethel	Yup'ik	42.2%	10.5%	29.8%	-29.8%
Tuntutuliak	Bethel	American Indian	42.5%	11.8%	49.5%	-10.1%
Tuntutuliak	Bethel	Yup'ik	41.0%	12.5%	49.5%	-10.1%
Tununak	Bethel	American Indian	40.5%	13.3%	40.8%	-18.8%
Tununak	Bethel	Yup'ik	42.9%	13.3%	40.8%	-18.8%
Twin Hills	Dillingham	American Indian, Yup'ik				
Unalakleet	Nome	American Indian	8.9%	11.4%	51.6%	-8.0%
Unalakleet	Nome	Inupiat	8.6%	13.3%	51.6%	-8.0%
Wainwright	North Slope	American Indian	21.5%	14.3%	44.3%	-15.3%
Wainwright	North Slope	Inupiat	20.6%	6.2%	44.3%	-15.3%
Wales	Nome	American Indian, Inupiat			60.4%	0.8%
White Mountain	Nome	American Indian, Inupiat			42.8%	-16.8%

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Nick, et al. Plaintiffs, vs. Bethel, et al. Defendants.	Case No. 3:07-cv-0098 TMB **ORDER** **Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants** (Filed Jul. 30, 2008)

I. MOTION PRESENTED

At Docket 202, Plaintiffs seek a preliminary injunction requiring the Defendants to adopt certain measures related to the minority language and voter assistance rights guaranteed by the Voting Rights Act of 1965 ("VRA"). Specifically, the Plaintiffs urge the Court to order mandatory relief to ensure that Yup'ik-speaking voters in the Bethel Census area receive effective language assistance under sections 203[1] and (4)(f)(4)[2] of the VRA, and that eligible voters receive assistance during the voting process, including in the voting booth, as guaranteed by section 208[3] of the VRA. Defendants oppose the motion, on which oral argument was heard July 8, 2008.

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[1] 42 U.S.C. § 1973aa-1a.

[2] 42 U.S.C. § 1973b(f)(4).

[3] 42 U.S.C. § 1973aa-6.

In light of the fact that the State's August 26, 2008 primary election is rapidly approaching, the Court issues this ruling with regard to the State Defendants[4] only. The portion of the Plaintiffs' motion seeking injunctive relief against the Bethel Defendants[5] remains under consideration.

As to the State Defendants, the Court has determined that the Plaintiffs are entitled to injunctive relief in connection with the upcoming state-run elections. The Court therefore **GRANTS** the Plaintiffs' motion with regard to the State Defendants and directs the State to comply with the relief described in section IV.B. of this order.

II. LEGAL STANDARD

A party moving for preliminary injunction must show that a legal remedy is inadequate, meaning that the moving party is faced with an immediate and irreparable injury for which they cannot be compensated with money damages.[6] "[A] preliminary injunction should issue . . . upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."[7] Under this second test, it must be shown, at a minimum, that "even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits."[8]

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[4] The "State Defendants" include Sean Parnell, in his official capacity as state Lieutenant Governor; Whitney Brewster, in her official capacity as Director of the state Division of Elections; Becka Baker, in her official capacity as Elections Supervisor of the Nome Regional Elections Office; and Michelle Speegle, in her official capacity as Elections Supervisor of the Fairbanks Regional Elections Office.

[5] The "Bethel Defendants" include Bethel, Alaska and Lori Strickler, in her official capacity as municipal clerk of Bethel.

Thus, the standard for a preliminary injunction balances the moving party's likelihood of success against the relative hardship to the parties.[9] "If the harm that may occur to the [moving party] is sufficiently serious, it is only necessary that there be a fair chance of success on the merits."[10]

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[6] *See Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964).

[7] *Aguirre v. Chula Vista Sanitary Serv. & Sani-Trainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976) (*citing Gresham v. Chambers*, 501 F.2d 687, 691 (2nd Cir. 1974)); *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999).

[8] *Martin v. Int'l. Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984).

[9] *See Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1118 (9th Cir. 1999)

[10] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975).

In the instant case, the Court must also consider the nature of the relief sought by the Plaintiffs. Where a party seeks mandatory relief that "goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction."[11] Mandatory preliminary relief is to be issued only where "the facts and law clearly favor the moving party."[12]

III. BACKGROUND

On June 11, 2007, the Plaintiffs initiated this action seeking declaratory and injunctive relief with respect to election-related policies and procedures used by the state of Alaska and the city of Bethel in the Bethel census area. The Plaintiffs' original complaint asserted violations of the VRA's bilingual language and voter-assistance guarantees. The Plaintiffs later amended their complaint to add an additional cause of action, alleging that the Defendants violated the "preclearance" requirements of section 5[13] of the VRA. A three-judge panel was then appointed to hear the section 5 claim, as required by federal law.[14]

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[11] *Id.*

[12] *Stanley v. University of Southern Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

[13] 42 U.S.C. § 1973c.

[14] 42 U.S.C. § 1973c; 28 U.S.C. § 2284.

On May 22, 2008, the Plaintiffs filed the motion for a preliminary injunction at issue here, along with a 29-page proposed order addressing the purported shortcomings of the Defendants' efforts to provide language assistance to Yup'ik-speaking voters in the Bethel region. The Plaintiffs seek injunctive relief in connection with three upcoming state-run elections: the August 26, 2008 primary, the October 7, 2008 Regional Educational Attendance Area (REAA) and Coastal Resources Service Area (CRSA) elections; and the November 4, 2008 general election.

The Plaintiffs did not seek expedited review of their request for injunctive relief until June 9, 2008. Following a Court-convened status conference, the Plaintiffs filed a status report with a much-reduced list of actions sought as relief for the August 26, 2008 primary election. The pared down list includes: the appointment of federal election observers, the hiring of a bilingual elections coordinator fluent in English and Yup'ik, the development of a Yup'ik glossary of common election terms, the airing of pre-election publicity and announcements in Yup'ik, consultation with Plaintiffs' counsel and tribal leaders to ensure the accuracy of any materials translated into Yup'ik, mandatory poll worker training on the VRA's bilingual language requirements, and pre- and post-election reports summarizing the State's efforts to comply with these measures. The Plaintiffs also seek, for each polling place within the Bethel census area, the provision of a sample ballot translated into Yup'ik and the display of a poster written in Yup'ik and

English notifying voters of the availability of language and voting assistance.

Even while opposing the Plaintiffs' motion for a preliminary injunction, the State has, during the course of this litigation, taken substantial steps to overhaul its minority language assistance program ("MLAP") for Alaska Native voters. The revised MLAP includes many – but not all – of the actions sought by the Plaintiffs in their status report. The State's plan does not, however, call for the translation of all written election materials into Yup'ik, because the State contends this is not required under the VRA. The State moved for summary judgment on this issue, which the Court granted before the hearing on July 8, 2008; in a written ruling issued on July 23, 2008, the Court found that Yup'ik is a "historically unwritten" language for purposes of the VRA and, therefore, the VRA requires the Defendants to provide oral – but not written – assistance to Yup'ik-speaking voters. While granting summary judgment to the State Defendants on this issue, the Court noted that they may need to print some election-related materials in Yup'ik, such as sample ballots, to provide "effective" language assistance, as required by federal regulations implementing the VRA.[15]

Because it initially appeared that the Plaintiffs' original motion for a preliminary injunction implicitly involved the section 5 claim, the three-judge panel appointed to hear that claim participated in the July 8, 2008 hearing. But the parties' arguments at the hearing, and the Plaintiffs' filing of a separate motion for a preliminary injunction on the section 5 claim shortly before the hearing, made clear that the issues raised in this motion are distinct from the section 5 claim. Because of this, Judge Burgess, to whom this case was originally assigned, retained jurisdiction over the Plaintiffs' original motion for a preliminary injunction. The Plaintiffs' second motion seeking injunctive relief – which deals exclusively with the section 5 claim – remains pending before the three-judge panel.

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[15] 28 C.F.R. § 55.2.

IV. DISCUSSION

As noted above, a party seeking a preliminary injunction must show either the possibility of an irreparable injury and a likelihood of succeeding on the merits, or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in their favor. Given the importance accorded an individual's constitutional right to vote, the Court finds at the outset that the Plaintiffs have satisfied the "irreparable harm" prong of the first preliminary injunction standard. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[16] Denial of the right to participate in an election is by its nature an irreparable injury.[17]

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[16] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

A. Probable Success on the Merits

Shifting to the second prong of the analysis, the Plaintiffs assert that there is "overwhelming evidence" of the State Defendants' failure to provide effective language and voter assistance in violation of sections 4(f)(4), 203 and 208 of the VRA. The State Defendants respond that injunctive relief should be denied because they are in the process of improving their MLAP and, therefore, the Plaintiffs cannot establish a likelihood of success on the merits.

The requirements of sections 4(f)(4) and 203 of the VRA are essentially identical. They bar covered jurisdictions from providing English-only voting instructions and materials in any public election; all "voting materials" provided in English must also be provided in each language triggering coverage under the VRA. Specifically, the VRA's provisions direct that whenever a State or political subdivision "provides any voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language . . . " Both sections also include the following exemption:

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[17] *Id.* at 585.

> *Provided*, That where the language of the applicable minority group is oral *or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten*, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.[18]

Because the Court has ruled that Yup'ik is a "historically unwritten" language, this exemption applies and the Defendants are required to provide oral assistance only to Yup'ik-speaking voters.

Compliance with the VRA's bilingual provisions is measured by an "effectiveness" standard. The critical question is whether materials are provided in a such a way that voters from applicable language groups are "effectively informed of and participate effectively in voting-connected activities" and whether a covered jurisdiction has taken "all reasonable steps to achieve that goal."[19] In addition, the U.S. Attorney General has issued regulations on oral assistance and election-related publicity, which state:

> (a) General. Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.

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[18] 42 U.S.C. §§ 1973b(f)(4) and 1973aa-1a(c) (emphasis added).

[19] 28 C.F.R. § 55.2.

> (b) Assistance. The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.
>
> (c) Helpers. With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his or her own choice. The basic standard is one of effectiveness.[20]

It is undisputed that the state of Alaska is a "covered jurisdiction" under Section 4(f)(4) for Alaska Natives, and that the Bethel census area, which includes the city of Bethel, is a "covered jurisdiction" under Section 203 for Alaska Natives and the Yup'ik language.[21] Section 208 of the VRA applies to all jurisdictions, and not just those deemed "covered" for the language assistance provisions. It provides that voters who need assistance because they are blind, disabled, or unable to read or write, may receive assistance from a person of their choice, other than their employer, agent of their employer, or an agent of their union.[22]

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[20] 28 CFR § 55.20.

[21] *See* 28 C.F.R. Pt. 55, App.

Based on the evidence presented, the Court finds that the Plaintiffs have met their burden and established that they are likely to succeed on the merits on the language assistance claims brought under sections 203 and 4(f)(4) of the VRA, and the voter assistance claims brought under section 208 of the VRA. In reaching this conclusion, the Court relies on affidavits, depositions and other evidence showing that the State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik;[23] ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik;[24] ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate;[25] or require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.[26]

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[22] 42 U.S.C. § 1973aa-6.

[23] Dkt. 202, Ex. 191 at 127-28, 148.

[24] Dkt. 202, Ex. 191 at 166; Ex. 159 at 73; Ex. 183 at ¶¶ 198-99. *See also* Dkt. 90 at ¶ 17.

[25] Dkt. 202, Ex. 159 at 76-77.

After considering this evidence and the parties' arguments at the July 8, 2008 hearing, the Court also rejects the State Defendants' contention that injunctive relief should be denied because the State is in the midst of revamping its MLAP. The evidence shows that State officials became aware of potential problems with their language-assistance program in the spring of 2006, after the Native American Rights Fund issued a report describing the State's alleged failure to comply with the VRA's minority language provisions. Yet the State's efforts to overhaul the language assistance program did not begin in earnest until after this litigation began. Whitney Brewster, director of the State's Division of Elections, testified during her deposition that the Division began working to improve the MLAP in April 2006. These efforts were put on hold, however, while the Division prepared for elections in the fall of 2006 and a statewide special election in April 2007.[27] Therefore, while the State contends that an injunction is unnecessary, the court disagrees in light of the fact that: 1) the State has been covered by Sections 203 and 4(f)4 for many years now; 2) the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters; and 3) the revisions to the

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[26] Dkt. 202, Ex. 191 at 169-71; Ex. 159 at 60, 63.

[27] Dkt. 202, Ex. 191 at 70-71.

State's MLAP, which are designed to bring it into compliance, are relatively new and untested. For all these reasons, the Court concludes that injunctive relief is both appropriate and necessary. The Court acknowledges that the State has undertaken significant efforts to improve its language assistance program. But by the State's own admission, the overhaul remains a work in progress. In opposing the Plaintiffs' motion, the State asserts that it is "in the process of adopting enhancements," and counsel for the State acknowledged during the July 8, 2008 hearing that officials are still working to train and recruit poll bilingual poll workers and to assemble a Yup'ik glossary of election-related terms. Until these measures and others are fully in place, the evidence of past shortcomings justifies the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections.[28]

In addition to the language-assistance claims brought under sections 203 and 4(f)(4) of the VRA, Plaintiffs have demonstrated that they are likely to prevail on their section 208 voter-assistance claim as well. That claim asserts that poll workers have regularly failed to allow voters (or apprise voters of their right) to bring an individual of their choice into the voting booth to assist them in the voting process. While the evidence on this claim is more anecdotal, it nonetheless satisfies the Plaintiffs' burden for injunctive relief. This evidence primarily consists of affidavits and deposition testimony showing that some poll workers in the Bethel census area do not understand that blind, disabled or illiterate voters have the right to receive assistance from a "helper" of their choosing. For example, Plaintiff Anna Nick has heard poll workers in Akiachak tell other voters that they "cannot bring anyone with them into the booth because their vote must remain private."[29] Similarly, Elena Gregory, a resident of the village of Tuluksak, reports being told by a poll worker that she "could not help the others vote if they did not understand" the ballots written in English.[30] In her declaration, she states: "I have voted in an election where the poll worker told me that elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting."[31] And in the city of Bethel of the village of Kwigillingok, election workers have failed to offer assistance to voters who needed it, and who were entitled to it under section 208.[32]

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[28] The Court also rejects the State's arguments that injunctive relief should be denied on the grounds of laches and unclean hands. The State asserts that the Plaintiffs unreasonably delayed filing for injunctive relief and "tried to block" the Division's implementation of improvements by filing critical comments with the U.S. Department of Justice in response to the State's effort to obtain "preclearance" of its new procedures. The Court finds these arguments to be without merit.

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[29] Dkt. 90 at ¶¶ 19-20.

[30] Dkt. 164 at ¶ 8.

[31] *Id.*

[32] Dkt. 89 at ¶ 24. *See also* Dkt. 161 at ¶¶ 22, 23.

Although courts have denied injunctions based on isolated instances of election-related misconduct, the evidence here appears to go well beyond that. Multiple individuals, in different districts and with different poll workers, have reported strikingly similar experiences. These accounts suggest that the violations of section 208 – which deny voters rights guaranteed by the VRA – are more than disparate incidents. As a result, an injunction appears to be an appropriate way to provide relief. Notably, as the Court will explain in the following section, most of the ordered relief simply obligates the State, under penalty of contempt, to do what it already promised to do at the July 8, 2008 oral argument. Accordingly, the burden imposed by this injunction will be minor.

B. Injunctive Relief

Having established that Plaintiffs are entitled to some form of injunctive relief, the Court turns next to the specific relief sought by the Plaintiffs. As noted above, the Plaintiffs submitted a pared-down list of requested actions in their June 6, 2008 status report to the Court. At oral argument, counsel for the State Defendants indicated that the State has already taken significant steps to implement a number of these actions. As a result, the issues in this case have narrowed considerably, and the remedial actions on which the parties remain at odds are relatively few. Based on the July 8, 2008 hearing and the parties' briefs, the Court orders the State Defendants to implement the following actions:

1. **Provide mandatory poll worker training.** Poll workers shall be instructed on the VRA's guarantees of language and voter assistance. In addition, poll workers serving as translators should be trained on the methods and tools available for providing complete and accurate translations.

2. **Hire a language assistance coordinator fluent in Yup'ik.** In addition to implementing the State's revised language assistance program in the Bethel region, the coordinator should act as a liaison to the tribal councils and Yup'ik-speaking community to ensure the State's efforts result in effective language assistance.

3. **Recruit bilingual poll workers or translators.** At least one poll worker or translator fluent in Yup'ik and English shall be assigned to each polling place within the Bethel census area for the upcoming State-run elections.

4. **Provide sample ballots in written Yup'ik.** At least one such ballot shall be available at each precinct within the Bethel census area to aid poll workers in translating ballot materials and instructions for Yup'ik-speaking voters with limited English proficiency.

5. **Provide pre-election publicity in Yup'ik.** Election-related announcements provided in English shall be broadcast or published in Yup'ik as well. Pre-election publicity should

specifically inform Yup'ik speakers that language assistance will be available at all polling locations within the Bethel census area.

6. **Ensure the accuracy of translations.** The State must consult with Yup'ik language experts to ensure the accuracy of all translated election materials.

7. **Provide a Yup'ik glossary of election terms.** During oral argument, counsel for the State Defendants indicated that the State has already compiled a draft version of a Yup'ik glossary of election-related terms. At least one copy of this glossary shall be provided to each polling place within the Bethel census area to assist bilingual poll workers and translators.

8. **Submit pre-election and post-election progress reports.** The State Defendants shall submit information on the status of efforts to comply with this Court-ordered program of relief and, more generally, the VRA's language and voter assistance provisions. The information should be specific and provided in a verifiable form, e.g., a precinct-by-precinct list of the names of designated bilingual poll workers or translators for the upcoming fall elections. Progress reports must be filed with the Court 15 days before each election (beginning with the August 26, 2008 statewide primary), and again 30 days after each election.

The Court's reasons for requesting the pre- and post-election progress reports are two-fold: First, they will assist the Court in gauging compliance with the measures ordered here and with sections 4(f)(4), 203 and 208 of the VRA. Second, the reports will aid the three-judge panel in assessing the baseline for Plaintiffs' section 5 preclearance claims. As mentioned above, the Plaintiffs' motion for a preliminary injunction on that claim remains pending before the panel.

In ordering this injunctive relief, the Court declines the Plaintiffs' request for federal election observers. Under 42 U.S.C. § 1973a(a) the Court has authority to appoint federal election observers "if the Court determines that the appointment of such examiners is necessary to enforce" the voting guarantees of the fourteenth and fifteenth amendments.[33] Given the significant efforts made by the State to revamp the language assistance program for Alaska Natives, and the progress reports required in connection with this order, the Court concludes that federal observers are not necessary at this time.

The Court also denies the Plaintiffs' request that the State be required to display a poster at each polling location within the Bethel census area announcing, in Yup'ik and English, the availability of language assistance. The State asserts that such a requirement would contradict the VRA's written-assistance exemption for "historically unwritten" languages. Without addressing this argument, the Court is satisfied that the State is pursuing adequate alternative means to inform Yup'ik-speaking voters about the availability of language assistance via pre-election publicity, poll worker training, and buttons for poll workers.

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[33] 42 U.S.C. § 1973a(a).

V. CONCLUSION

For the reasons stated above, the Court GRANTS the Plaintiffs' Motion for a Preliminary Injunction at Docket 202 as to the State Defendants and orders the specific relief listed in Section IV.B. of this order.[34]

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[34] Although courts typically require the plaintiff to post a bond before obtaining a preliminary injunction, *see* Fed. R. Civ. P. 65(c), this procedure may be excused when the defendant fails to request a bond, or when a case presents "exceptional" circumstances. Both apply here. First, the Defendants have effectively waived the requirement by failing to request a bond in their opposition. *See Aoude v. Mobile Oil Corp.*, 862 F.2d 890, 896 (1st Cir. 1988); *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 82 (9th Cir. 2003) (appellate court will not consider issued not raised in the trial court). Further, bonds may also be excused in exceptional cases, such as suits to protect the public interest, *Pharmaceutical Soc. of State of New York, Inc. v. New York State Dept. of Social Services*, 50 F.3d 1168, 1175-75 (suit to ensure that State complied with federal Medicaid Act), or cases in which a bond would effectively deny access to judicial review, *see Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) ([R]equiring nominal bonds is perfectly proper in public interest litigation"). The Court finds that these exceptional circumstances exist here: Plaintiffs have brought a public interest lawsuit, seeking only equitable and declaratory relief, to enforce the voting rights guaranteed themselves (and others) under federal law. Accordingly, the Court

(Continued on following page)

Dated at Anchorage, Alaska, this 30th day of July 2008.

/s/ Timothy Burgess
Timothy M. Burgess
United States District Judge

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concludes that a bond is unnecessary. *See Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1988).

[SEAL]

U.S. Department of Justice

Civil Rights Division

CC:MSR:SMC:jdh
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 14, 2008

Gail Fenumiai, Esq.
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the North Prince of Wales Precinct into the Klawock Precinct, and the subsequent polling place change, and precinct realignment; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change precinct realignment and precinct name change to the Iliamna Lake North Precinct; and the consolidation of the Levelock Precinct into the Kokhanok Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake south Precinct, for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 13, 2008.

With regard to the changes affecting the North Prince of Wales Precinct, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41).

With regard to the remaining specified changes, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A detailed explanation of the proposed changes including: (a) the criteria used to determine that the Tatitlek, Pedro Bay and Levelock Precincts should be eliminated; (b) reasons for the selection of the precincts these would be consolidated into; (c) a description of any alternative(s) precincts considered for the consolidation and the reason(s) why each such alternative was not recommended or approved; and (d) the factual basis, including any reports, studies,

analyses, or views (whatever formal or informal), for the State's determination that the proposed changes will not have a retrogressive effect on minority voters.

2. A map for each of the consolidations, which depicts the existing voting precincts and the locations of their current polling places, and any other locations considered as potential polling places for these consolidated precincts. The maps should be accompanied by a listing of the names and addresses of the current polling place locations along with the distance between each current location and the location with which it is being consolidated.

3. Please indicate the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct. If no roadways connect the two, please indicate how voters will get to the consolidated location.

4. Please provide any methodology the State used to determine that there are no Alaskan Native-speakers in the impacted precincts, which are covered by the provisions of Section 203 of the Voting Rights Act. Please provide names of community members spoken to regarding the presence or absence of limited-English proficient voters, including their daytime telephone numbers.

5. A detailed description of the efforts, both formal and informal, made by the State to secure the views of the public, including members of the minority community, regarding these changes. Describe the substance of any comments or suggestions received,

provide the names and daytime telephone numbers of the persons making the comments or suggestions, and articulate the State's response, if any.

6. Voter registration and turnout data, by race, for elections since 1998 for the precincts being eliminated and subsequently consolidated.

During your recent conversation with Ms. Stephanie Celandine, of our staff, regarding these consolidations, you noted that the specified voting precincts affected by the consolidations would be designated as *permanent* absentee by-mail precincts. According to our records, this change affecting voting has not been submitted to the United States District Court of the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. If our information is correct, it is necessary that this change be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Clark v. Roemer,* 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.10).

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Alaska plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Celandine of our staff. Refer to File Nos. 2008-2739 and 2008-3714 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Maureen S. [Illegible]
for Christopher Coates
Chief, Voting Section

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:TFM:SBD:LB:jdh *Voting Section – NWB*
DJ 166-012-3 *950 Pennsylvania Avenue, NW*
2008-1726 *Washington, DC 20530*

August 1, 2008

VIA FACSIMILE & FIRST CLASS MAIL

Gail Fenumiai
Director
Division of Elections
State of Alaska
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the changes in bilingual election procedures for the State of Alaska ("State"), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 19, 2008 request for additional information on June 9, 2008.

Your June 9, 2008, letter withdraws your submission of the State's revised Minority Language Assistance Program ("MLAP") from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. *See Procedures for the Administration of Section 5 of the Voting Rights Act,* 28 C.F.R. 51.25(a). Please be advised, however, that the State of Alaska is required to provide bilingual election materials and minority language assistance in the Native American and Alaska Native languages under Sections 4(f)(4) and 203 of the Voting Rights Act. Therefore, to the extent that the State seeks to implement new procedures, preclearance of those procedures will be required before they may be implemented.

The last precleared bilingual election procedures for the State are the 1981 plan for the Alaska Native languages, precleared by letter dated October 5, 1981, and the 2002 and 2003 plans for the Tagalog language, precleared by letters dated October 22, 2002 and November 17, 2003. However, according to discovery conducted in the case, *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB) ("*Nick*"), admissions by State elections officials, and assertions in your letter dated June 9, 2008, regarding "conditions existing at the time of the submission" and the State's continued implementation of "enhancements," it appears that the State of Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures. Any procedures deviating from the prior precleared procedures are changes affecting voting for which preclearance is required. *See Clark v. Roemer*, 500 U.S. 646 (1991).

According to our records, some of those changes affecting voting in the state's minority language program that have been implemented since 1981 have not been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act. If our information is correct, it is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Id.*; 28 C.F.R. 51.10.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines, 28 C.F.R. Part 51. At that time we will review your statewide bilingual procedures; however, any documentation previously provided need not be resubmitted.

The State of Alaska has recently submitted portions of its statewide bilingual procedures for Section 5 review in submissions dated June 2, 2008 (bilingual assistance forms and posters), June 10, 2008 (bilingual vote-by-mail materials), June 13, 2008 (bilingual vote-by-mail instructions), June 23, 2008 (Native Language and Tagalog audio on voting machines, and Native language audio CDs in polling places), and July 21, 2008 (using Native language audio CD recordings on automated phone system and website). With regard to these changes, please refer to the separate letter to you dated today, in which we state that it would be inappropriate for the Attorney General to make a preclearance determination until the related changes have been submitted for Section 5 review.

We are aware of the Order entered on July 30, 2008, in the *Nick* litigation, requiring the State to implement certain bilingual elections procedures within the Bethel Census Area in the Yup'ik language. While those specific federal court-ordered procedures do not have to be submitted for Section 5 review, any procedures outside the scope of the Order that are changes affecting voting are legally unenforceable without Section 5 preclearance. *Id.*

Additionally, your letter dated June 9, 2008, contains some misconceptions regarding the Section 5 process, specifically the standard and scope of review of Section 5 submissions by the Attorney General, the process involving comments from outside parties, and reason for and purpose of the more information letter.

The Voting Rights Reauthorization Act of 2006[1] made clear that the standard of review under Section 5 includes any discriminatory purpose and not simply "retrogressive purpose" as explained in *Reno v. Bossier Parish School Board,* 528 U.S. 320 (2000). The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights v. Metropolitan Housing Development Corp.,*

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[1] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, 5(c), 120 Stat. 577, 581

429 U.S. 252, 266 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68.

Likewise, the discriminatory effect of a voting change must be measured by whether there is retrogression from a "benchmark" practice which is legally enforceable under Section 5, either by virtue of having been precleared or not being subject to preclearance. The Attorney General's review of a submission thus requires the covered jurisdiction to accurately and completely identify the relevant benchmark practice. 28 C.F.R. 51.27(b), 51.54.

The Supreme Court has emphasized with respect to a covered jurisdiction that seeks judicial or administrative preclearance of a voting change under Section 5, "irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters . . . " *McCain v. Lybrand,* 465 U.S. 236, 247 (1984).

A request for more information, like the Department's May 19, 2008 letter, seeks to assist the submitting jurisdiction in meeting its burden of establishing an absence of discriminatory purpose and discriminatory effect, where such information was not clearly presented in the initial submission. Therefore, the questions contained in the May 19, 2008 letter are relevant to the Section 5 analysis and necessary for the Attorney General to determine whether the submitted changes were motivated by any discriminatory purpose or will have a discriminatory effect as compared to the relevant benchmark. Moreover, we believe that the State of Alaska's response to the questions contained in the May 19, 2008 letter are necessary for the Department to review the State's submissions relating to or including bilingual election procedures, and to make a determination as to discriminatory purpose and retrogressive effect.

Likewise, the scope of review of Section 5 submissions by the Attorney General is broad and includes all information and documentation before him, including information provided by the submitting jurisdiction, information provided by outside parties in the form of comment, and any other relevant information obtained through a variety of public and internal means. 28 C.F.R. 51.26 through 51.30. In its letter dated March 18, 2008, the State informed the Attorney General that it was involved in the *Nick* private litigation regarding the very issues submitted for review. Court filings in that litigation are publicly available and were reviewed during the Attorney

General's consideration of the State's submission, as were comments from third parties.

The Procedures for Section 5 review contemplate and encourage comments from third parties and the Attorney General reviews, as a matter of course, those comments received during the sixty day period. 28 C.F.R. 51.26 through 51.33. Both the Section 5 Procedures and the Freedom of Information Act, 5 U.S.C. 552, allow for persons outside of the Department to obtain a copy of the submission and any comments upon request, subject to certain restrictions of privacy and confidentiality. 28 C.F.R. 51.29. An individual or group who provides information concerning a change affecting voting may choose to keep their identity confidential. 28 C.F.R. 51.29(d). Additionally, the Attorney General may, in his discretion, inform the submitting authority of comments made by third parties, as was done in this matter. 28 C.F.R. 51.36. However, no jurisdiction has a standing request to be notified of all comments received for all submissions.

Lastly, the Section 5 Procedures provide a means for the Attorney General to seek clarification and additional information from a jurisdiction, when necessary, including when issues are raised during the sixty-day review process or information provided by the submitting authority is insufficient. 28 C.F.R. 51.37. Such procedures also allow the jurisdiction and opportunity to respond to and rebut allegations so that the Attorney General can make a fully informed determination. *Id.* During the review of the State's submission dated March 18, 2008, those issues set forth in the Department's letter dated May 19, 2008, came to light and the Attorney General sought the State's response to and clarification of same.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alaska plans to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance. If you have any questions, you should call Ms. Lema Bashir (202-305-0063) of our staff. Please refer to File No. 2008-1726 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of Alaska's minority language assistance program is before the court in *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ [Illegible]
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record

[SEAL]

U.S. Department of Justice

Civil Rights Division

CC:MSR:SMC:par
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

September 10, 2008

Ms. Gail Fenumiai
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake North Precinct; the consolidation of the Levelock Precinct into the Kokhanok-Iguigig Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake South Precinct; and resulting designation of the Tatitlek, Pedro Bay and Levelock Precincts as permanent absentee by-mail precincts for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting

Rights Act, 42 U.S.C. 1973c. We received your response to our July 14, 2008, request for additional information on July 30, 2008.

Your July 30, 2008, letter withdraws your submission from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25(a)).

Sincerely,

/s/ Maureen S. [Illegible]
for Christopher Coates
Chief, Voting Section

AMICUS CURIAE BRIEF

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

THE RECORD SUPPORTS CONGRESS' CONCLUSION THAT THE AVAILABILITY OF SECTION 2 LITIGATION IS NOT AN ADEQUATE REMEDY IN COVERED JURISDICTIONS 6

- A. Prospective Remedies From Successful Section 2 Litigation Do Not Undo Substantial Harms Flowing From Past Discriminatory Elections 7
- B. The Congressional Record Documents Numerous Obstacles To Individual Voting Rights Actions 14
- C. The Record Documents The Efficacy Of Section 5 In Protecting Section 2 Victories, Preventing Additional Harms, And Avoiding New Discriminatory Actions 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Bone Shirt v. *Hazeltine*,
336 F. Supp. 2d 976 (D.S.D. 2004) 11

Chatman v. *Spillers*,
44 F.3d 923 (11th Cir. 1995) 13

Dillard v. *Baldwin Cnty. Bd. of Educ.*,
686 F. Supp. 1459 (M.D. Ala. 1988) 10, 11

Dillard v. *City of Foley*,
926 F. Supp. 1053 (M.D. Ala. 1996) 19-20

Dillard v. *Crenshaw Cnty.*,
748 F. Supp. 819 (M.D. Ala. 1990) 20

Dillard v. *Town of North Jones*,
717 F. Supp. 1471 (M.D. Ala. 1989) 20

Houston v. *Lafayette Cnty.*,
20 F. Supp. 2d 996 (N.D. Miss. 1998) 12

Mississippi State Chapter, Operation PUSH, Inc. v. *Allain*,
674 F. Supp. 1245 (N.D. Miss. 1987) 22

Mississippi State Chapter, Operation PUSH, Inc. v. *Mabus*,
932 F.2d 400 (5th Cir. 1991) 22

Nw. Austin Mun. Util. Dist. No. One v. *Holder*,
557 U.S. 193 (2009) 14, 15

Reynolds v. *Simms*,
377 U.S. 533 (1964) 7

Shelby Cnty. v. *Holder*,
811 F. Supp. 2d 424 (D.D.C. 2011) 20

Page

South Carolina v. *Katzenbach*,
383 U.S. 301 (1966) 14, 15

Texas v. *Holder*,
__ F. Supp. 2d __, 2012 WL 3743676
(D.D.C. Aug. 30, 2012) 4-5

Texas v. *United States*,
__F. Supp. 2d __, 2012 WL 3671924
(D.D.C. Aug. 28, 2012) 4

Vander Linden v. *Hodges*,
193 F. 3d 268 (4th Cir. 1999) 12, 13

Young v. *Fordice*,
520 U.S. 273 (1997) 22

Statute:

42 U.S.C. § 1973 .... *passim*

Rule:

Supreme Court Rule 37.6 1

Legislative Materials:

An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing before the S. Comm. on the Judiciary, 109th Cong. (2006) 16, 18

TABLE OF AUTHORITIES—Continued

Page

H.R. Rep. No. 109-478 (2006) .... *passim*

Modern Enforcement of the Voting Rights Act: Hearing before the S. Comm. on the Judiciary, 109th Cong. (2006) 17,18

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing before the S. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

S. Rep. No. 109-295 (2006) 10, 16-17, 18, 20

The Continuing Need for Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary, 109th Cong. (2006).................................. *passim*

To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005)......................... 7, 8-9, 16, 18

Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary, 109th Cong. (2006)............................... 15, 16, 17

Page

Voting Rights Act: Evidence of Continued Need: Hearing before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong. (2006) .... *passim*

Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong. (2005) 9, 16, 17, 19

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ABA 2006 Report with Recommendation 3

ABA Report with Recommendation #105 2

ABA Report with Recommendation #108 3

Board of Supervisors Page, Overview, Lafayette County, Mississippi, *http://lafayettecoms.com/HTML/Main.html?Boardof Supervisors Page* (last visited Feb. 1, 2013) 12

TABLE OF AUTHORITIES—Continued

Page

Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives (June 20, 2006) 4

Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to Senate 2 (July 20, 2006) 4

STATEMENT OF INTEREST[1]

Amicus curiae the American Bar Association ("ABA") respectfully submits this brief in support of Respondents. Because Respondents, other amici, and the court below address in detail the congressional record as it relates to Section 5 preclearance, the ABA addresses a corollary issue: Section 5 is essential because the record amply supports the conclusion that Section 2 litigation alone cannot be an adequate and sufficient remedy for voting discrimination in covered jurisdictions.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

As the national voice of the legal profession, the ABA has taken special responsibility for protecting the rights guaranteed by the Constitution and fostering the rule of law. In 1973, for example, the ABA created a committee (now the Standing Committee on Election Law) to examine and develop ways to improve the federal electoral process. In 1981, when Congress began hearings on the reauthorization of the Voting Rights Act ("VRA"), this committee held a symposium attended by representatives from congressional committees, civil rights groups, academia, and states covered by the VRA. In recommending that the ABA support reauthorization of the VRA, the committee reported that the Act "has not only enhanced the political posture of minority groups, but it has also advanced the very ideals that make our country's governmental system unique in political history."[3] The committee also reported:

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

> The Voting Rights Act has been called the most effective civil rights law ever enacted in view of the large number of minority politicians elected to office subsequent to its passage. There is clear evidence that as soon as the Act comes into play, the number of minority politicians elected to office increases dramatically. Also, there is general agreement that the Act has been instrumental in

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[3] *ABA Report with Recommendation #105* (adopted August 1981), published in 106 Annual Report of the American Bar Association 742, 745 (1981), available from the ABA archives. Recommendations for ABA policy and their supporting reports are presented to the ABA's House of Delegates ("HOD"), which is comprised of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Only recommendations adopted by the HOD become ABA policy. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

> developing a political community of interest and awareness in minority communities.[4]

In 2005, the ABA adopted a policy that supported the 25-year extension of the Act that is now before the Court, stating in the accompanying Report that "despite the progress that has been made since the passage of the Act, members of minority groups still face discrimination in exercising their right to vote." *ABA 2005 Report with Recommendation #108* at 1.[5] Reauthorization would "enable continued efforts to prevent and dismantle discrimination in voting[,]" "enhance access to the political process, deter and/or document ongoing abuses and prohibit discriminatory voting practices." *Id.* As the Report concluded, "because of the persistence of discriminatory behavior in the election process," the ABA sought "to ensure that the Act remains a valuable tool in the struggle to preserve and protect voting rights for all Americans." *Id.* at 5.

The ABA reaffirmed this policy in 2006, pursuant to which it participated in the congressional debates on the VRA's 2006 reauthorization, *ABA 2006 Report with Recommendation,*[6] stating that Section 5 is one of the Act's "most important and effective" provisions; that it, along with its companion provisions, "will continue to be important factors and

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[4] *Id.* at 743.

[5] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_108.authcheckdam.pdf.

[6] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_bg_exhibit_2_3.authcheckdam.pdf. Because legislation reauthorizing the VRA was introduced in the United States House of Representatives and Senate in May 2006, but the ABA HOD did not meet until August 2006, this Report with Recommendation was adopted as ABA policy in June 2006 by the ABA's Board of Governors, acting pursuant to ABA by-laws.

safeguards in making available the right to vote to all segments of our population"; and that it therefore "must be reauthorized." *Id.* at 1, 4.[7]

The ABA continues to believe that Section 5's work is not yet complete and that the Act continues to provide critical protections against discrimination in voting. The ABA also believes, as discussed in this amicus brief, that Section 2 litigation alone would not be an adequate and sufficient remedy for voting discrimination in covered jurisdictions.

SUMMARY OF ARGUMENT

The ABA urges the Court to uphold the 2006 reauthorization of the Voting Rights Act as constitutional. The congressional record contains extensive statistical evidence and first-hand accounts demonstrating that the predicates for Section 5 preclearance continue to exist—namely, that unconstitutional voting discrimination continues in covered jurisdictions, that such discrimination would be even more prevalent without Section 5, and that Section 5 is an effective tool to combat it.[8]

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[7] The ABA's participation included letters sent to Congress supporting reauthorization. *See, e.g.*, Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives (June 20, 2006), http://www.abanet.org/poladv/letters/electionlaw/060620letter_vra_reauth_house.pdf; Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to Senate 2 (July 20, 2006), http://www.abanet.org/poladv/letters/election law/060720letter_vra_reauth_senate.pdf.

[8] Indeed, as recently as last year, courts continue to reject under Section 5 voting laws that have a discriminatory purpose or effect. *See, e.g.*, *Texas* v. *United States*, __ F. Supp. 2d __, 2012 WL 3671924, at *18 (D.D.C. Aug. 28, 2012) (redistricting plan violated Section 5 because it "was enacted with discriminatory purpose" and would increase representation gap); *Texas* v. *Holder*, __ F. Supp. 2d __, 2012 WL 3743676, at *32 (D.D.C. Aug. 30, 2012) (voter ID law violated Section 5

The congressional record also supports Congress' conclusion that Section 2 litigation alone would be an inadequate and insufficient remedy for voting discrimination in covered jurisdictions. That is the focus of this brief. Voting rights litigation under Section 2, as many ABA members know from front line experience, is extremely complex and costly. During the several years it regularly takes to litigate a Section 2 case, officials who were elected under an improper election regime continue to hold office, implement policies, and make a wide variety of decisions that remain in effect, often long after the election process that brought them to power is found to be discriminatory. Moreover, success in eliminating one discriminatory practice is often followed by the adoption of a new discriminatory practice that must be fought all over again. These effects are real and profound for representative democracy—and they cannot be remediated effectively through the prospective remedies Section 2 litigation characteristically offers.

The congressional record documents the limitations that would result from relying exclusively on Section 2 litigation to fight voting discrimination in jurisdictions with a documented history of discrimination. These limitations underscore the continuing need for Section 5 preclearance. The time, cost, and complexity of prosecuting a Section 2 case cause significant on-going harms that could be minimized by Section 5 preclearance but often cannot be remedied after the fact.

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because it would have retrogressive effect on racial minorities' effective exercise of the right to vote).

ARGUMENT

THE RECORD SUPPORTS CONGRESS' CONCLUSION THAT THE AVAILABILITY OF SECTION 2 LITIGATION IS NOT AN ADEQUATE REMEDY IN COVERED JURISDICTIONS

Petitioner and its *amici* argue that Section 2 litigation and case-by-case enforcement can adequately address present-day discrimination and should lead the Court to strike down Section 5 preclearance. The record compiled during the 2006 reauthorization contradicts that argument and led Congress to the opposite conclusion: that "case-by-case enforcement alone is not enough to combat" voting discrimination in covered jurisdictions. H.R. Rep. No. 109-478 at 57 (2006). Although Section 2 litigation is unquestionably useful, the record documents that many of the harms caused by voting discrimination are not later remediated through Section 2 litigation.

That is because elected officials enact, interpret, and enforce laws and policies, starting on the day they take office. Post-election Section 2 litigation cannot turn the clock back and undo the effects of these legislative choices. The following sections highlight materials in the legislative record that document why Section 2 litigation alone is not a sufficient remedy in jurisdictions with a history of voting discrimination. These materials reinforce why Section 5 preclearance remains necessary to prevent the fundamental harms to representative government that voting discrimination causes.

A. Prospective Remedies From Successful Section 2 Litigation Do Not Undo Substantial Harms Flowing From Past Discriminatory Elections.

Elections held under a discriminatory regime cause significant harms that are not remedied, years later, by forward-looking Section 2 remedies. Congress emphasized the magnitude of harms from abridgements of the right to vote: "The right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others." H.R. Rep. No. 109-478 at 6 (citing *Reynolds* v. *Simms*, 377 U.S. 533 (1964)). Indeed, "there is no right more fundamental than the right to participate in our democratic form of Government," because, "[t]he ability of our citizens to cast a ballot for their preferred candidate ensures that every voice is heard, most importantly, the right to vote safeguards our freedoms and all other rights enshrined in the Constitution." *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1 (2005) ("*Impact and Effectiveness*") (statement of Congressman Chabot).

Even when Section 2 litigation results in a finding that an election was discriminatory, a court is ill-equipped to undo the harms that flowed from that election, as lawyers well-versed in the remedies available for Section 2 litigants told Congress. For example, Donald M. Wright, General Counsel for the North Carolina State Board of Elections, testified from his personal experience that during the several years it takes to fully litigate a Section 2 case, "the discriminatory voting change is put into effect, which would not happen under Section 5." *Reauthorizing the Voting Rights Act's Temporary Provisions:*

Policy Perspectives and Views from the Field: Hearing before the S. Comm. on the Judiciary, 109th Cong. 121 (2006) ("*Views from the Field*"). As a result, "even after a successful Section 2 case is brought to stop a discriminatory voting change, the damage is often already done: elections may have been held under an unlawful plan, providing candidates elected under that plan an advantage in terms of incumbency and fundraising under any remedial plan that might be adopted." *Id.*

The congressional record repeatedly emphasizes this incumbency advantage that Mr. Wright highlighted. Several former and then-current elected officials—Republican and Democrat alike—reported to Congress that the incumbency benefits enjoyed by officials elected under a discriminatory regime are unlikely to be remedied by litigation that concludes years after they were elected. Colorado's former Lieutenant Governor testified to that precise point:

> Whether the incumbent achieved it by an illegal scheme, as you characterize it, or was simply elected to the position, the reality is that incumbents enjoy an advantage as it relates to opposition candidates. I mean, that has been proven clearly across the board in terms of the record of incumbency and the ability to hold on to offices.

Voting Rights Act: Evidence of Continued Need: Hearing before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong. 97 (2006) ("*Continued Need*") (testimony of Joe Rogers). So did numerous others.[9]

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[9] *See, e.g., Impact and Effectiveness* at 13-14 (testimony of Jack Kemp, former member of Congress and Secretary of Housing and Urban Development); *id.* at 43-44 (testimony of

When it comes to the incumbency advantage, "[i]t does little good to establish months, perhaps years after an election is over that the law was violated and that citizens were deprived of the opportunity to exercise their franchise in a meaningful and effective manner." *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong. 5 (2005) ("*History and Purpose*") (Congressman Nadler). Even if the election regime is changed for future elections as a result of successful Section 2 litigation, "[i]ncumbency can then preclude a subsequent remedy at the polls." *Id.*

Witnesses also made clear that many other harms flow from discriminatory elections during the time it takes to litigate a Section 2 case. *E.g., The Continuing Need for Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 15 (2006) (testimony of Pamela S. Karlan, Associate Dean, Stanford University School of Law) ("*Continuing Need*") ("Section 2 is not an adequate substitute for Section 5 because it allows the changes to go into effect, and that means you can go through several election cycles while the litigation is going on where the discriminatory change is in effect."); *Views from the Field* at 7 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.) ("but for Section 5, those voting changes, those redistricting plans would have gone into effect and would have served to minimize the opportunity of African-Americans in a State with a long and well-documented history of discrimination to participate

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Marc H. Morial, President and CEO of the National Urban League and former Mayor of New Orleans).

in the political process. They would have been left to try to find lawyers to bring complex Section 2 cases, and all the while they would have suffered from discrimination.").

Decisions in Section 2 cases litigated since the 1982 VRA reauthorization reinforce this point.[10] In one case, for instance, the court found that an at-large election scheme that had been in place *for 27 years* was specifically intended to be racially discriminatory and had "render[ed] the ability of the black voters to elect their representative substantially inferior to that of whites." *Dillard* v. *Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1467 (M.D. Ala. 1988). As a result, "black citizens of Baldwin County have been *effectively left unrepresented* because the school board representatives in the county may for the most part ignore the interests of blacks in the county without fear of political consequences." *Id.* (emphasis added). And, as the evidence established, "the Baldwin County Board of Education has been particularly unresponsive to the black citizens' concern about race relations in the county's schools, in particular concerns arising out of school desegregation and the apparent resulting displacement of black administrators." *Id.* Still, the court-ordered remedy only changed the situation going forward; it could not remedy nearly three decades of black children attending school while the school board was free to ignore their interests.

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[10] A significant portion of the congressional record consists of reports and accounts of voting rights litigation that occurred during 1982-2006. Congress reviewed the litigation reports and examined the underlying case law. *See* S. Rep. No. 109-295 at 65 (2006) (explaining staff's review of the case law). The examples discussed in this brief are drawn from these record materials.

Similarly, in *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004), the court held that a 2001 redistricting plan "dilute[d] the Indian vote and violates § 2 of the Voting Rights Act," finding "that Indians in Districts 26 and 27 have been denied an equal opportunity to access the political process." *Id.* at 1052. In reaching this conclusion, the court found that "South Dakota is largely unresponsive to the needs of Indians." *Id.* at 1043. In particular, the court catalogued numerous ways that three legislators from District 26 who took office under the 2001 plan "repeatedly voted against legislation that was of particular concern to, and supported by, Indians." *Id.* The court identified over a dozen pieces of such legislation that one or more of these legislators opposed or helped defeat. *Id.* 1043-46. It described how Indians from District 26 "frequently contact[ed]" another district's representative rather than their own representative. *Id.* at 1046. The remedy for the VRA violation, however, would only apply prospectively. *Id.* 1053. Votes that had been cast contrary to Indian interests were not revisited, and the legislators continued to serve their term in office.

As cases like *Baldwin County* and *Bone Shirt* demonstrate, during the time discriminatory election procedures are utilized, citizens whose votes are marginalized (or worse) may be subjected to the discriminatory policies and practices of improperly elected officials.

Litigation of an extended duration—while improperly elected officials continue to make decisions—is not an anomaly in individual enforcement actions. For example, it took *seven* *years* for a court to order Lafayette County, Mississippi to develop a remedial plan to cure a Section 2 violation in how the County Board of Supervisors was elected. *See Houston* v. *Lafayette Cnty.*, 20 F. Supp. 2d 996 (N.D. Miss. 1998). Elections continued to be held under the unlawful plan during the litigation. *Id.* at 998. As a result, improperly elected members of the Board of Supervisors made untold numbers of decisions over the course of nearly a decade that directly impacted Lafayette County's residents. Supervisors are responsible for "adopting the annual budget, setting tax rates, adopting orders, resolutions, or ordinances which involve county affairs, promoting growth and development of Lafayette County, appointing certain individuals to carry out the daily business of the county such as Attorney, Comptroller, County Administrator, Engineer, Purchase Clerk, and Road Manager, and many other duties as mandated by State Law."[11]

In another case, it took the plaintiffs *eight years* to obtain a ruling that a South Carolina legislative delegation system that historically "arose against the backdrop of a white supremacist movement" and "sought to diminish African-American voting power" violated the "one person, one vote" requirement derived from the Fourteenth Amendment's Equal Protection Clause. *Vander Linden* v. *Hodges*, 193 F. 3d 268, 270, 272 (4th Cir. 1999); *see also Continued Need* at 964-68 (Report by Voting Rights Project of the American Civil Liberties Union) ("*ACLU*

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[11] *Board of Supervisors Page, Overview*, Lafayette County, Mississippi, http://lafayettecoms.com/HTML/Main.html?Board of Supervisors Page (last visited Feb. 1, 2013).

Report").[12] Throughout these eight years, the delegations performed numerous governmental functions including "approving or recommending expenditures for various activities, approving local school district budgets, initiating referenda regarding special-purpose governing bodies in public service districts, approving reimbursement of expenses for county planning commissioners, approving county planning commission contracts, altering or dividing county school districts, reducing special school levies, submitting grant applications for park and recreation facilities, and making or recommending appointments." *Id.* at 276. The consequences of years of decisions by the unconstitutional legislative delegations unquestionably lasted long after the unlawful system was dismantled.

As one final example, no mayoral or city council elections were held in Butler, Georgia, *for nine years*, while Section 2 litigation was pending. *Chatman* v. *Spillers*, 44 F.3d 923 (11th Cir. 1995). Ultimately, the Eleventh Circuit had to direct the district court to dissolve its stay and order a special election. When that election occurred, two black candidates were elected to the city council for the first time in the city's history. *Continued Need* at 828-30 (*ACLU Report*).

In these cases, and numerous others, the courts ordered forward-looking relief—leaving victims to hope that, in the next election, they would not be denied an equal voice in governance. But the legislative legacies of officials elected through the discriminatory practices would undoubtedly be felt long after the next election.

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[12] The Fourth Circuit eventually resolved the "one person, one vote" issue in plaintiffs' favor, without needing to reach plaintiffs' other voting claims. *Vander Linden*, 193 F. 3d at 272.

B. The Congressional Record Documents Numerous Obstacles To Individual Voting Rights Actions.

Congress' conclusion that case-by-case enforcement actions would be insufficient to combat voting discrimination in jurisdictions with a history of discrimination is further buttressed by the evidence it compiled documenting impediments to litigating individual actions. Voting rights lawyers told Congress that these cases are especially complex, difficult, time consuming, and expensive. The inordinate amount of resources and expertise it typically takes to successfully litigate such cases creates real obstacles, even to filing suit.

In upholding the VRA in *South Carolina* v. *Katzenbach*, the Court acknowledged the historical fact that case-by-case litigation has previously proven inadequate to stop voting discrimination in some jurisdictions. 383 U.S. 301, 328 (1966) ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."). It emphasized this point again in *Northwest Austin Municipal Utility District No. One* v. *Holder*. 557 U.S. 193, 197-98 (2009) ("Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in 'contriving new rules' to continue violating the Fifteenth Amendment 'in the face of adverse federal court decrees.'") (citation omitted).

The 2006 legislative record confirms that the difficult and complex nature of individual voting rights litigation persists as a stumbling block to reliance on Section 2 alone. Section 2 litigation remains "slow and expensive." *Northwest Austin*, 557 U.S. at 197. If anything, testimony from lawyers in the field reveals that such litigation has only gotten slower, more expensive, and more arduous since *Katzenbach*. Section 2 cases are among the most difficult cases to prosecute and have become more complex as voting discrimination has evolved from the blatant forms of discrimination that characterized the 1965 record to subtler but persistent discrimination like vote dilution that is more likely to be at issue today. H.R. Rep. No. 109-478 at 6 ("Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice.").

The following record materials illustrate the nature of individual enforcement actions.

- *Section 2 cases are enormously complex.*

"The Administrative Office of U.S. Courts ranks different types of cases by complexity and Section 2 cases, and voting rights cases in general, have among the highest rating. They are up there with securities cases and antitrust cases in the complexity and time requirements rating. A Section 2 case is not a picnic. It is one of the hardest things to do that there is, and Section 5 was designed exactly to avoid that kind of difficulty." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 20 (2006) (testimony of Armand Derfner, Attorney with Derfner, Altman, & Wilborn) ("*Benefits and Costs*").

- *Section 2 cases impose an extraordinary workload on courts and parties.*

"According to a study published by the Federal Judicial Center, voting rights cases impose almost four times the judicial workload of the average case" and "are more work intensive than all but five of the sixty-three types of cases that come before the federal district courts." *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 141 (2006) (responses of Laughlin McDonald, Director, ACLU Voting Rights Project) ("*Introduction to Expiring Provisions*").

- *Section 2 cases are resource-intensive and take years to litigate.*

"Section 2 requires costly and time-consuming litigation. It also requires the bad change to go into effect and even be implemented for several election cycles before challengers can gather enough evidence to mount a successful court challenge, which is also incredibly costly, and although there is some attorney fees involved, you can never get back the money you put into section 2 cases." *History and Purpose* at 92 (testimony of Nina Perales, Regional Counsel for the Mexican American Legal Defense and Educational Fund).

"The costs by minority voters to hire a private attorney under section 2 * * * can run in the millions of dollars." *Impact and Effectiveness* at 42 (testimony of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Educational Fund); *see also Views from the*

Field at 121 (response of Donald M. Wright) (typical voting rights cases can take several years to litigate).[13]

"Adequate legal, financial and human resources *did* not exist in Mississippi in the past 40 years to bring a lawsuit in lieu of every one of the 169 objections that have been issued. Those resources do not exist today, and given persistent socio-economic disparities between Blacks and whites, I have little hope that this reality will change in the near future." *Modern Enforcement of the Voting Rights Act: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 96 (2006) (response of Robert B. McDuff, Attorney and Vice Chair of the Board of Directors of the Mississippi Center for Justice) ("*Modern Enforcement*").

A private plaintiffs' attorney reported that "we had to put in over 2000 hours representing the plaintiffs, in addition to many more hours that the Justice Department put in" on a successful 2001 suit challenging the method for electing the County Council for Charleston, South Carolina. *Benefits and Costs* at 80 (answers of Armand Derfner); *see*

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[13] Compounding the burden for victims of discrimination, a putative plaintiff must have the resources *up-front* to hire and fund the lawyers, the necessary cadre of experts, and all of the associated litigation costs for multi-year litigation. Petitioner's suggestion that concerns about costs may be addressed by a post-litigation award of fees, Pet. Br. 33, does not comport with reality. Voting rights lawyers repeatedly told Congress that potential litigants simply do not have the resources to take on the substantial expenses that the plaintiff bears—often for years—in these cases and that even in successful cases, voting rights lawyers do not expect to be fully compensated. *History and Purpose* at 92 (testimony of Nina Perales); *Views from the Field* at 121 (response of Donald M. Wright).

also Impact and Effectiveness (statement of Joe Rogers); H.R. Rep. No. 109-478 at 39.

- *Section 2 cases require extensive expert testimony.*

"A typical Section 2 case requires at a minimum a demographer to draw plans to prove geographic compactness, and a statistician to prove political cohesion and legally significant white bloc voting. In addition, a typical case may require the services of a political scientist, a historian, an anthropologist, or other specialist." *Introduction to Expiring Provisions* at 141 (responses of Laughlin McDonald).

"To be appropriately presented, these cases require costly experts including historians, social scientists and statisticians, among others." *Modern Enforcement* at 96 (response of Robert B. McDuff).

Expert fees alone can total "more than one hundred thousand dollars." *Views from the Field* at 121 (response of Donald M. Wright).

- *There is a small bar of attorneys with the experience and qualifications to litigate Section 2 cases.*

"Having litigated a great number of voting rights matters in the State of Mississippi, I know that there are not enough lawyers who specialize in this area to carry the load." *Modern Enforcement at* 96 (response of Robert B. McDuff).

"It is a very small bar of [lawyers] who do Section 2 litigation and who have the expertise to do it." *Continuing Need* at 15 (testimony of Pamela S. Karlan).

Voters in "local communities and particularly in rural areas * * * do not have access to the means to bring litigation under Section 2," even though "they are often the most vulnerable to discriminatory practices such as racially disparate annexation practices, that have significant impact on their property values, standing[sic] of living and their ability to participate equally in the election process." *History and Purpose* at 84 (statement of Anita Earls, Director of Advocacy, Center for Civil Rights); *see also Continuing Need* at 15 (testimony of Prof. Pamela S. Karlan) ("When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on").

- *Section 2 cases are ill-suited to preserving litigation victories.*

A number of the cases in the legislative record demonstrate that individual enforcement actions require multiple rounds of litigation, as recalcitrant jurisdictions simply change their tactics after initial defeats and continue to employ discriminatory electoral procedures after conceding, or after a court finding, that their election procedures were unlawful under Section 2. When this happens, hard-earned victories and their resultant remedies are of little value unless litigation is reinstituted. And during the reinstituted litigation, discrimination victims continue to be denied their fundamental rights and continue to be subject to the actions and legacy of incumbent officials who continue to be elected based on discriminatory procedures.

For instance, after plaintiffs challenged the City of Foley, Alabama's at-large election method under Section 2—and won—Foley responded by implementing a racially discriminatory annexation policy, and the plaintiffs had to sue all over again. *Dillard* v. *City of Foley*, 926 F. Supp. 1053 (M.D. Ala.

1995).[14] In that next round of litigation, the city entered into a consent decree acknowledging that the plaintiffs had established a prima facie violation of Section 2 and the Constitution in the annexation policy. *Id.* at 1059.

Similarly, another Alabama jurisdiction—North Jones—conceded that "its at-large system for electing members of the town council was racially discriminatory in violation of [Section] 2" and entered into a consent decree. *Dillard* v. *Town of North Jones*, 717 F. Supp. 1471, 1473 (M.D. Ala. 1989). Despite North Jones' admission, plaintiffs had to return to the district court as a result of the very next election. This time, the court found that North Jones had moved from a discriminatory at-large system to a system in which the mayor intentionally discriminated against black candidates by refusing to provide them with necessary registration forms and refusing to swear them in after they were elected. *Id.* at 1476; *see also* S. Rep. No. 109-295 at 126-27.

* * *

As these examples from the legislative record make clear, the evidence before Congress concerning the modern nature of Section 2 voting rights litigation and its remedies was more than sufficient to support Congress' conclusion that Section 2 litigation is not sufficient to address voting discrimination in covered jurisdictions and is not an adequate substitute for Section 5's preclearance requirements.

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[14] *Foley* was a part of the so-called "Dillard litigation" initiated in the 1980s and continuing through the 2000s that eventually "raised claims against a total of 183 Alabama cities, counties, and school boards that employed at-large methods of election, including Shelby County." *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424, 442 (D.D.C. 2011). Petitioner Shelby County was a party in that litigation. Shelby County entered into a consent decree and agreed to alter its electoral system. *See Dillard* v. *Crenshaw Cnty.*, 748 F. Supp. 819, 821-23 (M.D. Ala. 1990) (describing Shelby County's involvement in the Dillard litigation).

C. The Record Documents The Efficacy Of Section 5 In Protecting Section 2 Victories, Preventing Additional Harms, And Avoiding New Discriminatory Actions.

Congress compiled extensive evidence that Section 5 fills the gaps left by Section 2 remedies. It "has enabled the Federal Government and court to stay one step ahead of covered jurisdictions that have a documented history of denying minorities the protections guaranteed by the Constitution." H.R. Rep. No. 109-478 at 65. Among other benefits, preclearance prevents relitigation of victories and effectively blocks new discriminatory measures from being implemented before they can result in further injuries. And in so doing, it protects the integrity of future elections and our system of government.

Congress specifically found that Section 5 "ha[s] been and continue[s] to be a shield that prevents backsliding from the gains previously won." *Id.* at 53. It made that finding based on a record that demonstrated Section 5's efficacy in blocking deliberate, repeated attempts by covered jurisdictions to reenact a voting regime that a court previously had struck down as discriminatory. *Id.* at 39-40.

Among others, in 1995, the Mississippi state legislature attempted to resurrect a dual registration system "under the guise of complying with the National Voter Registration Act of 1993 (NVRA)," even though a federal court had struck down the same system as discriminatory years earlier. *Id.* at 39.[15] But, "[k]nowing that maintenance of the two registration systems had previously been struck down as discriminatory, the State refused to submit the change for preclearance under Section 5." *Id.* Following a Section 5 enforcement action, and a unanimous decision by this Court holding that the state must submit its plan, *see Young* v. *Fordice*, 520 U.S. 273 (1997), Mississippi finally submitted its plan to the Department of Justice ("DOJ") for preclearance. DOJ objected, and the system was not reinstituted. *See Continued Need* at 91 (statement of Joe Rogers).

In a similar fashion, in 2003, South Carolina "'enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier * * * been found to dilute minority voting strength in violation of Section 2,'" H.R. Rep. No. 109-478 at 39 (quoting *Continued Need* at 401 (*ACLU Report*)). When the DOJ denied preclearance, the state was prevented from re-implementing the same system that previously had been struck down. *Id.* at 40.

As the Mississippi and South Carolina examples (and others[16]) demonstrate, Section 5 prevented the victims of past voting discrimination from having to use Section 2 litigation to challenge—again—the same discriminatory system a court had already struck down and from having to live under it again while they did so.

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[15] The earlier victory had required plaintiffs to endure seven years of litigation. *See Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400 (5th Cir. 1991); *Mississippi State Chapter, Operation PUSH, Inc.* v. *Allain*, 674 F. Supp. 1245, 1241 (N.D. Miss. 1987).

[16] For additional examples of Section 5 objections spurred by a jurisdiction's attempt to evade or undermine the effect of a successful Section 2 action, *see* Federal Resp.'s Br. at 36 n.5.

Congress also considered numerous reports from witnesses, many of them lawyers on the front lines of voting rights litigation, documenting examples of new or additional discriminatory actions that Section 5 effectively blocked, often without first demanding that the victims suffer the discriminatory voting practice.

For example, Albany, Georgia submitted a proposed redistricting plan following the 2000 census that was rejected by the DOJ under Section 5. In its objection, the DOJ noted that the black population in Ward 4 had steadily increased over two decades, but redistricting had decreased the black population in Ward 4 "'in order to forestall the creation of a majority black district.'" *Continued Need* at 400 (*ACLU Report*) (quoting Letter from J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr. (Sept. 23, 2002). The DOJ's objection concluded that the plan was implicitly designed "'with the purpose to limit and retrogress the increased black voting strength in Ward 4.'" *Id.* Absent Section 5, these "elections would have gone forward under a plan in which purposeful discrimination was 'implicit,' and which could only have been challenged in time consuming vote dilution litigation under Section 2." *Id.* at 400-01; *see also* H.R. Rep. No. 109-478 at 37-38.

In another example, in Kilmichael, Mississippi, three weeks before a 2001 municipal election with an "unprecedented number" of black candidates, "the town's mayor and the all white five-member Board of Aldermen canceled the election." *Continued Need* at 1282 ("Promises to Keep: The Impact of the Voting Rights Act in 2006"). In objecting to this change under Section 5, the DOJ found "that the cancellation occurred after Census data revealed that African Americans had become a majority in the town." *Id.* After the town failed to reschedule the election, DOJ directed it to hold one in 2003, where Kilmichael's first black mayor was elected. *Id.; see also* H.R. Rep. No. 109-478 at 36-37.

As a final example, in Waller County, Texas, two students at historically black Prairie View A&M University were candidates for local office in 2004. "[A] month before the election, the Waller County Commissioners' Court voted to reduce the availability of early voting at the polling place closest to campus, from seventeen hours over two days to six hours in one day." *Continued Need* at 185 (Report by the National Commission on the Voting Rights Act). Early voting was crucial, because the election was scheduled during spring break. After a Section 5 action was filed seeking to prevent the county from implementing this change without preclearance, "[c]ounty officials abandoned the change and restored the additional eleven hours," which mooted the suit but provided relief before the election. *Id.* at 186. As a result, "[a]bout three hundred Prairie View students took advantage of the early voting period, compared to the sixty who would vote on the day of the primary, and the Prairie View student running for a seat on the commissioners' court narrowly prevailed." *Id.*

As these examples and all the others in this brief reinforce, the record Congress compiled in 2006 documents in detail the continuing need for Section 5 and the reasons that victims of voting discrimination cannot rely solely on Section 2 litigation to fight discrimination in covered jurisdictions. Based on the record it compiled, Congress reasonably concluded that there remains a continuing need for Section 5 preclearance.

* * *

As Chairman Sensenbrenner aptly put it, "[t]here is no more fundamental right than the right to vote because in a democracy, only the right to vote can protect all the other rights." H.R. Rep. No. 109-478 at 117. The ABA agrees that no right is more "central to our system of Government" than the right to vote, *id.*, and it urges the Court to uphold the VRA reauthorization.

CONCLUSION

For the foregoing reasons and those in Respondents' briefs, the Court should affirm the decision of the D.C. Circuit and uphold the constitutionality of the 2006 Voting Rights Act reauthorization.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

SHELBY COUNTY, ALABAMA
PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ***ET AL.*,**
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioner

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QUESTION PRESENTED

As reformulated by this Court, this case presents the question:

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Question Presented i
Table of Contents ii
Table of Authorities iiiii
Statement of Interest 1
Preliminary Statement 2
Summary of Argument 6
Argument 8
  1. Section 5 limits covered jurisdictions from taking good government steps that non-covered jurisdictions can take without fear of denial of preclearance or second-guessing of preclearance submissions 8
  A. Section 5 affects a covered State's ability to adopt methods to identify the qualifications of voters 9
  B. Section 5 derailed an otherwise appropriate request for a recount in Alabama. 12
  C. Section 5 blocked Alabama's absentee ballot reform 16
  2. Congress erred in relying on the gross number of § 2 cases as a factor supporting its extension of § 5 for another 25 years. 18
CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Arizona v. Inter Tribal Council of Arizona, No. 12-71 1

Arizona v. United States ("*Arizona*"), No. 11-182, ___ U.S. ___ (June 25, 2012) 1

Boxx v. Bennett, 50 F. Supp. 2d 1219 (M.D. Ala. 1999) 13, 14, 16

Chamber of Commerce v. Whiting, No. 09-115, 563 U.S. __, 131 S. Ct. 1968 (2011) 1

City of Mobile v. Bolden, 446 U.S. 55 (1980) 19

Common Cause of Georgia v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007) 11

Crawford v. Marion County Elections Board, 553 U.S. 181 (2008) 1, 10

Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459 (M.D. Ala. 1988) 23, 24, 26, 28

Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870 (M.D. Ala. 1988) 25, 28

Dillard v. Crenshaw County Commission, 831 F. 2d 246 (11th Cir. 1987) 22, 23, 24, 28

Dillard v. North Johns, 717 F. Supp. 1471 (M.D. Ala. 1989) 24, 25, 28

Eubanks v. Hale, 752 So. 2d 1113 (Ala. 1999) .. 14, 15

Georgia v. Ashcroft, 539 U.S. 461 (2003) 4, 5

Holder v. Hall, 512 U.S. 874 (1994) 26

Horne v. Flores, 557 U.S. 433, 129 S. Ct. 2579 (2009) 1

Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) 10

Lance v. Coffman, 549 U.S. 437 (2007) 28

Lopez v. Monterey County, 525 U.S. 266 (1999) 3

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 6

Nipper v. Smith, 39 F. 3d 1494 (11th Cir, 1994)...... 26

Northwest Austin Municipal Utility District Number 1 v. Holder, 129 S. Ct. 2504 (2009) 2, 3, 7, 8

Northwest Austin, 129 S. Ct. at 2512 3

Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000)... 4, 5

Rice v. Cayetano, 528 U.S. 495 (2000) 6

Shelby County v. Holder, 679 F. Supp. 2d 848 (D.D.C. 2012)..*passim*

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 2, 3, 4, 6

Texas v. Holder, __ F. Supp. 2d __, 2012 WL 3743676 (D.D.C. October 12, 2012).................................. 11

United States v. Marengo County Commission, 731 F. 2d 1546 (11th Cir. 1984)................................. 22

Ward v. State of Alabama, 31 F. Supp.2d 968 (M.D. Ala. 1998) 17

Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala. 1992) 21, 27

White v. Alabama, 74 F. 3d 1058 (11th Cir. 1996)... 27

Wilson v. Minor, 220 F. 3d 1297 (11th Cir. 2000)..... 27

Statutes

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub.L. 109-246, 120 Stat. 577 4

Fla. Stat. 102.141(7).. 15

Alabama Code

Ala. Code (1975) § 17-15-7(2).................................. 15

Ala. Code (2005) § 17-13-12(j)................................. 16

Ala. Code (2005) §17-13-12(a) 16
Ala. Code (2008) § 11-3-1(c) 28

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Abigail Thernstrom, VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS (2009) 2

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John Fund and Hans von Spakovsky, WHO'S COUNTING? HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK (2012), at 106 .... 11, 16

Winthrop E. Johnson, COUNTING VOTES IN ALABAMA: WHEN LAWYERS TAKE OVER A STATE'S POLITICS (1999) 16

Congressional Records

151 Cong. Rec. H5131, H5181 (daily ed. July 13, 2006) 6

Congressional Reports

Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary, 201, (2006) .... *passim*

STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. Inter Tribal Council of Arizona*, No. 12-71; *Arizona v. United States* ("*Arizona*"), No. 11-182, ___ U.S. ___ (June 25, 2012); *Chamber of Commerce v. Whiting*, No. 09-115, 563 U.S. __, 131 S. Ct. 1968 (2011), *Horne v. Flores*, 557 U.S. 433, n. 10, 129 S. Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief), and *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008).

AULDF supports the Petitioners' arguments and agrees with its reasons for requesting reversal of the decision below. AULDF writes separately to identify instances in which litigants have used § 5 for political ends to block state efforts to implement reasonable, non-discriminatory reforms in voting laws and to explain why hesitation is justified before relying on the gross number of successful § 2 claims in covered jurisdictions to justify the extension of § 5's coverage until 2031.

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[1] Pursuant to Rule 37.2(b), *amicus* certifies that counsel for Respondents, Petitioners and Respondents-Intervenors have provided the Clerk with blanket consents to file amicus briefs. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

As this Court recently observed, "The historical accomplishments of the Voting Rights Act are undeniable." *Northwest Austin Municipal Utility District Number 1 v. Holder*, 129 S. Ct. 2504 (2009). When Congress devised the coverage formula in § 4(b) of the Act in 1965, it captured the jurisdictions it wanted to capture by focusing on the States that, as of November 1, 1964, used tests and devices to limit voter participation or had voter registration and turnout rates of less than 50% in the November 1964 presidential election. At that time, for example, only 19.45% of the black residents of voting age in Alabama were registered to vote. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). By the presidential election of 2004, the average African-American registration in the original covered states had improved to 68.2%, a rate higher than the rest of the country, and Alabama had a minority turnout rate of "almost 70 percent." See Abigail Thernstrom, VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS (2009), at 192 ("Voting Rights and Wrongs"). In fact, the rate of minority voter turnout exceeded that of the majority in Georgia and Mississippi in that 2004 election.

Those and other changes in the performance and behavior in the covered jurisdictions prompted this Court to note that "the Act imposes current burdens and must be justified by present needs." *Northwest Austin*, 129 S. Ct. at 2512. This case presents the question whether those "current burdens," which will now be in place until 2031, can be justified by "present needs." In the judgment of AULDF, the current application of § 5, which is governed by a statutory formula that uses 40-year old election results, cannot be so justified.

The history of the Voting Rights Act, generally, and § 5 in particular, is one that has responded to positive change on the part of the covered jurisdictions with continued and increased oversight. For its part, this Court has recognized that § 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking imposes substantial federalism costs." *Northwest Austin*, 129 S. Ct. at 2512 (quoting *Lopez v. Monterey County*, 525 U.S. 266 (1999)(internal quotation deleted). With time, the intrusion, which was justifiable at the outset, should be seen as more difficult to sustain. Indeed, to the extent that the initial intrusion was seen as temporary and based on "exceptional" conditions, see *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), the now-expected 66-year life of § 5 strains the meaning of both concepts.

AULDF recognizes that, when it first upheld §§ 4(b) and 5 against a constitutional challenge in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court saw that Congress faced an "unremitting and ingenious defiance of the Constitution" which the then-existing legal remedies could not defeat. This Court recognized that, while conditioning the implementation of changes in the voting laws and practices in the covered jurisdictions on administrative or judicial preclearance was an "uncommon exercise of congressional power, ... exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334. Those "exceptional conditions" included the covered jurisdictions' creation of new rules "for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.*, at 335.

The "exceptional conditions" which justified an "uncommon exercise of congressional power" in 1965 are no longer present. Objective indicia like voter registration and turnout rates and the number of elected African-American officials attest to the significance of the change in the covered jurisdictions.

Notwithstanding the accomplishments of the covered jurisdictions, Congress decided to reauthorize § 5 for another 25 years in 2006. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub.L. 109-246, 120 Stat. 577. It didn't stop at another 25 years, though. Instead, Congress rewarded the covered jurisdictions for their progress by tightening the screws. It overturned this Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000).

Overturning *Georgia v. Ashcroft* "restrict[ed] the ability of states to experiment with different methods of maintaining (or perhaps even expanding) minority influence" on elected bodies. *Shelby County v. Holder*, 679 F. Supp. 2d 848, 886 (D.D.C. 2012)(Williams, J. dissenting). Instead, § 5 now "not only mandates race-conscious decision making, but a particular brand of it." *Id.*

Congress also overturned this Court's decision in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000), expanding the scope of the discriminatory purpose inquiry to include "any discriminatory purpose." Absent that change, the administrative and judicial inquiry in § 5 submissions and cases would have been limited to looking for a retrogressive purpose, or one that would leave minority voters in a worse position than before the change. Now, the Department of Justice can decline to preclear a covered jurisdiction's proposed change that leaves the minority in the same position as before if it finds that the majority acted with a discriminatory purpose. And the covered jurisdiction bears the burden of proving a negative—that it did not act with a discriminatory purpose.

Even as Congress tightened the screws on the covered jurisdictions, it left the coverage formula alone. That formula still looks at the 1964, 1968, and 1972 presidential elections and does not account for subsequent events. In fact, as Shelby County notes, if the formula looked at voting data for the 1996, 2000, and 2004 presidential elections, only Hawaii would be covered. Pet. Br. at 44, citing 151

Cong. Rec. H5131, H5181 (daily ed. July 13, 2006); cf. *Rice v. Cayetano*, 528 U.S. 495 (2000)(Hawaii's limitation of voting for members of Office of Native Affairs to Native Hawaiians violates the Fifteenth Amendment.).

SUMMARY OF ARGUMENT

More than eighty years ago, Justice Brandeis famously observed, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That opportunity belongs to each State that enters the Union.

The Voting Rights Act has been found to be an authorized departure from the "doctrine of equality of the states" in order to provide "remedies for local evils which have subsequently appeared." ***South Carolina v. Katzenbach***, 383 U.S. at 328-29. This Court concluded that the Fifteenth Amendment empowered Congress to attack those local evils, which were reflected in the use of discriminatorily administered tests for voting and low rates of minority registration and turnout, through an "uncommon exercise of congressional power" that could be justified as a response to the then-prevailing "exceptional conditions." *Id.*, at 334.

Section 5 of the Voting Rights Act limits the ability of some States to serve as the "laboratories" which Justice Brandeis envisioned. He spoke of "novel" steps, but there is little novel about voter ID laws, automatic recounts in tight elections, or absentee ballot reform. Those are unexceptional good government measures that a State might attempt. Section 5 blocks that kind of experimentation in some States, but not in others. Thus, Indiana can implement voter ID, but Texas cannot. Likewise, Alabama has had difficulty implementing automatic recount and absentee ballot reform measures, among other things. In order to justify the continuing "departure from the fundamental principle of equal sovereignty," this Court should "require a showing that [the Voting Rights Act's] disparate geographic coverage is sufficiently related to the problem that it targets." *Northwest Austin*, 129 S. Ct. at 2512.

When Congress decided to continue treating the covered States differently for another 25 years in 2006, one of the factors it relied on was the number of § 2 cases that were filed and brought to a successful conclusion in the covered States. Nearly 200 of the 653 cases that came to the attention of Congress are from Alabama. But the vast majority of those decisions, more than 180 of them, involved the same claim, a challenge to at-large election schemes, that was pursued against county commissions, county boards of education, and municipalities throughout Alabama. Treating those cases as 200 different cases dramatically overstates the differences between them. If treated as one theory, the gross number of cases becomes less and the difference between covered and non-covered jurisdictions shrinks.

Indeed, when the justifications invoked by Congress are examined critically, as Shelby County, AULDF, and other amici will do, it should be clear to this Court that the "current burdens" imposed on the covered jurisdictions cannot be "justified by current needs." *Northwest Austin*, 129 S. Ct. at 2511. This Court should require Congress to revisit the formula it has used for more than 40 years as a basis for departing from the "fundamental principle of equal sovereignty." *Id.*, at 2512.

ARGUMENT

1. Section 5 limits covered jurisdictions from taking good government steps that non-covered jurisdictions can take without fear of denial of preclearance or second-guessing of preclearance submissions.

In at least three instances, § 5 has hampered the ability of a covered State to implement what it sees as good government reforms. First, Texas has been unable to implement its voter ID law, even though it is unclear whether it disenfranchises anyone, because a three-judge court found its attempt to disprove retrogression unpersuasive. Second, two cases from Alabama illustrate how, notwithstanding a State's good faith efforts, its compliance with § 5 will not necessarily bring it the peace of mind envisioned by Congress and the Constitution. Instead, in both cases, the State found itself with laws that could not be enforced because a court found fault with the State's submissions, which had already been approved by the Department of Justice.

A. Section 5 affects a covered State's ability to adopt methods to identify the qualifications of voters.

Since 1965, §§ 4(b) and 5 of the Voting Rights Act have divided the States into covered and non-covered jurisdictions. The non-covered jurisdictions can change their election-related laws without seeking permission from the Attorney General or the United States District Court for the District of Columbia. The non-covered jurisdictions can also do things that the covered jurisdictions cannot.

The lower court joined Congress in reasoning that § 5 has only a positive deterrent effect, blocking the covered jurisdictions from making changes that might be deemed to have the purpose or effect of impairing the ability of minority voters to participate in the electoral process. *Shelby County v. Holder*, 679 F. 3d at 871-72. But that is only part of the picture. Covered jurisdictions can also be blocked from making changes that a State might see as beneficial or at least non-discriminatory, as the following examples show. And those changes can be made by non-covered jurisdictions with far less difficulty.

Take voter ID, for example. As this Court has explained, "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). Accordingly, there is nothing facially unconstitutional about requiring prospective voters to present photo identification before voting. The States' interests in deterring and detecting voter fraud, safeguarding voter confidence, and counting only the votes of eligible voters are sufficient to justify a State's decision to enact such a requirement.

Significantly, when the parties challenging the validity of voter identification laws have been put to their proof, they have been unable to identify anyone who was prevented from voting because of the requirement. In Indiana, the district court found that the challengers had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Indiana law] or who will have his or her right to vote unduly burdened by its requirements." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006). Similarly, in Georgia litigation which followed the administrative preclearance of a voter identification law, the district court concluded, "[T]he fact that Plaintiffs, in spite of their efforts, have failed to uncover anyone 'who can attest that he/she will be prevented from voting' provides significant support for a conclusion that the photo ID requirement does not unduly burden the right to vote." *Common*

Cause of Georgia v. Billups, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007).[2]

In contrast, when a covered jurisdiction seeks preclearance, it bears the burden of showing that the change will not be discriminatory. In *Texas v. Holder*, __ F. Supp. 2d __, 2012 WL 3743676 (D.D.C. October 12, 2012) (three-judge court), the court declined to judicially preclear the Texas voter ID law because it would likely have a retrogressive effect. After criticizing the studies the parties offered to show the possession or non-possession of qualifying identification papers on the part of voters, the court stated, "[N]o party has submitted reliable evidence as to the number of Texas voters who lack photo ID, much less the rate of ID possession among different racial groups." *Id.*, at [44]. The effect of that failure fell on Texas because the burden was Texas's to bear; the court explained that it had "little trouble" ruling against Texas "[b]ecause all of Texas's evidence on retrogression is some combination of invalid, irrelevant, and unreliable ...." *Id.*, at [44-45].[3]

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[2] The Plaintiffs' efforts in the Georgia case included an e-mail from Plaintiffs' counsel that a participant in the ACLU's Voting Rights Project forwarded to his "Key Georgia Contacts" under the subject line "URGENT REQUEST FOR HELP IN THE PHOTO ID CASE." John Fund and Hans von Spakovsky, WHO'S COUNTING? HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK (2012), at 65 ("WHO'S COUNTING?"). Fund and von Spakovsky write, "This broad appeal, sent to advocacy groups, churches, and other organizations all over Georgia, failed to turn up anyone to support the claim made by the plaintiffs that the voter ID law would prevent any Georgian from voting." *Id.*

In short, § 5 divides the States into two camps even with respect to their ability to use an election administration tool that this Court has said is constitutional. That division demonstrates that the § 5 preclearance process does not solely block disfavored practices.

B. Section 5 derailed an otherwise appropriate request for a recount in Alabama.

In 1999, fifteen years after the original submission, Alabama learned that its 1984 submission of new regulations governing the use of electronic voting equipment was only partially valid. The State learned that fact when a challenger who didn't want the recount successfully invoked § 5 to block the incumbent's effort to obtain one, when the first count of votes put them only 37 votes apart out of more than 212,000 cast.

The 1998 election for Sheriff of Jefferson County, Alabama, produced an instance in which the

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[3] The court said that its decision didn't "hinge merely on Texas's failure to prove a negative." *Id.*, at [45] (internal quotation and citation omitted). Instead, it went on to set out what it saw as a retrogressive effect.

Texas has declared that it intends to appeal from the three-judge court's denial of judicial preclearance, but further proceedings have been stayed pending a decision in this case on whether the reauthorization of § 5 in 2006, using the formula in § 4(b), is a constitutional exercise of Congress's powers.

State was not allowed to conduct a recount in a tight election, the margin of which was 37 votes. At that time, Alabama statutory law limited the grounds for an election contest and did not provide for a recount in advance of filing an election contest. A regulation promulgated in 1983 by the State's Electronic Voting Committee, however, empowered a qualified elector to request a recount of the ballots cast on electronic voting equipment before filing a contest and to use the results of the recount as a basis for the contest if it produced a count large enough to change the result. When the State submitted the Electronic Voting Committee's regulations, all of which were brand new, for preclearance in 1984, it pointed to the use of the new equipment, but not the basis for contest. See *Boxx v. Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999).

The 1998 election was the first time anyone had attempted to use the recount provision in the regulations, but a three-judge court blocked that effort. It concluded that the State's 1984 preclearance letter did "not put the Attorney General on notice that the submission included a provision creating a pre-election contest recount which could serve as a new basis for an election contest under Alabama law." *Id.*, at 1227.[4] More specifically, the court found that the State "did not identify the recount provision in an unambiguous and recordable manner" and rejected the State's contention that the regulations, which applied only where electronic voting equipment was used, stood on their own.

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[4] AULDF notes that the Justice Department appeared as an amicus in support of the plaintiffs in *Boxx*. Nonetheless, the court's focus remained on what the State told the Attorney General, not what the Attorney General might have known.

In short, 15 years after the State submitted the regulations for administrative preclearance, the State could not use them because it didn't use the right words. The Department of Justice never said it didn't know about the change; despite its amicus participation, the court didn't require it to say what it knew or didn't know.

In a concurring opinion, one judge suggested that empowering any qualified elector to ask for a recount had the potential for discriminatory application. He pointed to statements of the state court trial judge considering the actual election contest to the effect that the challengers were targeting black voters and precincts. *Boxx*, 50 F. Supp. 2d at 1232 (Thompson, J., concurring). The statements on which the concurring judge relied proved unworthy of that reliance.

When it reviewed the appeal from the election contest, the Alabama Supreme Court found numerous problems with that trial judge's procedures and with his ability to render an accurate count. *Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999). The Alabama Supreme Court noted that the contestants identified 274 voters suspected of having cast illegal or invalid ballots. Of the 274, only 64 were from the Bessemer Division of Jefferson County; the contestants also pointed to between 100 and 200 absentee ballots in the Birmingham

Division that were claimed to be invalid. *Id.*, at 1119. The trial judge ruled in favor of the challenger stating that he had counted "every single uncounted ballot" and that the challenger won. *Id.*, at 1120. The Supreme Court of Alabama twice remanded the case, the first time so that the trial judge could specify the materials he relied on and allow the parties to examine them as Alabama law required. *Id.*, at 1120 citing Ala. Code (1975) § 17-15-7(2).[5] After the trial court complied with that order, the Alabama Supreme Court reviewed those materials and found the trial court's count to be incorrect. In the end, the Alabama Supreme Court found that the incumbent won by 6 votes. *Id.*, at 1162.

An election result this close would have triggered an automatic recount in at least one neighboring non-covered jurisdiction. See, e.g., Fla. Stat. 102.141(7). The effect of the three-judge court's ruling was to deny Alabama the chance to conduct a recount under similar circumstances.

In 2003, Alabama amended its election laws to allow for an automatic recount when the margin is

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[5] In pertinent part, Ala. Code (1975) § 17-15-7(2), provides that, when a court examines election materials pursuant to a contest, it should consider, among other things, "the need to insure that votes are accurately cast and counted" and "the need to ensure that all persons and candidates involved in the election have the opportunity to observe the examination and ensure that an examination does not wrongfully alter the election results." *Id.* In addition, "The court must, when so requested by any party or candidate involved in the contest, allow such party or candidate, and his agents, to observe all of the examination proceedings." *Id.*

"not more than one-half of one percent of the ballots cast for the office, or the ballot measure," unless the defeated candidate waives the procedure. Ala. Code (2005) §17-13-12(a). In addition, if the recount changes the result, the outcome of the recount shall be grounds for a contest. Ala. Code (2005) § 17-13-12(j). Notwithstanding the Attorney General's amicus participation in *Boxx* against the State, the new automatic recount provision was administratively precleared. That administrative preclearance suggests that concerns about the discriminatory potential were unfounded.

C. Section 5 blocked Alabama's absentee ballot reform.

In the 1994 elections, the State of Alabama had a problem with the use of absentee ballots in a number of the Black Belt counties. In Greene County, Alabama, absentee ballots were sent to 14 people at the post office box used by the local Democratic Party, 24 were sent to the acting chairman of the local Democratic Party, and 8 to the address of the Greene County Sewer and Water Authority. Winthrop E. Johnson, COUNTING VOTES IN ALABAMA: WHEN LAWYERS TAKE OVER A STATE'S POLITICS (1999), at 78. More than 1000 absentee ballots were mailed by five people who brought "suitcases of ballots" to the post office. John Fund and Hans von Spakovsky, WHO'S COUNTING? at 106. The Alabama Legislature subsequently enacted a law which revised the procedures for obtaining absentee ballots and the State submitted it to the Department of Justice, where that law was administratively precleared. Or, so the State thought.

Given some of the problems with absentee ballots in the 1994 election, the State sought to limit the places to which ballots could be mailed. After the change, voters could have ballots mailed to them at their places of residence or delivered to them in person, but not mailed to the place they regularly received mail, as before. That would prevent the mailing of ballots to the office of the local Democratic Party, for example, but some complained that the Postal Service didn't deliver the mail to residences in some smaller parts of rural counties; in those locations, the mail was available through General Delivery or through a post office box. *Ward v. State of Alabama*, 31 F. Supp.2d 968 (M.D. Ala. 1998)(three-judge court).

In retrospect, the change might not have worked. But the State was unable to test it and change it if necessary because a preclearance lawsuit found that the State didn't use the magic words. In *Ward*, the three-judge court said that a redlined version of the prior law that was an exhibit to the submission was not enough to put the Attorney General on notice of the change because the submission letter didn't point to that redline. The court went on to say that, if the letter had referred the Attorney General to the redline, the submission of the redline "might" be sufficiently clear to satisfy the State's burden. *Id.*, at 972.

The court rejected the State's arguments, which included pointing out that the Department of Justice had asked questions and, one might think, if it did not ask, it had no concern with the provision. Again, the Department of Justice participated as an amicus against the State, but did not say what it knew or produce its files for inspection.

The three-judge court's opinion almost turns on the use or non-use of magic words. If the State had pointed to the redline in its letter, as the court deemed necessary, it might or might not have been sufficient. The three-judge court hardly informs the State how to tell whether pointing to a redline in a future letter will be sufficient or when it might have to say more.

These three examples demonstrate that § 5 is not only effective in blocking disfavored practices; it also attacks valid election procedures on highly technical or procedural grounds that have little or nothing to do with the underlying purpose of the law.

2. Congress erred in relying on the gross number of § 2 cases as a factor supporting its extension of § 5 for another 25 years.

When Congress reauthorized § 5 for another 25 years in 2006, it justified its action by pointing to, among other things, the number of successful § 2 lawsuits that had been filed in the covered jurisdictions between 1982 and 2005.[6] In AULDF's judgment, that number is soft for two reasons. First, nearly 200 of those 653 cases come from Alabama, and all but a handful of those involve a challenge to at-large election schemes. One theory, thus, explains more than 180 cases, some of which involve tiny municipalities. Second, in a number of those cases, the remedy imposed exceeded the powers of the district court. Accordingly, in addition to the overinclusive and underinclusive elements discussed in Judge Williams's opinion see *Shelby County v. Holder*, 679 F.3d at 895-98 (Williams, J., dissenting), these elements undercut any finding of "current burdens" needed to justify Congressional action.

One report in the legislative record identified a total of 653 successful § 2 lawsuits, in both reported and unreported decisions, during that time. See *Voting Rights Act: Evidence of Continued Need:*

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[6] The count begins in 1982 for a reason. That is the year in which Congress overturned this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In *Bolden*, this Court held that § 2 prohibited only intentional discrimination, not disparate effect. In response, Congress added a results test to the language of § 2, codifying a "totality of the circumstances" test that does not require a showing of intentional discrimination.

The elimination of the requirement to prove intentional discrimination "precipitate[d] an unparalleled increase in section 2 litigation, as well as an unprecedented rate of success for plaintiffs." Anthony A Peacock, DECONSTRUCTING THE REPUBLIC: VOTING RIGHTS, THE SUPREME COURT, AND THE FOUNDERS' REPUBLICANISM RECONSIDERED (2008), at 80. (footnotes omitted.)

Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary, 201, (2006)("*Evidence of Continued Need*"). That number of successful § 2 cases represents the total of the published cases, which comes from a study by Professor Ellen Katz[7], and the unpublished decisions, which were assembled by the staff of The National Commission on the Voting Rights Act. See *Evidence of Continued Need* at 251 (reporting 12 successful reported cases and a total of 192 decisions for Alabama).

For its part, the Court of Appeals said that it couldn't "ignore the sheer volume" of such cases. *Shelby County v. Holder*, 679 F. 3d at 869. It reasoned that the number of such cases outweighed the limitations inherent in the structure of § 2, which is not limited to cases that include a showing of unconstitutional intentional discrimination. *Id.*, at 868-69 Likewise, it implicitly assumed that all § 2 lawsuits are equal.

The "sheer volume of successful Section 2 cases" is misleading for at least two reasons. First, as Senior Judge Williams pointed out in his dissent, the results of the McCrary study might support a "more tailored coverage formula," but not the one in § 4 (b). *Shelby County v. Holder*, 679 F. 3d at 897 (Williams, J., dissenting). Second, with respect to

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[7] The final Katz report can be found at http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

Alabama, the count of 192 successful reported and unreported cases is inflated because, for the vast majority of those cases, the same practice of at-large election schemes for local governmental bodies was at issue.[8]

In his dissent, Senior Judge Williams noted that, when the reported cases were sorted by state, some of the covered states stood out and others were not readily distinguishable from some of the non-covered states. 679 F. 3d at 897 (Williams, J., dissenting). He explained that a "more narrowly tailored" formula which captured Mississippi, Alabama, and Louisiana, as well as the covered portions of South Dakota and North Carolina "might be defensible." *Id.* As for the other covered jurisdictions, two fully covered states (Arizona and Alaska) did not have any such cases, and the other covered jurisdictions were "indistinguishable" from the non-covered jurisdictions. *Id.* He pointed out, "Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered (five if we add back in the covered portion of South

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[8] In her report, Professor Katz identified nine reported successful § 2 cases for Alabama. That count includes the case of *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992)(three-judge court). That case may represent a successful § 2 challenge, but it's not as if the State had a long-standing illegal practice that had to be remedied. Rather, *Wesch* arose after the Alabama Legislature proved unable to enact a congressional redistricting plan that reflected the results of the 1990 Census. In the end, the court adopted a remedial plan that was used until after the 2000 Census results were received. Thus, there is good reason to doubt whether *Wesch* belongs in her count.

Dakota)." *Id.* Judge Williams concluded, "A formula with an error rate of 50% or more does not seem 'congruent and proportional." *Id.*

As for the Alabama count, the vast majority of the § 2 claims involved challenges to the wide-spread practice of at-large elections. The relief awarded did not just involve a change to single-member districts. Instead, the district court, often with the consent of the parties to the cases, frequently changed the size of the governing body, imposed cumulative or limited voting schemes, or both. Section 2 did not empower the district court to make these changes, whether the parties agreed to them or not.

The challenge to at-large district schemes began with a lawsuit by the United States. In 1984, the Eleventh Circuit Court of Appeals held that the system used to elect the county commissioners and members of the Board of Education of Marengo County, Alabama, had a discriminatory effect on minority voters. *United States v. Marengo County Commission*, 731 F. 2d 1546 (11th Cir. 1984). Under that system, as modified in 1955, the county commission was elected on an at-large basis, with four commissioners being elected from residency districts.

African-American plaintiffs used the *Marengo County Commission* decision as a springboard to challenge the at-large system used to elect the county commissioners in nine Alabama counties. See *Dillard v. Crenshaw County Commission*, 831 F. 2d 246, 247 n. 1 (11th Cir. 1987).

Subsequently, the district court allowed the *Dillard* Plaintiffs to expand their claim to cover 183 county commissions, county boards of education, and municipalities that also used at-large schemes to elect their governing bodies. See *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). Of those 183 jurisdictions, 176 settled, as to liability, remedy, or both, agreeing to the entry of an interim consent judgment and the certification of a plaintiff class of black residents. *Id.* Later, the parties agreed to treat 165 of those jurisdictions as separate lawsuits, with their own docket number. *Id.*

Given that the same state practice—at-large election schemes—was at issue in each case, treating each of the *Dillard* cases as a separate successful § 2 lawsuit overstates the number of them. This is particularly true given the number of the cases that resulted in settlement.

Moreover, many of those cases involved smaller municipalities, which lacked the resources to contest liability and remedy. The cases against these municipalities illustrate the extraordinary reach of § 2 of the Voting Rights Act, and the related intrusiveness of § 5. Each of the small municipalities involved in the *Dillard* cases would have to get permission from the Attorney General of the United States to change their district lines or move a polling place.

There are numerous examples of such cases among the 183 *Dillard* cases, and the affected municipalities lie all over the State of Alabama. Some of them are: Loachapoka[9] (180 residents in the 2010 Census); Orrville[10] (204 residents); Pickensville[11] (608 residents); Silas[12] (452 residents); Autaugaville[13] (870 residents); and many more. In *Dillard v. North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989)[14], the district court held that the town violated § 2 by intentionally withholding candidacy requirement information and forms from two African-American candidates; in the underlying case, the municipality, which has 145 residents according to the 2010 Census, agreed to a five-member commission elected from single-member districts. *Id.*, at 1473.

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[9] Dillard v. Town of Loachapoka, Case No. 87-cv-1248, in the United States District Court for the Middle District of Alabama. Loachapoka is in Lee County, Alabama, not far from Auburn. The 2010 Census results are available at, among other places, www.ador.state.al.us/licenses/census.

[10] Dillard v. Town of Orrville, Case No. 87-cv-1270, in the United States District Court for the Middle District of Alabama. Orrville is in Dallas County, Alabama. The county seat of Dallas County is Selma.

[11] Dillard v. Town of Pickensville, Case No. 87-cv-1275, in the United States District Court for the Middle District of Alabama. Pickensville is in Pickens County, Alabama, which borders on Mississippi.

[12] Dillard v. Town of Silas, Case No. 87-cv-1291, in the United States District Court for the Middle District of Alabama. Silas is in Choctaw County, Alabama, which lies on the Mississippi border south of Pickens County.

[13] Dillard v. Town of Autaugaville, Case No. 87-cv-1157, in the United States District Court for the Middle District of Alabama. Autaugaville is in Autauga County, in south central Alabama, north of Montgomery.

[14] Professor Katz includes this decision in her report.

Separate and apart from the number of cases, the relief awarded exceeded the court's powers under § 2. That agreed to relief generally started with a change to single-member districts. In some jurisdictions, though, the *Dillard* Plaintiffs and the district court found it necessary to change the size of the governing body or adopt different schemes of voting in order to provide what the district court believed to be meaningful relief. In Chilton County, for example, the relief involved increasing the size of the county commission and board of education from five to seven members elected using a scheme of cumulative voting. See *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988).[15] The district court approved that plan even though the "threshold of exclusion" (12.5%) under the plan was greater than the minority population (11.9% of the county's total population). *Id.*, at 874-75.

Similarly, according to the 1980 Census, for example, the black population of Baldwin County was 16.19% of the total population, and a decrease to 13.86% was expected in the 1990 Census. The district court rejected the county Board of Education's proposal for a five-district plan finding that it would not give black voters "an equal opportunity to participate in the political process" and would submerge them in districts dominated by white voters. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. at 1469. Instead, the court adopted the seven-member plan proposed by the Dillard Plaintiffs, suggesting that the plan "provides full relief." *Id.*, at 1470.

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[15] In her report, Professor Katz includes the Eleventh Circuit's summary affirmance of the district court's judgment. *Dillard v. Chilton County Bd. of Educ.*, 868 F. 2d 1274 (11th Cir. 1989).

The district court's confidence was unfounded. Baldwin County, which is across the bay from Mobile, grew dramatically, but most of the influx was white. According to the 2000 Census, the black population of Baldwin County was only 9.13% of the county's total population. See *Dillard v. Baldwin County Com'rs*, 376 F. 3d 1260, 1264 (11th Cir. 2004) ("As of the 2000 census, the county's African-American voting-age population had declined to 9.13%, and Baldwin County no longer had a minority-majority district."). The seven-member plan had been drawn with an eye toward proportionality, but events outstripped it.

After this Court's decision in *Holder v. Hall*, 512 U.S. 874 (1994), undercut the legality of the district court's remedy, challengers began to try to undo it. In *Holder*, a plurality of this Court held that the size of a governing body could not be the subject of a vote dilution challenge under § 2 because "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id.*, 512 U.S. at 881; see also *Nipper v. Smith*, 39 F. 3d 1494, 1532 (11th Cir, 1994)(en banc)("[Under *Holder*, federal courts cannot mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies."); . *White v. Alabama*, 74 F. 3d 1058, 1072 (11th Cir. 1996).[16]

In *Wilson v. Minor*, 220 F. 3d 1297 (11th Cir. 2000), the Eleventh Circuit affirmed the district court's order vacating an injunction that changed the size of the county commission in Dallas County, Alabama. Before the injunction was entered, four commissioners were elected on an at-large basis from residency districts, and the probate judge, who was elected on a county-wide basis, served as ex officio chair, voting only to break ties. The injunction created a five-member commission elected from single-member districts. The court found that the pre-injunction "role, purpose, and power" of the probate judge were "significant[ly]" different from those of a fifth commissioner. *Id.*, at 1309.

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[16] Professor Katz includes *White v. Alabama* in her report. As with *Wesch*, see fn. 8, supra, there is reason to doubt that it should be so counted. In *White*, the Eleventh Circuit vacated a consent judgment that would have changed the size of the Alabama appellate courts, which are elected on a partisan basis, and created a selection process that would insure that the black voters in Alabama could select at least two representatives of their choice. The court held that "the district court, in fashioning its remedy, lacked the authority to require Alabama to increase the size of its appellate courts." *White v. Alabama*, 74 F. 3d at 1072. The remedy could not be sustained as a consent judgment either, because there were parties who objected to the proposed relief. *Id.*, at 1073. Far from being a successful invocation of § 2, *White v. Alabama* blocked its improper use.

Similarly, in *Dillard v. Baldwin County Comm'rs*, the Eleventh Circuit affirmed the district court's order dissolving the permanent injunction which increased the number of commissioners from five to seven. The court concluded, "If the [minority] group is too small to elect candidates of its choice in the absence of a challenged structure or practice, then it is the size of the minority population that results in the plaintiff's injury, and not the challenged structure or practice." *Id.*, 376 F. 3d at 1269.

These efforts to undo the overreaching of the *Dillard* remedies came to an end for two reasons. First, this Court's decision in *Lance v. Coffman*, 549 U.S. 437 (2007), undercut the standing of the challengers, leading to the vacatur of a remedial order and remand with instructions to dismiss the challenge. See *Dillard v. Chilton County Com'n*, 495 F. 3d 1324 (11th Cir. 2007). Second, the Alabama legislature passed a statute in which it essentially accepted the results in the *Dillard* cases which had not been the subject of challenges. Ala. Code (2008) § 11-3-1(c).

This Court should view the counting of the *Dillard* cases as individual cases with suspicion. If counted as one case with many branches, the total number of § 2 cases would be fewer than 500, not 653, and the difference between the covered and non-covered jurisdictions would no longer be 56% to 44%. AULDF believes that, if the cases were properly counted, the district court would have found the number and distribution of § 2 cases far less significant.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the decision below.

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AMICUS CURIAE BRIEF

RECORD
AND
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No. 12-96

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In The
Supreme Court of the United States

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SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

BRIEF OF ARIZONA, GEORGIA, SOUTH CAROLINA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICI STATES 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

- I. The Decision, Upholding Section 4(b)'s Outdated Coverage Formula and Section 5's Preclearance Requirement, Is Seriously Flawed and Undermines the Principle of Equal Sovereignty 5
  - A. The Court of Appeals Erred in Finding that Congress Had Adequate Data to Justify the Continued Use of the Section 4(b) Formula 7
  - B. Current Conditions Do Not Justify the VRA's Departure from the Fundamental Principle of Equal Sovereignty Among the States 17
    - 1. Arizona and Nevada Are Strikingly Similar in Population Makeup, Voter Registration, and Voter Turnout, but Are Treated Differently by the VRA 17
    - 2. Several States Adopted Voter-Identification Laws but Experienced Dramatically Different Treatment Under the VRA 30

TABLE OF CONTENTS – Continued

Page

C. The Preclearance Requirements Are Arbitrary and Burdensome 24

  1. Arizona's Budgetary Decision to Close Several Motor Vehicle Department Branches Required Preclearance 25

  2. The DOJ Denied Georgia County Expedited Preclearance for Temporary Change of Venue Following Construction Delays 26

D. The Prospect of Bailout for the Covered States Is Illusory 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

City of Tucson v. Arizona, 273 P.3d 624 (Ariz. 2012) 29

Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) 21

Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) 2, 22

Gonzalez v. Arizona, 624 F.3d 1162 (9th Cir. 2010) 21

Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012), *cert. granted on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 476 (2012) (No. 12-71) 21

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Shelby Cnty. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) 6, 27

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 4, 6, 11, 16

South Carolina v. U.S., ___ F. Supp. 2d ___, 2012 WL 4814094 (D.D.C. 2012) 22, 23

Strode v. Sullivan, 236 P.2d 48 (Ariz. 1951) 29

United States v. Louisiana, 363 U.S. 1 (1960) 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XV 6

U.S. Const. amend. XV, § 2 5

STATUTES

42 U.S.C. § 1973 2

42 U.S.C. § 1973b 1, 8

42 U.S.C. § 1973b(a)(1) 29

42 U.S.C. § 1973b(a)(5) 28, 29

42 U.S.C. § 1973b(c) 8

42 U.S.C. § 1973b(f)(3) 9

42 U.S.C. § 1973c ....*passim*

42 U.S.C. § 1983 1

42 U.S.C. § 12132 1

Ala. Code § 17-9-30 (2012) 21

Ariz. Rev. Stat. § 16-122 25

Nev. Rev. Stat. § 293.2699 (2003) 19

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TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

1 U.S. Census of Population: 1960, *Characteristics of the Population* (1964) 17

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152 Cong. Rec. S7986-87 (daily ed. July 20, 2006) (statement of Sen. Sessions) 15

152 Cong. Rec. S7990 (daily ed. July 20, 2006) (statement of Sen. Coburn) 13

152 Cong. Rec. S8012 (daily ed. July 20, 2006) 12

28 C.F.R. § 51.13(a) 24

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28 C.F.R. § 51.13(d) 24

Census 2000 Brief on Population Change and Distribution: 1990-2000, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf 18

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TABLE OF AUTHORITIES – Continued

Page

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Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php 10, 11

Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (1965) 8

Determination Regarding Literacy Tests, 35 Fed. Reg. 12354 (1970) 8

Extension of the Voting Rights Act of 1965: Hearing Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater) 9

H.R. Rep. No. 109-478 (2006) 13

S. Rep. No. 109-295 (2006) 12, 14, 15, 20

The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d Sess. (May 16, 2006) 14

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TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF THE AMICI STATES

The Voting Rights Act ("VRA" or "Act") created two different classifications of States: covered and uncovered. Section 5 of the VRA, 42 U.S.C. § 1973c, requires Alabama, Alaska, Arizona,* Georgia,* Louisiana, Mississippi, South Carolina,* Texas, and Virginia (and every sub-jurisdiction within those States), and portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota* (collectively "Covered Jurisdictions"), based on the formula provided in Section 4(b) of the VRA, 42 U.S.C. § 1973b, to seek approval of all statutory or procedural changes that affect voting before implementing or enforcing the changes. This Court has recognized that the Act imposes burdens on Covered Jurisdictions and "differentiates between the States" in a way that departs from the fundamental principle of equal sovereignty among States. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). The amici States (*), which are all Covered Jurisdictions substantially burdened by the VRA, have a direct and compelling interest in having this Court evaluate whether the court of appeals correctly determined that the VRA's "severe remedy of preclearance remain[s] 'congruent and proportional.'" (Pet. App. at 62a.)

Contrary to other anti-discrimination statutes, such as the Civil Rights Act of 1964, 42 U.S.C. § 1983, and the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 5 of the VRA shifts the burden of proof to the Covered Jurisdictions to seek federal approval *before* enforcing any statutory or procedural change affecting voting and to demonstrate that the proposed voting change will not have a discriminatory effect. On the other hand, Section 2 of the VRA, 42 U.S.C. § 1973, provides more customary relief, in that a plaintiff who alleges that he or she has been the victim of some form of voting discrimination may file a lawsuit against the offending jurisdiction. Section 2 applies to all of the States equally, as well as any of the sub-jurisdictions within the States. However, because obtaining preclearance does not protect a Covered Jurisdiction from litigation under Section 2, Covered Jurisdictions alone bear the burden of Section 5 preclearance without any concomitant benefit.

Since *Northwest Austin*, the "federalism costs" associated with Section 5, 557 U.S. at 202, have only continued to increase while the statute's benefits have all but vanished. In particular, the Department of Justice ("DOJ") has interpreted Section 5 to force the Covered Jurisdictions to spend millions of dollars and thousands of attorney hours to preclear an ever-expanding array of laws. The most vivid example comes from voter-identification laws: Indiana's sovereign policymakers are free to enact such requirements, *see Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), but as a result of DOJ's administrative fiat, the equally sovereign policymakers in Covered Jurisdictions are not, *see* DOJ File Nos. 2011-2775 (Texas) and 2011-2495 (South Carolina).

Section 5 has served a noble purpose, but its remedy is no longer justified by the decades-old coverage formula. Congress has refused to amend the statute after this Court identified its infirmities in *Northwest Austin* and it seems unlikely that Congress will reconsider this issue before the current iteration of the VRA approaches expiration in 2031. Meanwhile, the federal government will continue to treat amici States and other Covered Jurisdictions as unequal sovereigns. The amici States urge this Court to overturn the coverage formula of Section 4(b) and the preclearance obligation of Section 5 because those provisions are no longer congruent and proportional to the current state of voter rights nationwide, yet impose costly and time-consuming burdens on an arbitrary group of states and localities without any reference to current conditions in those jurisdictions.

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SUMMARY OF ARGUMENT

In *Northwest Austin*, the Court noted that Section 5's departure from traditional notions of equal sovereignty enjoyed by all of the fifty states "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203. But when Congress reauthorized Section 5 of the VRA in 2006, it used the same coverage formula as previous enactments and failed to examine the current status of non-covered jurisdictions. As the Court noted, "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* The Court should declare the 2006 reauthorization of the VRA is unconstitutional because its antiquated formula to determine which states are covered is neither congruent nor proportional to the harms that exist in the Covered States.

Section 5 applies arbitrarily to the Covered Jurisdictions. No Covered Jurisdiction uses discriminatory tests or devices, and many have higher voter turnout or lower disparity in minority voter turnout, than numerous uncovered jurisdictions. The Covered States therefore are denied the fundamental principles of equal sovereignty and equal footing. Treating States differently no longer serves the Act's purpose of eradicating voting discrimination for *all* United States citizens.[1] Section 5 was an important and necessary part of the effort to end voter discrimination in this country, but has now outlived its purpose. The current enactment of Section 5 under the preexisting coverage formula of Section 4(b) is unconstitutional because it is not appropriately tailored to correct any current voting discrimination that may exist anywhere in the country.

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[1] "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

ARGUMENT

I. The Decision, Upholding Section 4(b)'s Outdated Coverage Formula and Section 5's Preclearance Requirement, Is Seriously Flawed and Undermines the Principle of Equal Sovereignty.

The court of appeals acknowledged that Congress did not make a finding that "racial discrimination in voting was 'concentrated in the jurisdictions singled out for preclearance'" when Congress reauthorized Section 5 of the VRA in 2006 under the pre-existing coverage formula of Section 4(b) of the VRA. (Pet. App. at 53a (quoting *Nw. Austin*, 557 U.S. at 203).) It nonetheless upheld Congress's continued use of Section 4(b)'s formula by speculating that lack of evidence of discriminatory practices in the Covered Jurisdictions arose from Section 5's deterrent effect (*id.* at 42a-44a) and noting that bailout ensures that "section 5 covers only those jurisdictions with the worst records of racial discrimination in voting" (*id.* at 57a). The court's analysis is seriously flawed for two reasons: (1) the obsolete formula is not linked to current conditions and therefore intrudes on the Covered States' sovereignty, and (2) the supposed remedy of bailout is illusory. The Court should overturn Sections 4(b) and 5 of the VRA because those sections of the law unjustifiably intrude on the Covered States' sovereignty and impose significant and unwarranted burdens on Covered Jurisdictions.

Congress passed the VRA under the authority of Section 2 of the Fifteenth Amendment to enact "appropriate" measures to effectuate the constitutional prohibition against racial discrimination in voting. *Katzenbach*, 383 U.S. at 308. Section 5 goes well beyond the Fifteenth Amendment's prohibition against racial discrimination in voting by "plac[ing] the burden on covered jurisdictions to show their voting changes are nondiscriminatory *before* those changes can be put into effect." *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 431 (D.D.C. 2011). The VRA thus treats some States differently "despite [the Court's] historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin,* 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). But Section 5's "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*

This Court put Congress on notice regarding Section 5's constitutional infirmities: "The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 203; *see also id.* at 216 (Thomas, J., concurring in judgment in part and dissenting in part) ("The Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional."). The Court further emphasized that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Id.* at 204. But the Court remained "keenly mindful of [its] institutional role," *id.* at 204, resolved the case on non-constitutional grounds, and charged the political branches with fixing both the VRA's antiquated coverage formula and the blunt instrument of preclearance, *id.* at 205-06.

But Congress has done nothing since *Northwest Austin*, and the Covered Jurisdictions continue to labor under a coverage formula that is now forty years old. And the DOJ has exacerbated the VRA's federalism costs by broadening its interpretation of Section 5 and denying preclearance to an ever-widening array of sovereign state prerogatives. *See* § I(B)(1) *infra*.

A. The Court of Appeals Erred in Finding that Congress Had Adequate Data to Justify the Continued Use of the Section 4(b) Formula.

The VRA requires a jurisdiction to comply with the preclearance obligations if it satisfied two conditions. First, the jurisdiction must have used a forbidden test or device[2] to determine voter eligibility in

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[2] The VRA defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret

(Continued on following page)

1964, 1968, or 1972. 42 U.S.C. § 1973b. Second, the jurisdiction must have had – again in 1964, 1968, or 1972 – less than fifty percent of the citizens of voting age registered to vote, or less than fifty percent of the citizens in the jurisdiction voting in the then-most recent presidential election. 42 U.S.C. § 1973c.

Because the Act references specific years, some States, such as Delaware, remain uncovered even though they used a test or device prohibited by Section 4(c) in both 1964 and 1968. *See* Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (1965); Determination Regarding Literacy Tests, 35 Fed. Reg. 12354 (1970); Dave Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ (follow "1996" hyperlink; then follow "%VAP M" hyperlink). Because voter registration fell below fifty percent *after* 1972 rather than during that year, Delaware need not seek preclearance for its laws. *Id.* In contrast, Arizona was not using a test or device in 1975, when Congress amended the Act to add language minorities to the coverage formula.[3] *See*

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any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c).

[3] Congress expanded the definition of "test or device" to include the provision of English-only voting materials in circumstances in which the census data shows that more than five

(Continued on following page)

Extension of the Voting Rights Act of 1965: Hearing Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater, explaining that Arizona did not use English-only ballots in 1974 or thereafter). But because Arizona did not include Spanish in its ballots in 1964, 1968, and 1972, it became and remains a Covered Jurisdiction. These distinctions between coequal sovereigns cannot be justified on the basis of a formula that is outdated on its face.

Because Congress never intended the preclearance requirements to be permanent, fixing the determination on a then-recent presidential election year was logical when it originally enacted the VRA. Decades later, however, the facts no longer support that reasoning. No jurisdiction, covered or uncovered, currently uses a test or device, and Covered Jurisdictions are no more likely than uncovered jurisdictions to have low voter turnout. In eighteen of the forty-one States that are not covered jurisdictions in their entirety, the percentage of voting age persons who voted was less than fifty percent during one or more presidential elections since the 1982 amendment to the VRA: Arkansas (1988, 1996, 2000), California (1984, 1988, 1992, 1996, 2000), Delaware (1996), Florida (1984, 1988, 1996, 2000), Hawaii (1984, 1988, 1992, 1996, 2000, 2004, 2008), Illinois (1996), Indiana

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percent of the voting age citizens are members of a single language minority. 42 U.S.C. § 1973b(f)(3).

(1996, 2000), Kentucky (1988, 1996), Maryland (1988, 1996), Nevada (1984, 1988, 1996, 2000), New Mexico (1988, 1996, 2000), New York (1988, 1996, 2000), North Carolina (1984, 1988, 1996, 2000), Oklahoma (1988, 1996, 2000), Pennsylvania (1996), Tennessee (1984, 1988, 1996, 2000), Utah (1996), and West Virginia (1988, 1996, 2000). *See* Dave Leip's Atlas, *supra* (select applicable election year on left panel and then select "%VAP M"). Eleven of these states have never been partially or fully covered jurisdictions: Arkansas, Delaware, Illinois, Indiana, Kentucky, Maryland, Nevada, Pennsylvania, Tennessee, Utah, and West Virginia. *Compare* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited December 21, 2012) *with* Department of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited December 21, 2012).

Congress made no findings concerning these issues when it reauthorized the Act in 2006. This is because Congress did not engage in in-depth deliberations regarding the coverage formula.

This Court detailed the congressional deliberations that went into the original enactment of the VRA:

> Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received

> testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.

Katzenbach, 383 U.S. at 308-09.

In contrast, Congress reauthorized the VRA in 2006 on an expedited basis and without careful deliberation concerning the formula used to determine whether a jurisdiction should be covered by the Act. Senators John Cornyn[4] and Tom Coburn,[5] members of the Senate Judiciary Committee, explained their "significant reservations" about this rush to renew:

> Those concerns can generally be categorized as follows: (1) the record of evidence does not appear to reasonably underscore the decision to simply reauthorize the existing Section 5 coverage formula – a formula that is based on 33 to 41 year old data, and (2) the seemingly rushed, somewhat incomplete legislative process involved in passing the legislation prevented the full consideration of numerous improvements. . . . We also conclude that it would have been beneficial if

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[4] Senator Cornyn represents Texas, a Covered Jurisdiction. *See* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited December 21, 2012).

[5] Senator Coburn represents Oklahoma, an uncovered jurisdiction. *Id.*

> the Section 4 coverage formula had been updated in order to adhere to constitutional requirements. . . .

S. Rep. No. 109-295 at 25-26 (2006). The Senators continued by stating that the formula should be updated to "reflect the problems where they really exist and where the record demonstrates some justification for the assertion of Federal power and intrusion into the local and State electoral processes," but noted that Congress did not take the time to have "a full discussion of ways to improve the Act to ensure its important provisions were narrowly tailored and applied in a congruent and proportional way." *Id.* at 33-34. After the Report was submitted and the bill was sent to the Senate floor, the Senate passed it unanimously the very next day with only a brief debate. 152 Cong. Rec. S8012 (daily ed. July 20, 2006). However, the Senate Report itself notes that it was not provided, even in draft form, to members of the Senate before the floor debate. S. Rep. No. 109-295 at 55 (2006).

During the Senate debate, Senator Coburn again voiced his concerns with the rush to renew the VRA:

> My point is that it is unfortunate that we insisted on doing this on an expedited basis when the act does not expire for a year. . . . Because of the political nature of this bill and the fear of being improperly classified as "racist," the bill was crafted and virtually passed before any Senator properly understood any of the major changes. For example, the bill that passed out of committee

> included a finding section before any hearings were held. No changes to those findings were made.

152 Cong. Rec. S7990 (daily ed. July 20, 2006) (statement of Sen. Coburn). Senator Cornyn echoed this sentiment, opining that the hurried process "prohibited the kind of debate and discussion and perhaps amendment process that might have been helpful to protect the act against future legal challenges." 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn).

Congress expressed the rationale for renewing the VRA with the laudable and necessary intention of protecting the voting rights of *all* citizens. *See* H.R. Rep. No. 109-478 at 6 (2006). But neither the House nor the Senate seriously considered modernizing the coverage formula to reflect current circumstances throughout the country.

The House Judiciary Committee, in fact, emphasized the strides made in the Covered Jurisdictions and did not discuss at any length the similar needs in the uncovered jurisdictions. The Committee noted the results from the previous incarnations of the VRA and summarized its findings that substantial discrimination continued to exist in 2006 in the Covered Jurisdictions. *Id.* at 25. The Committee referenced limited anecdotal evidence that allegedly justified continuing preclearance obligations for some of the Covered Jurisdictions, but failed to include any evidence in its findings concerning the rights of voters in uncovered jurisdictions. The House Report contains no findings regarding the non-covered States' population changes, voter registration and turnout, or record of minority individuals elected. *See Voting Rights Act: An Examination of the Scope of Criteria for Coverage Under the Special Provisions of the Act*, 109th Cong., 1st Sess., at 92 (Oct. 20, 2005) (statement of Hebert). Moreover, testimony showed that "most seem to agree that [the formula] is outdated" and that "this is an area that Congress should give serious consideration and study to." *Id.* Nonetheless, the issue was never "addressed in any detail in the [Senate] hearings or in the House" and "little evidence in the [legislative] record reexamines whether systematic differences exist between the currently covered and non-covered jurisdictions." *The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., at 200-01 (May 16, 2006) (testimony of Pildes); *see also Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 109th Cong., 2d Sess., at 21-22 (May 4, 2006) (testimony of Clegg) ("[V]ery little if any evidence compares covered jurisdictions to noncovered jurisdictions, and what comparisons there are undermine the bill.").

Likewise, the Senate Judiciary Committee Report barely examined the history or current record of voting discrimination in the uncovered jurisdictions. *See generally* S. Rep. No. 109-295 (2006). The nearly 300 pages of appendices to the Report included (1) summaries of the reported cases or settlements finding discrimination against voters in the Covered Jurisdictions and the uncovered jurisdictions; (2) a summary of the evidence gathered by the House and Senate concerning voting discrimination; and (3) a discussion of the lawsuits or enforcement actions, statistics, and anecdotal evidence for thirty-five of the fifty states. *Id.* at 65–363. All of the Covered Jurisdictions were represented by pages of discussion, while some of the uncovered States, such as Nebraska and Tennessee, had only single paragraphs of anecdotal evidence presented. The Report and its appendices included no evidence regarding Arkansas, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Nevada, New Hampshire, North Dakota, Oregon, Utah, Vermont, or West Virginia. The absence of evidence does not compel the conclusion that there were no instances of voter discrimination in the listed states, but fortifies the claim that the Senate failed to collect and incorporate such evidence into its report.

Once the bill reached the floor, the Senate quickly passed it without engaging in meaningful debate regarding the outdated formula. Several Senators expressed concern, but recommended passage of the bill nonetheless. 152 Cong. Rec. S7983 (daily ed. July 20, 2006) (statement of Sen. Saxby Chambliss discussing some hesitation about leaving unaddressed the issue of modernizing the formula); 152 Cong. Rec. S7986-87 (daily ed. July 20, 2006) (statement of Sen. Jefferson Sessions discussing the significant progress that Alabama had made in eliminating voting discrimination while noting that the same could not be said of fourteen other jurisdictions that are not covered by Section 5 and noting that he "would have expected Congress" to take action by modernizing Section 5); 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn expressing a desire that Congress focus on "places where the problems really do exist and where the record demonstrates with some justification for the assertion of Federal power and intrusion into the local and State electoral processes").

Congress did not explore the problem of voting discrimination throughout the entire country, and therefore failed to demonstrate the "great care" that the *Katzenbach* Court required as justification for the "uncommon exercise of congressional power" contained in the 1965 version of the VRA, power that was only justified because of the "exceptional conditions" and "unique circumstances" present in 1965.

In addition, the successive reauthorizations of the VRA have rendered the notion of its enactment as a temporary solution to an extraordinary problem a misnomer. Congress originally enacted the VRA for five years in 1965, renewed it subsequently in 1970 (for five years), then in 1975 (for seven years), then in 1982 (for twenty-five years), and again in 2006 (for twenty-five years). *Nw. Austin*, 557 U.S. at 200. If the Court does not strike down the coverage formula now, the amici States will very likely continue to be unequal sovereigns until at least 2031, despite an utter lack of evidence that such treatment is justified.

B. Current Conditions Do Not Justify the VRA's Departure from the Fundamental Principle of Equal Sovereignty Among the States.

When the VRA was initially enacted in 1965, Congress found that there was significant evidence of voting discrimination in the southern States. But the United States is a different country than it was forty-seven years ago. According to the U.S. Census Bureau, in 1960, there were approximately 183 million people in the country; in 2010, there were 308.7 million people – a 68% increase. *Compare* 1 U.S. Census of Population: 1960, *Characteristics of the Population*, at xvii (1964), *with* Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 1, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf (last visited December 21, 2012). Certain regions have grown quickly while others have grown much more slowly. *Id.* As discussed below, these changes in the States' respective populations have significantly changed the picture regarding minority representation as voters and elected officials. Congress failed to analyze or even recognize these shifts, which leaves the VRA even further out-of-step with the current circumstances in this country.

1. Arizona and Nevada Are Strikingly Similar in Population Makeup, Voter Registration, and Voter Turnout, but Are Treated Differently by the VRA.

According to the 2000 and 2010 censuses, Nevada is by far the fastest growing State in the country, while Arizona is the second fastest. Census 2000 Brief on Population Change and Distribution: 1990-2000 at 3, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf; Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 2, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. Nevada's Hispanic population more than doubled in the last twenty years, increasing from 10.4% of the population to 26.5%. *Compare* Census 2000 Brief on the Hispanic Population at 4, http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf *with* Census 2010 Brief on the Hispanic Population at 6, http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf. During the same time period, Arizona's Hispanic population grew from 18.8% to 29.6%. *Compare* Census 2000 Brief on the Hispanic Population at 4, *with* Census 2010 Brief on the Hispanic Population at 6.

The voting registration and turnout records for Arizona and Nevada are also similar. During the 2000 election, 53.3% of Arizona's total citizenry were registered voters and 46.7% voted, and in Nevada 52.3% registered and 46.5% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2000, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2000/tab04a.pdf (last visited December 21, 2012). But a smaller percentage of Nevada's Hispanic population than Arizona's Hispanic population participated in the voting process. *Id.* In Arizona, 33.4% of its Hispanic population registered to vote and 27.1% voted; while in Nevada, 23.9% of its population registered and only 20.4% voted. *Id.*

In 2004, Arizona's record showed that 60.3% of the total population registered and 54.3% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (follow "Detailed Tables" hyperlink; then follow Table 4a "XLS" hyperlink). The Arizona Hispanic populations of total registered voters and those actually voting were 30.5% and 25.5%, respectively. *Id.* Nevada, on the other hand, had 56.8% of its entire population registered, with 51.3% actually voting. *Id.* The Nevada Hispanic population's numbers were 27.6% and 23.8%, respectively. *Id.*

In the 1972 election, only 49.5% of Nevada's voting age residents voted. (*See* Dave Leip's Atlas, *supra* (follow "1972" hyperlink; then follow "%VAP" hyperlink)). Also, none of Nevada's current laws protecting non-English-speaking voters had been enacted. (*See* Nev. Rev. Stat. § 293.2699 (added 2003); Nev. Rev. Stat. § 293.296 (added 1973); Nev. Rev. Stat. § 293C.282 (added 1997).) In spite of these facts, Arizona is a Covered Jurisdiction while Nevada has never been covered.

Despite the similar populations, a smaller percentage of Hispanic voters in Nevada are voting than in Arizona. In the Senate Judiciary Committee Report, there were only two pieces of anecdotal evidence regarding possible voting discrimination in Nevada, but both involved discrimination against Hispanic voters. S. Rep. No. 109-295 at 277 (summarizing anecdotal evidence that Hispanics have been told they need to speak English or have a driver's license in order to vote and that voter registration forms for some Hispanics were found in dumpsters and not submitted). Congress made no findings concerning the number of minorities elected to office in Nevada or the possibility of racial polarization in its elections. This lack of justification by Congress for the different treatment of Arizona and Nevada, despite the stark similarities in their current populations and voter turnout records, is evidence that the VRA's formula is neither congruent with, nor proportional to, the goal of eliminating discrimination in voting. Further, Congress's failure to take into account these similar statistics shows that its decision to continue using the outdated coverage formula is arbitrary.

2. Several States Adopted Voter-Identification Laws but Experienced Dramatically Different Treatment Under the VRA.

Thirty states presently have laws in place that may require voters to show identification at the polls in November. *Voter Identification Requirements*, National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last visited December 21, 2012). Whether the laws may be effective depends greatly on whether the jurisdiction is covered or not. Since 2001, nearly 1,000 bills have been introduced in 46 states. *Id.* Twenty-one states passed major legislation between 2003 and 2011. *Id.* Alabama, Colorado, Montana, North Dakota, and South Dakota passed new voter identification laws in 2003; Alabama had to request preclearance (*id.*), which DOJ granted on August 15, 2003 (DOJ File Nos. 2003-2245; 2003-3434).[6] In 2004, Arizona voters passed a voter identification law. *Gonzalez v. Arizona* 624 F.3d 1162, 1169 (9th Cir. 2010) (en banc). The DOJ precleared Arizona's law.[7] *See* DOJ File No. 2004-5004. In 2005, Indiana, New Mexico, and Washington passed new voter identification laws, while Georgia passed legislation to strengthen its existing voter identification law. *See Voter Identification Requirements*, *supra*. Georgia had to request preclearance, while the other States did not. The DOJ precleared Georgia's law on August 26, 2005. *See Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294, 1303 (N.D. Ga. 2006).

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[6] Alabama has enacted a new voter identification law that has not yet been submitted for preclearance and which will not take effect until 2014. Ala. Code § 17-9-30 (2012); *see also Voter Identification Requirements, supra,* at table 1, n.1.

[7] A group of plaintiffs challenged Arizona's voter identification law under Section 2 of the VRA, among other claims. *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012), *cert. granted on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 476 (2012) (No. 12-71). The Ninth Circuit Court of Appeals, upon rehearing en banc, affirmed the district court's denial of the VRA claim. *Id.* at 407. This Court granted certiorari on a question of preemption.

Indiana enacted a law providing that voters who were unable to produce photo identification on election day could cast a provisional ballot that would be counted only if the voter produced an appropriate affidavit or produced photo identification before the court clerk within ten days following the election. *Crawford*, 553 U.S. at 185-86. Because Indiana is not covered by Section 5, it did not have to seek preclearance. This Court upheld the facial validity of Indiana's law, stating that the Court could not "conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Id.* at 202.

The DOJ has not yet permitted South Carolina and Texas,[8] both Covered Jurisdictions, to enforce their voter-identification requirements despite the fact that these laws are similar to the Indiana law upheld in *Crawford*. After DOJ denied administrative preclearance for South Carolina's revised voter identification law, the State filed a declaratory-judgment action seeking reconsideration of the denial. *South Carolina v. United States*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 1.) South Carolina has had a voter identification law since 1988. *South Carolina v. U.S.*, ___ F. Supp. 2d ___, 2012 WL 4814094, at *1 (D.D.C. 2012). The new version, referred to as Act R54, created a new type of photo ID that could be obtained for free at each county's election office. *Id.* In addition, R54 removed the $5 fee for DMV photo ID cards. *Id.*

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[8] The State of Texas joined in the multi-state amicus brief at the petition stage, but has chosen to file its own separate amicus brief at the merits stage, in which it will likely discuss preclearance of its voter identification law.

A three-judge panel held a trial from August 27, 2012 through August 31, 2012. *South Carolina v. U.S.*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 300-309.) In a memorandum opinion, the panel granted preclearance, holding that the law did not have a discriminatory retrogressive effect and that it was not enacted for a discriminatory purpose. *South Carolina v. U.S.*, ___ F. Supp. 2d ___, 2012 WL 4814094, at *1 (D.D.C. 2012). However, because of the "numerous steps necessary to properly implement the law," the court did not grant preclearance for the 2012 elections. *Id.*

South Carolina submitted a bill of costs seeking over $90,000 in taxable costs to which DOJ objected. *South Carolina v. U.S.*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 310, 312.) While the court has not yet ruled on the bill of costs, it cannot be disputed that South Carolina incurred an enormous cost to preclear a law similar to one that Indiana was able to implement without the federal government's involvement.

Judge Williams questioned this inequity in his dissent in this case, stating: "Why should voter ID laws from South Carolina and Texas be judged by different criteria . . . from those governing Indiana?" (Pet. App. 94a.) Judge Williams could not find a rational explanation other than the *historical* records of the Covered Jurisdictions, but noted that such a focus appears to be "foreclosed by *Northwest Austin*'s requirement that current burdens be justified by current needs." (*Id.* at 95a.) This dramatic disparity in the treatment of similar States is incompatible with our history of treating the States as equal sovereigns and warrants this Court's review.

C. The Preclearance Requirements Are Arbitrary and Burdensome.

As with the voter identification laws discussed above, Section 5's preclearance obligations lead to other absurdities. The Covered States and their political subdivisions must obtain federal preclearance before they enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. § 1973c. Changes requiring preclearance include:

- "Any change in qualifications or eligibility for voting";
- "Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting"; and
- "Any change in the boundaries of voting precincts or in the location of polling places."

28 C.F.R. § 51.13(a), (b), (d). At the state level, the various attorneys general monitor legislation for "covered" changes and submit those changes to the

DOJ for preclearance. If a change originates at the local level, the local officials identify and submit the change.

1. Arizona's Budgetary Decision to Close Several Motor Vehicle Department Branches Required Preclearance.

Because Arizona, like many other States, has faced serious budget concerns over the past several years, the Arizona Motor Vehicle Department ("MVD") opted to close several branch offices. Arizona citizens who apply for a driver license or license renewal may, if otherwise qualified, register to vote or update their voter registration at the same time. Ariz. Rev. Stat. § 16-122. Thus, this decision to close the branch offices was a change concerning registration that necessitated a preclearance submission.

On June 21, 2012, Arizona requested preclearance to close an MVD location within the Pima County Justice Court in Tucson, Arizona. *See* DOJ File No. 2012-3656. The submission noted that there were three other voter registration locations in the immediate vicinity – one of which was the Pima County Recorder's Office in the very same building as the MVD office that was closing. *Id.* This type of administrative decision should be left to the local jurisdictions. But because of Section 5, Arizona's MVD had to wait until it received DOJ's preclearance letter to effectuate that change.

2. The DOJ Denied Georgia County Expedited Preclearance for Temporary Change of Venue Following Construction Delays.

On July 12, 2012, the Douglas County, Georgia Board of Elections & Registration learned that renovations would not be complete in time for the State's July 31 primary at two county schools serving as polling places. Fortunately, the problem was easily resolved as a substantive matter – both schools were within easy walking distance of another school that could serve as an alternative polling place. Four days later, on July 16, 2012, Douglas County sought expedited review of this change. Administrative Submission of Douglas County, Georgia, DOJ File No. 2012-4022. The detailed submission explained that this simple change would not have the purpose or effect of denying the right to vote on account of race, color, or membership in a language minority, and included a seven-page submission letter detailing 28 categories and subcategories of information, as well as multiple attachments. *See id.*

In spite of the simplicity of the requested change, the lack of any plausible discriminatory explanation, and the literal impossibility of *not* making the change, the DOJ did not preclear the Douglas County polling location changes before the election. The County was forced to move forward with the location change because the original polling places were unsafe, despite the Voting Rights Act provisions prohibiting implementation of an uncleared change.

In a September 13, 2012 letter, more than 40 days after the primary election, the Department of Justice finally notified Douglas County that while the Attorney General did not "interpose any objections" to the polling place change, the Department reserved the right to reexamine the county's submission. Response to Douglas County Georgia, DOJ File No. 2012-4022. The letter further noted that "Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes." *Id.* Douglas County thus remained under continued threat of federal administrative review and litigation because of a decision that was necessary to protect the health and safety of its citizens.

D. The Prospect of Bailout for the Covered States Is Illusory.

Congress justified the possibility that its coverage formula would be over- or under-inclusive, with the bailout and bail-in provisions. *Shelby Cnty.*, 811 F. Supp. 2d at 432-33. As discussed below, it would be essentially impossible for any of the amici States to bail out.

Like Congress, the majority below found solace in the bailout provision, stating that as of May 9, 2012, 136 jurisdictions and sub-jurisdictions had successfully bailed out. (Pet. App. 57a.) But no Covered State has ever been allowed to bail out,[9] and as Judge Williams noted in his dissent, bailout does not remove federal oversight. (Pet. App. 92a (stating that "for a decade after bailout, the court 'retain[s] jurisdiction' just in case the Justice Department or 'any aggrieved person' wishes to file a motion 'alleging that conduct has occurred which . . . would have precluded' bailout in the first place.") (quoting 42 U.S.C. § 1973b(a)(5))). Further, the 1982 reauthorization of the VRA tightened the substantive standards for bailout:

> A covered jurisdiction can now obtain bailout if, and only if, it can demonstrate that, during the preceding *ten* years, it has (simplifying slightly): (1) effectively engaged in no voting discrimination (proven by the absence of any judicial finding of discrimination or even a Justice Department "objection" (unless judicially overturned); (2) faithfully complied with § 5 preclearance; (3) "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process"; and (4) engaged in "constructive efforts to eliminate intimidation and harassment of persons exercising rights protected" under the act and "in other

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[9] The DOJ and the State of New Hampshire have jointly moved for entry of a bailout consent judgment and decree. *State of New Hampshire v. Holder*, D.D.C. Cause No. 1:12-cv-01854 (EGS, TBG, RMC) (Doc. 10). Unlike the amici states, New Hampshire has only ten covered towns and townships. *Id*.

> constructive efforts, such as the expanded opportunity for convenient registration."

(*Id.* (citing 42 U.S.C. § 1973b(a)(1)).)

None of the amici States is likely to ever successfully bail out because each state must prove that it (and *all* of its sub-jurisdictions) meets all the bailout requirements for the ten years preceding its declaratory judgment seeking bailout. If even one sub-jurisdiction receives an objection letter from DOJ for a voting change, the ten-year time period starts anew. Arizona, for example, has 667 sub-jurisdictions that are authorized to hold some form of election, including counties, cities, towns, school districts, and special taxing districts. The State of Arizona does not monitor those individual sub-jurisdictions to determine whether they are complying with Section 5 or whether they have ever received any preclearance objections. In fact, such oversight potentially violates Arizona law. The Arizona Supreme Court recently reiterated the long-held position that the framers of the Arizona Constitution valued local autonomy over the developing Nineteenth Century case law in other states that generally viewed cities and towns as subordinate to and dependent on the state's legislature for government authority. *City of Tucson v. Arizona*, 273 P.3d 624, 625-26, ¶¶ 7-8 (Ariz. 2012); *see also Strode v. Sullivan*, 236 P.2d 48, 53 (Ariz. 1951). As with Arizona's cities, the counties, school boards, and special taxing districts are responsible for submitting their respective voting changes for preclearance.

Because the State of Arizona has no method of ensuring that the sub-jurisdictions comply with Section 5, the State cannot affirmatively allege in a bailout action that no sub-jurisdiction has violated the VRA. Instead, the State will have to ask all of the sub-jurisdictions to voluntarily provide the necessary information and request the DOJ for each submission. This process in itself will cause the State (and the sub-jurisdictions) to use valuable staff time and resources. And if just one single sub-jurisdiction of the 667 received a preclearance objection or an unfavorable result in a Section 2 lawsuit in the past ten years, the bailout clock will start ticking again from the date of the most recent objection. As Justice Thomas noted in his dissent in *Northwest Austin*, the prospect of bailout for a State is nothing more than a "mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in the judgment in part and dissenting in part).

Covered jurisdictions such as the amici States likely will be forced to continue to operate under the unconstitutional burdens of Sections 4(b) and 5 of the VRA unless and until this Court removes them. The Court should do so now.

◆

CONCLUSION

The Court should reverse the court of appeals' judgment.

Respectfully submitted this 31st day of December, 2012,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIE

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN PUBLIC INTEREST GROUPS IN SUPPORT OF RESPONDENTS

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Additional *amici curiae* are the following organizations that represent Asian American voters and have conducted voter registration drives, voter education events, and election protection activities on election day.

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SOUTHEAST ASIA RESOURCE ACTION CENTER (SEARAC)

QUESTION PRESENTED

Whether Congress acted within its authority when it reauthorized Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Section 5), in 2006?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. SECTION 5 OF THE VOTING RIGHTS ACT CONTINUES TO BE NECESSARY AS DISCRIMINATION AND DISPARITIES AFFECT ASIAN AMERICAN VOTERS IN SECTION 5 JURISDICTIONS 5

  A. Asian Americans Face Intimidation and Discrimination in Voting and Are Discouraged from Even Going to the Polls in Section 5 Jurisdictions 6

  B. Continuing Discrimination Against Asian American Populations in Section 5 Jurisdictions Has Resulted in Disparities in Voter Registration, Turnout, and Electoral Representation 9

II. SECTION 5 OF THE VOTING RIGHTS ACT PROTECTS THE VOTING RIGHTS OF ASIAN AMERICANS 12

A. Section 5 Prevents Voter Redistricting Plans from Diluting Asian American Voting Power ... 14

B. Section 5 Prevents Changes to Voting Systems from Weakening Asian American Voting Power ... 17

C. Section 5 Ensures that Changes to Poll Sites Do Not Deny Asian Americans the Right to Vote ... 18

D. Section 5 Helps Asian Americans Exercise Their Voting Rights, Particularly in Jurisdictions Covered by the Language Assistance Provisions of the Voting Rights Act ... 21

III. SECTION 5 OF THE VOTING RIGHTS ACT REMAINS CRITICAL IN THE CONTEXT OF DISCRIMINATION FACED BY ASIAN AMERICANS ... 24

A. Asian Americans Have Suffered a Long History of Discrimination ... 26

B. Continued Discrimination Against Asian Americans Is a Barrier to Full Participation in the Political Process ... 28

CONCLUSION ... 33

APPENDIX OF *AMICI CURIAE* ... App. 1

TABLE OF AUTHORITIES

Page(s)

Federal Cases

City of Rome v. United States,
446 U.S. 156 (1980) 9

Gong Lum v. Rice,
275 U.S. 78 (1927) 27

Korematsu v. United States,
323 U.S. 214 (1944) 27, 28

Oyama v. California,
332 U.S. 633 (1948) 27

Ozawa v. United States,
260 U.S. 178 (1922) 27

People v. Brady,
40 Cal. 198 (1870) 27

Perez v. Perry,
835 F. Supp. 2d 209 (W.D. Tex. 2011) 8, 15

Perry v. Perez,
132 S. Ct. 934 (2012) 14

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 33

Federal Statutes

Birthright Citizenship Act of 2011, H.R.
140, 112th Cong. (2011) 33

Birthright Citizenship Act of 2013, H.R. 140, 113th Cong. (2013) 33

Chinese Exclusion Act of 1882, Ch. 126, 22 Stat. 58 (repealed 1943) 26

Immigration Act of 1917, Ch. 29, 39 Stat. 874 (repealed 1952) 26

Immigration Act of 1924, Ch. 190, 43 Stat. 153 (repealed 1952) 26

Naturalization Act of 1790, Ch. 3, 1 Stat. 103 (repealed 1795) 26, 27

Philippines Independence Act of 1934, Ch. 84, 48 Stat. 456 26

Scott Act of 1888, Ch. 1064, 1, 25 Stat. 504 26

Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* .... *passim*

State Statutes

N. Y. Sess. Laws 569-70 18

Regulations

28 C.F.R. pt. 51, App. 31

28 C.F.R. § 51.29 21

28 C.F.R. § 51.32 19

28 C.F.R. § 51.33 19

Executive Orders

Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) 27

Constitutional Provisions

Cal. Const. art. II, § 1 (1879) 27

Other Authorities

2011-12 National Asian Pacific American Political Almanac 58 (Don T. Nakanishi and James S. Lai eds., 14th ed. 2011-2012) 12

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INTEREST OF *AMICI CURIAE*[1]

Non-parties Asian American Legal Defense and Education Fund ("AALDEF"), Asian American Justice Center ("AAJC") and others (collectively, "*Amici Curiae*" or "*Amici*") are organizations that promote the constitutional and civil rights of Asian American citizens and residents, including, in particular, the right of Asian Americans to participate in the United States political process.

AALDEF is a 39-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has collected valuable data that documents both the use of, and the continued need for, protection under the Voting Rights Act of 1965. In 2012, AALDEF dispatched over 800 attorneys, law students, and community volunteers to 127 poll sites in 14 states to document voter problems on Election Day. The survey polled 9,298 Asian American voters.

AAJC is a national nonprofit, nonpartisan organization based in Washington, D.C. AAJC is a member of the Asian American Center for Advancing Justice, whose other members are Asian American Institute, Asian Law Caucus, and Asian Pacific American Legal Center. Founded in 1991, AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. AAJC was a key player in collaborating with other civil rights groups to reauthorize the Voting Rights Act in 2006. In the 2012 election, AAJC and the affiliates conducted poll monitoring and voter protection efforts across the country, including in California, Florida, Georgia, Illinois, Texas, and Virginia.

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[1] Pursuant to Rule 37.6, *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members, and their counsel have made any monetary contribution to the preparation and submission of this brief. This brief is filed with the parties' written consent, copies of which are on file with the Clerk.

Among other activities, *Amici* provide educational services, promote community awareness, monitor and seek to prevent violence against Asian Americans, and assist with the development and adoption of legislation and rulemaking that ensure Asian Americans can meaningfully participate in the United States political process. All of the *Amici* share as a common goal the desire that Asian Americans' voting rights are honored in accordance with constitutional and legislative guarantees, particularly with the Voting Rights Act of 1965. To that end *Amici* have conducted voter education events, voter registration drives, and election monitoring activities on Election Day, as well as undertaken efforts to ensure that populations of Asian Americans are accurately tabulated as part of the United States Census.[2]

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[2] Statements of interest for the other *Amici* are included in the Appendix to this brief.

SUMMARY OF ARGUMENT

Amici Curiae submit this brief to underscore the importance of the continued enforcement of the Voting Rights Act of 1965 in preventing actual and threatened discrimination aimed at Asian Americans in national and local elections. *Amici* also seek to highlight the ongoing disparities in voter registration, voter turnout and electoral representation experienced by Asian American populations in jurisdictions covered by Section 5 of the Voting Rights Act, and to illustrate how the Act has ameliorated specific instances of such electoral irregularity. Given the discrimination and disparities in voting rights that still exist in these covered jurisdictions, and given the exemplary record of the Act in preventing further exacerbation of the problems experienced by Asian American communities, Section 5 remains a critical tool to protect the right of Asian Americans to participate in the political process on an equal basis with all other United States citizens.

Representatives of the Asian American community submitted significant evidence to Congress in support of the reauthorization of the Voting Rights Act, documenting the unique discriminatory practices faced by Asian Americans in exercising their right to vote. This evidence also demonstrated that the Voting Rights Act has had, and continues to have, a meaningful positive impact on the Asian American community. *Amici* wish to highlight how the evidence Congress received illuminates a valuable, but often overlooked, perspective on unique discriminatory practices aimed at Asian Americans in the electoral process; such practices underscore the necessary and ongoing contributions of the Voting Rights Act to protecting minority voting rights.

The significance of Section 5 in protecting the voting rights of Asian Americans is amply illustrated through the community's experiences in scrutinizing redistricting efforts, ensuring participation and representation in local elections, responding to changes in poll sites and seeking language assistance at the polls. Continued disparities in voter registration and electoral representation, however, indicate that the work of Section 5 is not over. Despite the important victories achieved through prior successful Section 5 challenges, the need for Section 5's protection remains critical to the Asian American community today, particularly as the Asian American population grows in jurisdictions covered by Section 5. Ongoing discrimination against Asian Americans, derived from historical antipathy coupled with continued efforts to stifle the community's emerging political voice, make Section 5 an essential mechanism for combating the systemic problems that prevent Asian Americans from fully participating in the electoral process.

Section 5 of the Voting Rights Act continues to be necessary, is justified under current circumstances, and was properly reauthorized by Congress in 2006. A ruling to the contrary would disregard Congress' deliberative fact-finding process and leave the Asian American community, currently the fastest-growing racial group in the United

States, without the necessary protections to fully exercise its right to vote.

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT CONTINUES TO BE NECESSARY AS DISCRIMINATION AND DISPARITIES AFFECT ASIAN AMERICAN VOTERS IN SECTION 5 JURISDICTIONS.

Asian Americans[3] have successfully utilized Section 5 to prevent discriminatory changes to voting from being implemented.[4] However, Asian Americans continue to face discrimination in Section 5 jurisdictions on Election Day. Additionally, continuing and pervasive discrimination against

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[3] The notion of "Asian American" encompasses a broad diversity of ethnicities, many of which have historically suffered their own unique forms of discrimination. Discrimination against Asian Americans as discussed here addresses both discrimination aimed at specific ethnic groups along with the discrimination directed at Asian Americans generally.

[4] Section 5 requires certain states and localities with a history of racial discrimination to obtain federal approval of changes in voting practices. Once a jurisdiction is covered, Section 5 requires that changes to any voting qualification, standard, practice, procedure, or redistricting plan be "precleared" by the United States Department of Justice ("DOJ") or the U.S. District Court for the District of Columbia before going into effect. *See* 42 U.S.C. § 1973c. To obtain preclearance, the jurisdiction must show that the proposed change does not have the purpose or effect of denying or abridging the right to vote on the basis of race or color. *See id.* If preclearance is denied, then the change cannot be implemented. *See id.*

Asian American voters in Section 5 jurisdictions has resulted in disparities in voter participation and electoral representation, especially compared to non-Hispanic Whites.

A. Asian Americans Face Intimidation and Discrimination in Voting and Are Discouraged from Even Going to the Polls in Section 5 Jurisdictions.

In reauthorizing Section 5 of the Voting Rights Act, the House Judiciary Committee found instances of discriminatory tactics and efforts by local officials to keep covered language minority citizens from registering and casting effective ballots in many different jurisdictions. *See* H.R. Rep. No. 109-478, *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* at 45 (2006). These discriminatory practices, including against Asian American voters, continue to afflict Section 5 jurisdictions.

For example, in the 2004 primary elections in Bayou LaBatre, Alabama, supporters of a white incumbent running against Phuong Tan Huynh, a Vietnamese American candidate, made a concerted effort to intimidate Asian American voters. They challenged Asian Americans at the polls, falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions. *See* H.R. Rep. No. 109-478 at 45; *see also Challenged Asian ballots in council race stir discrimination concern*, Associated Press State & Local Wire, Aug. 29, 2004, *available at* http://news.google.com/newspapers?nid

=1817&dat=20040830&id=cc4dAAAAIBAJ&sjid=w6cEAAAAIBAJ&pg=6668,5046184. The challenged voters were forced to complete a paper ballot and have that ballot vouched for by a registered voter. In explaining his and his supporters' actions, the losing incumbent stated, "We figured if they couldn't speak good English, they possibly weren't American citizens." *See* DeWayne Wickham, *Why renew Voting Rights Act? Ala. Town provides answer*, USA Today, Feb 22, 2006, *available at* http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm. The DOJ investigated the allegations and found them to be racially motivated. *See* H.R. Rep. No. 109-478 at 45; *see also* Press Release, U.S. Dep't of Justice, *Justice Department to Monitor Elections in New York, Washington, and Alabama*, Sept. 13, 2004, *available at* http://www.justice.gov/opa/pr/2004/September/04_crt_615.htm ("In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters."). As a result, the challengers were prohibited from interfering in the general election, and the city, for the first time, elected an Asian American to the City Council. *See* Wickham, *supra*.

In another example, from the 2004 Texas House of Representatives race, Hubert Vo's victory over an Anglo incumbent prompted two recounts, both of which affirmed the victory over the incumbent's request that the Texas House of Representatives investigate the legality of the votes cast in the election. The implication was that Vo's Vietnamese American supporters voted in the wrong district or were not U.S. citizens with the right to vote in the first place. Vo's campaign voiced concern that such an investigation could intimidate Asian Americans from political participation altogether. *See* Thao L. Ha, *The Vietnamese Texans*, in *Asian Texas* 284-85 (Irwin A. Tang ed. 2007). Vo's election was particularly significant for the Asian American community because he is the first Vietnamese American state representative in Texas history. *See* Test. of Ed Martin, Trial Tr. at 350:15-23, *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011) (hereinafter "Martin Test."); Test. of Rogene Calvert, Trial Tr. at 420:2-421:13, *Perez*, 835 F. Supp. 2d 209; Test. of Sarah Winkler, Trial Tr. at 425:18-426:10, *Perez*, 835 F. Supp. 2d at 209.

Similarly, in 2004 in New York, a Section 5 jurisdiction for certain counties, poll workers required Asian American voters to provide naturalization certificates before they could vote.[5] At another poll site, a police officer demanded that all Asian American voters show photo identification, even though photo identification is not required to vote in New York elections. If voters could not produce such identification, the officer turned them away and told them to go home. *See Continuing*

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[5] New York City has the nation's largest Asian American population. Elizabeth M. Hoeffel, Sonya Rastogi, Myoung Ouk Kim & Hasan Shahid, U.S. Census Bureau, *The Asian Population: 2010*, at 12 tbl.3 (2012), *available at* www.census.gov/prod/cen2010/briefs/c2010br-11.pdf. Most of the examples of Section 5's success in this brief draw from the Asian American experience in New York City because of its sizeable Asian American population and because it is one of the few places in the country covered under both Section 5 and Section 203.

Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the S. Judiciary Comm., 109th Cong. 37 (2006) (testimony of Margaret Fung, AALDEF, Exec. Dir.); Letter from G. Magpantay, AALDEF Staff Attorney, to J. Ravitz, Exec. Dir., New York City Bd. of Elections (June 16, 2005) (submitted to Congress).

B. Continuing Discrimination Against Asian American Populations in Section 5 Jurisdictions Has Resulted in Disparities in Voter Registration, Turnout, and Electoral Representation.

In *City of Rome v. United States*, the Court upheld the constitutionality of Section 5, recognizing Congress' determination that significant disparities existed between the percentages of registered whites and African Americans to vote. 446 U.S. 156, 180-81 (1980). The Court also recognized the dearth of African American elected officials, particularly in state office. *Id.* More than 30 years after this decision, disparities in voting and political representation still exist for minorities, and in particular for Asian Americans, as compared to non-Hispanic white Americans. Approximately 45 percent of Asian Americans are not registered to vote compared to only 26 percent of non-Hispanic Whites and 30 percent of African Americans.[6] Thom

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[6] This depressed voter turnout stems, in part, from a failure to adequately eliminate formidable language barriers to voting, as roughly one-third of Asian Americans over the age of 18 have limited English proficiency. *See* Voting Rights Act: Hearing on Section 203-Bilingual Election Requirements, Part

File & Sarah Crissey, U.S. Census Bureau, *Voting and Registration in the Election of November 2008*, at 1, 5 (2012), *available at* www.census.gov/prod/ 2010pubs/p20-562.pdf.

The voting rates for Asian Americans also tend to be low (as low as 35 percent for 18- to 24-year old voters) in the South, where many Section 5 jurisdictions are located, including Alabama, Texas, and Georgia. *See id.* at 10. In Alabama, only 4,000 of the 16,000 Asian American citizens of voting age voted in 2010. *See* U.S. Census Bureau, *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2010* (2010), Table 4b, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html. This is in stark contrast to the almost 1.1 million non-Hispanic white voting-age Alabama citizens who voted (out of almost 2.5 million non-Hispanic white voting-age citizens), equaling 44 percent of those eligible. *See id.* Data are similarly low in other Section 5 jurisdictions, particularly in the South. For example, in Georgia, which has a population of 102,000 Asian American citizens, only 30 percent of those citizens were registered to vote in November 2006, and only 26 percent actually voted. *See* U.S. Census Bureau, *Reported Voting and Registration of the Voting-Age Population, by Sex, Race and*

I Before the H. Subcomm. on the Const. of the H. Judiciary Comm., 109th Cong. 19 (2005) (statement of Margaret Fung, AALDEF, Exec. Dir.); *see also* Voting Rights Act and Reauthorization Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the H. Subcomm. on the Const. of the H. Judiciary Comm., 109th Cong. 40 (2006) (prepared statement of K. Narasaki, citing a 2000 U.S. Census Report).

Hispanic Origin, for States: November 2006 (2006), Table 4b, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2006/tables.html (hereinafter "2006 Table 4b"). This stands in stark contrast to the percentage of non-Hispanic white citizens in Georgia who were registered (69 percent) and who voted (47 percent). *See id.*[7] In the 2008 general election, only 58 percent of Georgia's Asian American registered voters turned out to vote compared to 77 percent of the state's white registered voters. *See* Ga. Sec'y of State Voter Registration Sys., *Active Voters by Race/Gender, General Election Voting History* (Jan. 23, 2009), *available at* http://sos.georgia.gov/elections/voter_registration/2008%20stats/DocumentDirect%20SSVRZ376_Nov_2008.pdf.

In addition to these disparities in voter registration and turnout, Asian Americans continue to lack representation in elected offices nationwide. The Asian American community faces ongoing discrimination and has yet to see its political strength keep pace with its rapid growth. While the Asian American population experienced an astonishing eight-fold increase between 1970 and 2000, the number of Asian American elected officials grew comparatively modestly from 120 to 613 between 1978 and 2012. *Compare* Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 10 (2006) (citing 1970 statistics), *available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf, *with 2011-12 National Asian Pacific American Political Almanac* 58 (Don T. Nakanishi and James S. Lai eds., 14th ed. 2011-2012) (presenting 2012 statistics). However, even these modest gains for the Asian American community could not have been achieved without the protections afforded under Section 5 and other provisions of the Voting Rights Act.[8]

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[7] Similarly, in Texas, home to 319,000 Asian American citizens, only 43.0% were registered in November 2006, with 24.1% actually voting. *See* 2006 Table 4b, *supra*, at 11. In contrast, 72.8% of non-Hispanic white citizens in Texas were registered, with 45.2% voting. *See id.* In Virginia, home to 140,000 Asian American citizens, only 48.4% were registered in November 2006, with 25.2% actually voting. *See id.* In contrast, 71.1% of non-Hispanic white citizens in Virginia were registered, with 51.9% voting. *See id.*

II. SECTION 5 OF THE VOTING RIGHTS ACT PROTECTS THE VOTING RIGHTS OF ASIAN AMERICANS.

The importance of Section 5 of the Voting Rights Act in protecting the constitutional rights of Asian Americans to participate in the United States electoral process at local, state, and national levels cannot be overstated. The protections offered by the Act remain of paramount importance to the ability of the Asian American community to exercise the most fundamental of rights offered by a democratic system – that is, to vote, and to have that vote be counted the same as all other participants.

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[8] According to a 2005 study, approximately 75 percent "of Asian American elected officials were from jurisdictions covered by Section 203 provisions or in combination with other provisions," including Section 5. *See* Carol Hardy-Fanta *et al.*, *Race Gender and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States*, at 17 (2005), *available at* www.gmcl.org/pdf/APSA9-05-05.pdf.

In 1975, Congress extended the Voting Rights Act to cover "language minorities," including Asian Americans, recognizing that "[d]iscrimination against Asian Americans is a well known and sordid part of our history." S. Rep. No. 94-295, at 28 n.21 (1975); 42 U.S.C. §§ 1973b(f), 1973l(c)(3); *see also* S. Rep. No. 94-295, at 28-30 (noting that "language minority citizens have been the target of discrimination in almost every facet of life"). Alabama, one of the original jurisdictions covered by Section 5, was immediately subject to these broader prescriptions for protecting the voting rights of language minorities.

Yet by 2006, when Congress was considering reauthorizing Section 5, the record before it demonstrated that the problems Section 5 sought to address, including those experienced by Asian Americans, remained ongoing, and could not be dismissed as mere sordid history. Over thirty years after passing protections for language minorities, Congress still faced evidence of profound voting discrimination against Asian Americans and other minorities, including in Alabama. *See, e.g.*, H.R. Rep 109-478 at 44, 45; *Voting Rights Act and Reauthorization Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the H. Subcomm. on the Const. of the H. Judiciary Comm.*, 109th Cong. 40 (2006) (hereinafter "Hearing on H.R. 9"); *see also* James Blacksher, Edward Still, Nick Quinton, Cullen Brown & Royal Dumas, *Voting Rights in Alabama 1982-2006*, at 5-19 (2006) (outlining extensive voting discrimination in Alabama between 1982 and 2006, including intentional discrimination in poll worker appointment and in methods of electing local bodies), *available at* http://www.protectcivilrights.org/pdf/voting/AlabamaVRA.pdf. Overt racism and discrimination against Asian Americans at the polls persist to the present day, and Section 5 has been a tool to combat such barriers.

A. Section 5 Prevents Voter Redistricting Plans from Diluting Asian American Voting Power.

Section 5 prevents voter dilution and other retrogressive effects against Asian Americans in voter redistricting plans by allowing Asian Americans to participate in and scrutinize the redistricting process.

The protection of the Asian American voice afforded by Section 5 remains necessary today as there exists evidence of redistricting plans still being drafted with discriminatory intent. Indeed, in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas Legislature engaged in efforts to preclear a redistricting plan, PlanH283, that would have had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote.

Since 2004, the Asian American community in Texas State House District 149 has voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62 percent. *See* United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53. Texas, a covered jurisdiction under Section 5, is home to the third-largest Asian American community in the United States, following New York and California. Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States 2011*, App. B, at 60 (2011), *available at* http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf. (hereinafter "*Community of Contrasts*"). Consistent with its dramatic growth in other Southern states, the Asian American population in Texas grew 72 percent between 2000 and 2010. *Id.*

The Texas Legislature sought to eliminate Vo's State House seat and redistribute the coalition of minority voters to the surrounding three districts. PlanH283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149, to districts with larger non-minority populations. *See* Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. *See* http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf. PlanH283 would have thus abridged the Asian American community's right to vote in Texas by diluting the large Asian American populations in District 149 and other districts.

AAJC's partner, the Texas Asian-American Redistricting Initiative (TAARI), working with a coalition of Asian American and other civil rights organizations, participated in the Texas redistricting process and advocated on the District 149 issue.[9] Despite the community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of Section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and the DOJ ultimately rejected PlanH283 as not complying with Section 5. *See Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3.

AALDEF has also long used Section 5 to protect the Asian American community in New York. After the 1980, 1990, 2000, and 2010 Censuses, AALDEF, along with many community groups, submitted comments under Section 5 on the redistricting plans for the New York City Council and New York State Legislature, highlighting the importance of keeping Asian American neighborhoods within a single district due to political cohesion among Asian American voters. *See* AALDEF, *Asian Americans and the Voting Rights Act: The Case for Reauthorization*, App. O (2006) (hereinafter, "AALDEF Report") (submitted to Congress and *available at* www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf); Letter from M. Fung, AALDEF Exec. Dir., *et al.* to J. Rich, U.S. Dep't of Justice (Apr. 29, 2003) (submitted to

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[9] Letter from TAARI, Mexican American Legal Defense and Educational Fund, and NAACP Houston to Chairman Solomons on the elimination of HD 149 and the community's desire for it to be reinstated (April 26, 2011) (on file with author).

Congress with AALDEF Report and on file with counsel).

B. Section 5 Prevents Changes to Voting Systems from Weakening Asian American Voting Power.

Section 5 has also prevented changes to voting systems that would have retrogressive effects on Asian American voters. For example, before 2001, in New York City the only electoral success for Asian Americans was on local community school boards. In each election – in 1993, 1996, and 1999 – Asian American candidates ran for the school board and won. *See* Lynette Holloway, *This Just In: May 18 School Board Election Results*, N.Y. Times, June 13, 1999, *available at* http://www.nytimes.com/1999/06/13/nyregion/making-it-work-this-just-in-may-18-school-board-election-results.html; Jacques Steinberg, *School Board Election Results*, N.Y. Times, June 23, 1996, *available at* http://www.nytimes.com/1996/06/23/nyregion/neighborhood-report-new-york-up-close-school-board-election-results.html; Sam Dillon, *Ethnic Shifts Are Revealed in Voting for Schools*, N.Y. Times, May 20, 1993, *available at* http://www.nytimes.com/1993/05/20/nyregion/ethnic-shifts-are-revealed-in-voting-for-schools.html. These victories were due, in part, to the alternative voting system known as "single transferable voting" or "preference voting." Instead of selecting one representative from single-member districts, voters ranked candidates in order of preference, from "1" to "9." *See* Thomas T. Mackie & Richard Rose, The International Almanac of Electoral History 508 (3d ed. 1991).

In 1998, New York submitted to the DOJ for preclearance a switch from a "preference voting" system, where voters ranked their choices, to a "limited voting" system, where voters could select only four candidates for the nine-member board, and the nine candidates with the highest number of votes were elected. *See* 1998 N. Y. Sess. Laws 569-70 (McKinney). AALDEF submitted comments to the DOJ opposing the change and urged denial of preclearance because Asian American voters would be in a worse position to elect candidates of their choice. *See* Letter from M. Fung, AALDEF Exec. Dir., and T. Sinha, AALDEF Staff Attorney, to E. Johnson, U.S. Dep't of Justice (Oct. 8, 1998) (submitted to Congress with AALDEF Report and on file with counsel). The DOJ, using its authority under Section 5, interposed an objection and prevented the voting change from taking effect. *See Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing Before the H. Subcomm. on the Const., H. Judiciary Comm.*, 109th Cong. 1664-66 (2005) (appendix to statement of the Honorable Bradley J. Schlozman, U.S. Dep't. of Justice) (providing Section 5 objection letter to Board and summarizing changes made to the voting methods, along with overall objections to the changes).

C. Section 5 Ensures that Changes to Poll Sites Do Not Deny Asian Americans the Right to Vote.

Changes to poll sites frustrate the ability of Asian Americans to vote. Since AALDEF began monitoring elections in New York City, there have been numerous instances where the Board has failed to take reasonable steps to ensure that Asian American voters are informed of their correct poll sites. Voters have been misinformed about their poll sites before the elections or misdirected by poll workers at poll sites on Election Day. Section 5 has helped to minimize these disruptions.

Section 5's preclearance requirement serves an important and mandatory public notice function: any changes to the locations of designated poll sites must be submitted for preclearance, and, once submitted, the Attorney General must notify interested individuals and groups of the proposed submission, as well as provide copies of detailed submissions to groups who request the information. *See* 28 C.F.R. §§ 51.32, 51.33. Such advance notice is a prerequisite to the community's ability to react to a disruptive change in poll sites or other election procedures. Experience has shown that Section 5 has prevented sudden poll site closures in Asian American neighborhoods that would otherwise have been made without any notice to the community.

Section 5 ensures that voters receive notice of poll site changes, even in emergencies. *See* AALDEF Report at 41. For example, in 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, AALDEF discovered that a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks.

The Board chose to close down the poll site and submitted the proposed change to the DOJ for preclearance under Section 5, but failed to inform voters of the change. *See id.*

AALDEF lodged oral comments with the DOJ urging for an objection because no notice had been given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203. AALDEF contended that the Board should have considered placing bilingual poll workers and translated signs at the poll site directing voters to alternative poll sites. *See id.*

Thereafter, the DOJ issued an objection and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. *See id.* Without Section 5, those voters would have undoubtedly lost their right to vote.

D. Section 5 Helps Asian Americans Exercise Their Voting Rights, Particularly in Jurisdictions Covered by the Language Assistance Provisions of the Voting Rights Act.

Section 5 has had its greatest impact on the ability of Asian Americans to participate in the political process by ensuring effective language assistance at the polls.[10] Section 203 of the Voting Rights Act requires jurisdictions, based on a formula using census data, to provide translated ballots and voting materials as well as oral language assistance for voters who are limited English proficient. *See* 42 U.S.C. § 1973aa-1a(c). Section 5 requires that any plans to comply with Section 203, or changes to current practices to comply with that section, be precleared. *See* 42 U.S.C. § 1973b(f)(3)-(4) (applying Section 5 coverage trigger to language assistance obligations). Section 5 enforces Section 203 so as to ensure that any changes to the provision of language assistance are not retrogressive by allowing interested individuals and community groups to review any proposed changes and provide comments during the preclearance period. *See* 28 C.F.R. § 51.29.

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[10] The United States Census Bureau reports that almost two-thirds of Asian Americans are foreign-born, and approximately one in three are limited in their English proficiency. *See Community of Contrasts*, *supra*, at 15. Moreover, the U.S. Census Bureau estimates that among certain Asian American groups, including Vietnamese, Hmong, Cambodians, Laotians, Taiwanese, Koreans, and Chinese, roughly half the populations are "limited English proficient." *Id.* at 28.

Thus, when jurisdictions are covered under both Sections 5 and 203 for Asian language assistance – such as New York and Kings Counties in New York and Harris County in Texas – the provisions combine as a powerful tool to ensure that language minorities have full access to political participation.

For example, Section 5 played a pivotal role in shaping the Chinese Language Assistance Program in New York City, which was first adopted after three counties in the city gained coverage under Section 203 in 1992. Limited English proficient Chinese American voters typically know the candidates by their transliterated names. These names appear in Asian-language media outlets, advertising, public notices, and campaign literature. *See* AALDEF, *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* 12 (2005) (finding that 36 percent of Asian American voters turned to ethnic media outlets in Asian languages for their main source of news about politics and community issues), *available at* www.aaldef.org/docs/AALDEF-Exit-Poll-2004.pdf.

In the 1994 election cycle, community groups pressed for fully translated ballots that included the transliteration of the candidates' names in Chinese. The Justice Department's denial of preclearance for New York City's Chinese language program under Section 5's comment and preclearance process gave community groups and individuals the valuable opportunity to shape the nature and scope of meaningful language assistance programs, resulting in fully translated ballots for the limited English proficient Chinese Americans who sought to exercise their civic duties. Ashley Dunn, *Board Agrees on Ballots In Chinese*, N.Y. Times, Aug. 25, 1994, *available at* http://www.nytimes.com/1994/08/25/nyegion/board-agrees-on-ballots-in-chinese.html; *Voting Rights Act: Hearing on Section 203-Bilingual Election Requirements, (Part I) Before the H. Subcomm. on the Const. of the H. Judiciary Comm.*, 109th Cong. 19 (2005) (statement of Margaret Fung, AALDEF, Exec. Dir.); *see also* Letter from D. Patrick, U.S. Dep't of Justice to K. King, Gen. Counsel, New York City Bd. of Elections (May 13, 1994) (denying preclearance; on file with counsel).

The growing need for Sections 5 and 203 to provide language assistance for voters became more evident after the 2000 Census, which reported a 66 percent growth in the Asian American population in New York. *See* Jessica S. Barnes & Claudette E. Bennett, U.S. Census Bureau, *The Asian Population: 2000*, at 5 tbl. 2 (2002), *available at* www.census.gov/prod/2002pubs/c2kbr01-16.pdf. Commensurate with this growth, the number of poll sites and election districts targeted to provide language assistance significantly increased. *See* AALDEF Report at 43.

Despite this population growth, the New York City Board of Election tried to curtail its language assistance program by proposing a change in its targeting formula, which would have resulted in the removal of Chinese language assistance at nearly 70 poll sites in heavily populated neighborhoods. The change would have also removed 16 sites for Korean language assistance. *See id.* In response, AALDEF submitted comments opposing preclearance under

Section 5, arguing that the change was retrogressive. *See* Letter from G. Magpantay, AALDEF Staff Attorney, to J. Rich, U.S. Dep't of Justice (Oct. 17, 2003) (submitted to Congress with AALDEF Report and on file with counsel).

In deciding whether to interpose an objection, the DOJ sent the Board a "more information" request letter, asking for more detailed information to refute AALDEF's contentions. It also gave the Board another opportunity to demonstrate that the change would not place Asian Americans in a worse position to exercise their right to vote. Upon receiving DOJ's "more information" letter, along with AALDEF's opposition letter, the Board withdrew its submission to change the targeting formula. *See* AALDEF Report at 43. Only because of Section 5 was Section 203 fully implemented in New York City in this instance.

In short, Section 5 is a critical component of the Voting Rights Act, allowing Asian Americans full access to voting and affording them a powerful tool to fight efforts to quiet their voices. Without the safeguards provided by Section 5, Asian Americans would be denied their constitutional right to participate equally and meaningfully in the electoral process.

III. SECTION 5 OF THE VOTING RIGHTS ACT REMAINS CRITICAL IN THE CONTEXT OF DISCRIMINATION FACED BY ASIAN AMERICANS.

Discrimination against Asian American populations in Section 5 jurisdictions is of particular concern given the perception of Asian Americans as "outsiders," "aliens," and "foreigners." *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them).[11] Based on this perception, at various points in history Asian Americans were denied rights held by U.S. citizens. Remnants of the sentiment that evoked these denials persist today and continue to harm Asian Americans.

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[11] In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001), *available at* http://www.committee100.org/publications/survey/C100survey.pdf. Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. Cynthia Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 UCLA Asian Pac. Am. L.J. 72, 74-75 (2001); Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. Personality & Soc. Psychol. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

A. Asian Americans Have Suffered a Long History of Discrimination.

The shameful history of extensive discrimination against the Asian American community in the United States is well known. Until 1943, federal policy barred immigrants of Asian descent from even becoming United States citizens, and it was not until 1952 that racial criteria for naturalization were removed altogether. *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage,* 53 UCLA L. Rev. 405, 415 (2005). Indeed, history is replete with examples of anti-immigrant sentiment directed towards Asian Americans, manifesting in legislative efforts to prevent Asian immigrants from entering the United States and becoming citizens. *See, e.g.*, Philippines Independence Act of 1934, ch. 84, 48 Stat. 456, 462 (imposing annual quota of fifty Filipino immigrants; amended 1946); Immigration Act of 1924, ch. 190, 43 Stat. 153 (denying entry to virtually all Asians; repealed 1952); Scott Act of 1888, ch. 1064, 1, 25 Stat. 504, 504 (rendering 20,000 Chinese re-entry certificates null and void); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (providing one of the first laws to limit naturalization to aliens who were "free white persons" and thus, in effect, excluding African-

Americans, and later, Asian Americans; repealed 1795).

Legally identified as aliens "ineligible for citizenship," *Ozawa v. United States*, 260 U.S. 178, 198 (1922), Asian immigrants were prohibited from voting, *see, e.g.*, Cal. Const. art. II, § 1 (1879) ("no native of China . . . shall ever exercise the privileges of an elector in this State"), and owning land, *Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that California's Alien Land Law "was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien"). Both immigrant and native-born Asians also experienced pervasive discrimination in everyday life, *People v. Brady*, 40 Cal. 198, 207 (1870) (upholding law providing that "No Indian. . . or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man" against Fourteenth Amendment challenge); *see also Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren).

Perhaps the most egregious example of discrimination was the incarceration of 120,000 Americans of Japanese ancestry during World War II without due process. *See* Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the internment); *see also Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment under strict scrutiny review). White immigrant groups whose home countries were also at war with the United States were not similarly detained and no assumptions regarding their loyalty, trustworthiness and character were similarly made. *See Korematsu*, 323 U.S. at 233, 240-42 (Murphy, J., dissenting) (noting that similarly situated American citizens of German and Italian ancestry were not subjected to the "ugly abyss of racism" of forced detention based on racist assumptions that they were disloyal, "subversive," and of "an enemy race," as Japanese Americans were); Natsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 Duke F. for L. & Soc. Change 71, 75 (2009) (noting "the presumption made by the military and sanctioned by the Supreme Court that Japanese Americans, unlike German or Italian Americans, could be presumed disloyal by virtue of their national origin").

B. Continued Discrimination Against Asian Americans Is a Barrier to Full Participation in the Political Process.

1. Anti-Immigrant and Anti-Asian American Sentiment Remains Pervasive.

Racist sentiment towards Asian Americans is not a passing adversity but a continuing reality, fueled in recent years by reactionary post-9/11 prejudice and a growing backlash against immigrants. *See* U.S. Dep't of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, at 4 (Oct. 19, 2011) (noting that the FBI reported a 1,600 percent increase in anti-Muslim hate crime incidents in 2001), *available at* http://www.justice.gov/crt/

publications/post911/post911summit_report_2012-04.pdf. Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants. *See, e.g.*, *id.*, at 7-9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ). In 2010, the nation's law enforcement agencies reported 150 incidents and 190 offenses motivated by anti-Asian/Pacific Islander bias. Fed. Bureau of Investigation, *Hate Crime Statistics* (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-1-incidents-offenses-victims-and-known-offenders-by-bias-motivation-2010.xls.

Discriminatory attitudes towards Asian Americans manifest themselves in the political process as well. For example, during a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters adopt names that are "easier for Americans to deal with" in order to avoid difficulties imposed on them by voter identification laws. R.G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chron., Apr. 8, 2009, *available at* http://www.chron.com/news/houston-texas/article/Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php. Although this statement did not physically obstruct any voters from reaching the polls, it made clear that the Asian American community's voice was unwelcome in American politics and notably cast Asian Americans apart from other "Americans."

At a campaign rally during the 2004 U.S. Senate race in Virginia (a jurisdiction covered under Section 5), incumbent George Allen repeatedly called a South Asian volunteer for his opponent a "macaca" – a racial epithet used to describe Arabs or North Africans that literally means "monkey" – and then began talking about the "war on terror." *See* Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology; Name Insults Webb Volunteer*, Wash. Post, Aug. 15, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/14/AR2006081400589.html.

Incidents of discrimination and racism like these perpetuate the misperception that Asian American citizens are foreigners and have the real effect of denying Asian Americans the right to fully participate in the electoral process. Such discrimination has created an environment of fear and resentment towards Asian Americans, many of whom are perceived as foreigners based on their physical attributes. This perception, coupled with the growing sentiment that foreigners are destroying or injuring the country, jeopardizes Asian Americans' ability to exercise their right to vote free of harassment and discrimination.

2. As Asian American Populations Continue to Grow Rapidly in Section 5 Jurisdictions, Levels of Discrimination Against Racial Minorities Can Be Expected to Rise.

Asian Americans have become the fastest growing minority group in the United States. *See* Hoeffel *et al.*, *supra* note 5, at 1, 3. While the total population in the United States rose 10 percent between 2000 and 2010, the Asian American population increased 43 percent[12] during that same time span. *Id.*

The fastest population growth occurred in the South, where the Asian American population increased by 69 percent. *Id.* at 6. Today, of the five states with the fastest Asian American population growth, two are entirely covered under Section 5 (Arizona and Georgia) and another (North Carolina) is partially covered. *See* 28 C.F.R. pt. 51, App.; Hoeffel *et al.*, *supra*, note 5, at 8. In Alabama (also a completely covered state), Asian Americans experienced a 70 percent increase between 2000 and 2010. Hoeffel *et al.*, *supra*, note 5, at 7.

With this demographic shift comes a continuing need for Section 5 to combat voting discrimination in covered jurisdictions. *See Voting Rights Act: Hearing on Section 203-Bilingual Election Requirements, (Part I) Before the H. Subcomm. on the Const. of the H. Judiciary Comm.*, 109th Cong. 19 (2005) (statement of Margaret Fung, AALDEF, Exec. Dir.); Hearing on H.R. 9, 109th Cong. 47 (prepared statement of K. Narasaki, Exec. Dir., Asian Am. Justice Ctr.). When groups of minorities move into or outpace general population growth in an area, reactions to the influx of outsiders can result in racial tension.[13] Thus, as Asian American populations continue to increase rapidly in jurisdictions covered by Section 5, levels of racial tension and discrimination against racial minorities can be expected to increase. In 2011, the growth of immigrant communities and rising anti-immigrant sentiment in Alabama led to the passage of H.B. 56, the toughest immigration enforcement law in the country. Also in 2011, state lawmakers in other regions in the South, including Georgia and South Carolina, launched efforts to deny the automatic right of citizenship to the U.S.-born children of undocumented immigrants.[14] At the federal level, Alabama members of the U.S. House of Representatives co-sponsored legislation to enact this restriction.[15] This bill was reintroduced in 2013 and co-sponsored again by Alabama Representatives, as well as legislators from other Section 5 jurisdictions such as Arizona, Georgia, and Texas.[16]

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[12] The U.S. Census Bureau data in this brief reflects figures for Asian Americans who reported themselves as "Asian alone." Counting the Asian American community's rapidly growing multiracial population, who reported as "Asian alone or in combination," this growth rate is 46 percent. *Community of Contrasts*, *supra*, at 15.

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[13] *See* Gillian Gaynair, *Demographic shifts helped fuel anti-immigration policy in Va.*, The Capital (Feb. 26, 2009), *available at* http://www.hometownannapolis.com/news/gov/2009/02/26-10/Demographic-shifts-helped-fuel-anti-immigration-policy-in-Va.html (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times, Feb. 22, 2009 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), *available at* http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer, Jan. 25, 2009 (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift is in Store*, L.A. Times, Apr. 12, 2007, at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian), *available at* http://articles.latimes.com/2007/apr/12/ local/me-chinohills12.

Given the discrimination against Asian Americans and immigrants that persists as these populations continue to grow, the protections of Section 5 remain critical in the jurisdictions they cover.

CONCLUSION

Section 5 has proven to be an effective tool in protecting Asian American voters against a host of actions that threaten to curtail their voting rights. American citizens of Asian ancestry have been targeted as foreigners and unwanted immigrants, and racism and discrimination against them in this country persist to this day. These negative perceptions have real consequences for the ability of Asian Americans to fully participate in the electoral and political process. Congress properly reauthorized Section 5 after a deliberative fact-finding process, mindful in particular of the important functions that Section 5 serves for minority communities.

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[14] *See* Shankar Vedantam, State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship, Wash. Post, Jan. 5, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html; *see also United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents).

[15] Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011).

[16] Birthright Citizenship Act of 2013, H.R. 140, 113th Cong., (2013).

For the foregoing reasons and the reasons presented by Respondent and Intervenor-Respondent, the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI*

Alliance of South Asian American Labor (ASAAL)

ASAAL is a community-based organization founded by trade unionists that are of South Asian heritage. ASAAL's mission is to increase the culture of civic participation in the larger South Asian American community based on their organizing experiences in the labor movement.

American Citizens for Justice/Asian American Center for Justice

American Citizens for Justice/Asian American Center for Justice was founded in 1983 in response to the baseball bat beating case of Vincent Chin. It is an organization devoted to civil rights education and advocacy in the Asian American community.

Asian American Bar Association of the Greater Bay Area (AABA)

The Asian American Bar Association of the Greater Bay Area (AABA) represents the interests of Asian Pacific American attorneys in the Greater San Francisco Bay Area. It is one of the largest Asian Pacific American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, AABA has been actively involved in civil rights issues and has advocated on issues regarding minority communities, diversity, and equal protection. Among other things, AABA filed an amicus brief in the *Bakke* affirmative action case before the United States Supreme Court in 1977 and in *In re Marriage Cases* before the California Supreme Court in 2007.

Asian American Institute (AAI)

The Asian American Institute (AAI) is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI is a member of the Asian American Center for Advancing Justice, whose other members include Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the discrimination and other challenges that immigrants face, including laws or policies that disproportionately impact and hinder eligible citizens' ability to exercise their fundamental right to vote. Accordingly, AAI has a strong interest in this case.

Asian Law Alliance (ALA)

The Asian Law Alliance (ALA) is a local non-profit, non-partisan organization whose mission is to ensure equal access to the justice system to Asian and Pacific Islanders and low income residents of Santa Clara County through legal services, community education and advocacy. Founded in 1977, ALA has a long-standing interest in voting rights and protecting the rights of Asian and Pacific Islanders to access the polls.

Asian Law Caucus (ALC)

Established in 1972, the Asian Law Caucus (ALC) is the country's oldest civil rights and public interest legal organization serving the Asian Pacific American community. ALC is dedicated to the pursuit of equality and justice for all sectors of society. ALC represents primarily low-income, monolingual, or limited English proficient Asian Pacific Americans in the areas of employment/labor, immigration, housing/community development, and civil rights. Through its Voting Rights project, ALC works to ensure the full participation of all eligible voters in the electoral process.

Asian Pacific American Legal Center (APALC)

Founded in 1983, the Asian Pacific American Legal Center of Southern California (APALC), a member of the Asian American Center for Advancing Justice, is the nation's largest nonprofit public interest law firm devoted to the Asian American, Native Hawaiian and Pacific Islander community. APALC provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders. APALC's civil rights litigation has covered a broad range of issues such as race and national origin discrimination, access to education, immigration and naturalization, language rights, garment worker rights and other low-wage worker exploitation. APALC has a long history of working to protect the voting rights of historically disenfranchised communities and thus has a strong interest in the outcome of this case.

Asian Pacific American Legal Resource Center (APALRC)

The Asian Pacific American Legal Resource Center (APALRC) is a non-profit civil legal services organization based in Washington, D.C. that serves the region's low-income Asian Americans with limited English proficiency. Founded in 1998, the mission of APALRC is to ensure Asian Americans' access to justice through linguistically accessible and culturally appropriate legal services, community legal education, and advocacy. Promoting language access in government services and the legal system is central to the work of the APALRC. Since 2008, APALRC has participated in election monitoring and voter assistance activities on Election Day to protect Asian Americans' right to political participation.

Asian Pacific American Network of Oregon (APANO)

The Asian Pacific American Network of Oregon (APANO) is a statewide, grassroots organization, uniting Asians and Pacific Islanders (APIs) to achieve social justice. APANO's efforts focus on creating a just and equitable world where APIs are fully engaged in the social, economic and political issues that affect us. APANO's work on redistricting issues has successfully raised awareness about the political representation of Oregon's fast-growing API community with legislative decision makers, with community partners, and with API communities.

Asian & Pacific Islander American Health Forum (APIAHF)

The Asian & Pacific Islander American Health Forum (APIAHF) is a national health justice organization that influences policy, mobilizes communities, and strengthens programs and organizations to improve the health and well-being of more than 18 million Asian Americans, Native Hawaiians, and Pacific Islanders living in the United States and its jurisdictions. Many of APIAHF's partners are located in Section 5-covered jurisdictions including Arizona, Georgia, Louisiana, Mississippi, Texas and Virginia. APIAHF believes that civic engagement and the ability to participate in the political process is a crucial aspect to achieving health equity and justice for Asian American communities.

Asian and Pacific Islander American Vote – Michigan (APIAVote-MI)

APIAVote-MI is a nonpartisan 501(c)(3) nonprofit organization that serves the Asian Pacific Islander American community in Michigan through civic participation, advocacy, and education. APIAVote-MI registered over 700 voters, mobilized over 20,000 voters, conducted poll monitoring/exit polling, and distributed a multilingual voter guide during the 2012 election.

Asian Services in Action, Inc. (ASIA)

Asian Services in Action, Inc. (ASIA) is a non-profit health and human services agency in Ohio dedicated to empowering and advocating for Asian Americans/Pacific Islanders (AAPIs) and to providing AAPIs access to quality, culturally and linguistically appropriate information and services. Incorporated in 1995, ASIA serves over 10,000 individuals annually, the majority of whom are immigrants and refugees from Asia, through legal assistance, social services, vocational training, and issue advocacy. ASIA has witnessed firsthand that naturalized AAPI voters often require assistance at the polls due to limited English proficiency and unfamiliarity with American civic institutions. Given the widespread and persistent stereotypes of AAPIs as perpetual and 'invasive' foreigners or immigrants, ASIA believes that Section 5 of the Voting Rights Act remains necessary to protect the voting rights of AAPI citizens, especially in locales with histories of racial discrimination.

Association of Asian Pacific Community Health Organizations (AAPCHO)

The Association of Asian Pacific Community Health Organizations (AAPCHO) is a national association of community health organizations serving medically underserved Asian Americans, Native Hawaiians, and other Pacific Islanders. AAPCHO is dedicated to promoting advocacy, collaboration, leadership, access, and civic participation to improve the health status of these groups. AAPCHO shares the collective knowledge and experiences of its members with policy makers at the national, state, and local levels and seeks to improve the integration and engagement of community health centers and their patients in the electoral process.

Center for Pan Asian Community Services, Inc. (CPACS)

Center for Pan Asian Community Services, Inc. (CPACS) is a private nonprofit located in Atlanta, Georgia. CPACS' mission is to promote self-sufficiency and equity for immigrants, refugees, and the underprivileged through comprehensive health and social services, capacity building, and advocacy. CPACS sponsored numerous events and provided community services, such as voter registration drives, polling site assistance, exit polling, and voter education, during the most recent election cycle. CPACS seeks to protect and advance the voting rights of Asian and Pacific Islander Americans in a state that is covered by Section 5.

Chinese for Affirmative Action (CAA)

Chinese for Affirmative Action (CAA) was founded in 1969 to protect the civil and political rights of Chinese Americans and to advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community. CAA advocates for systemic change that protects immigrant rights, promotes language diversity, and remedies racial injustice.

Chinese Progressive Association (CPA)

Founded in 1972, the Chinese Progressive Association (CPA) educates, organizes and empowers the low income and working class immigrant Chinese community in San Francisco to build collective power with other oppressed communities to demand better living and working conditions and justice for all people. As part of CPA's Political

Empowerment Campaign, CPA has trained and developed dozens of new grassroots leaders and reached thousands of Chinese immigrant voters.

Hmong American Partnership (HAP)

Hmong American Partnership (HAP) is a non-profit community development and social service agency that provides critical services and support to more than 5,000 community members within Minnesota each year. HAP's vision is to reach out to the world with profound social, economic and education transformation, and a crucial key to accomplishing this vision is to encourage Asian American community members to participate in the civic engagement process. During the last election, HAP worked closely with its subsidiary organization, Hmong National Development (HND), to launch a full-scale GOTV campaign to encourage individuals within the community to vote. In addition, HAP took a public stance against the Voter ID amendment in Minnesota and educated the community on the amendment and the importance of voting. HAP is dedicated to empowering the Asian American community and opposes any measures that discriminate and create additional barriers for community members to have a voice. Therefore, HAP strongly supports efforts to ensure that all individuals are given a voice and a chance to vote.

Japanese American Citizens League (JACL)

The Japanese American Citizens League (JACL) was founded in 1929. It is the oldest and largest civil rights organization representing persons of Japanese and other ancestry in the United States. It has over 10,000 members and chapters throughout the nation. JACL was a leading organization in removing state alien land laws and in securing redress for Japanese Americans imprisoned during World War II. JACL also has a long history of advocacy in issues relating to immigration, naturalization, and voting rights.

Korean Americans for Political Advancement (KAPA)

KAPA is a membership organization promoting progressive policies that advance the political and civil rights of all citizens, the rights of all immigrants, and economic and social justice for all individuals and communities. Through lobbying, grassroots organizing, and political action, KAPA also strives to encourage civic participation and to help organize the political power of individuals – particularly of Korean American individuals residing in the New York metropolitan area – in ways that advance KAPA's advocacy purpose.

MinKwon Center for Community Action (MinKwon)

MinKwon was established to meet the needs and concerns of the Korean American community through education, civic participation, immigrant rights, social services, and culture in New York. MinKwon works with various grassroots organizations on immigration policy and voter rights. MinKwon has conducted election poll monitoring/exit polling for the past several elections, including the 2008 election.

National Asian Pacific American Bar Association (NAPABA)

The National Asian Pacific American Bar Association (NAPABA) is the national association of

Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over 40,000 attorneys and more than 60 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. Section 5 of the Voting Rights Act has proven to be a critical tool for ensuring that all Americans have access to the ballot, and must be upheld in order to protect the voting rights of Asian Pacific Americans. NAPABA has affiliates in many of the Section 5-covered jurisdictions, including Alabama, Arizona, Georgia, Louisiana, Texas, Virginia, California, Florida, and New York.

OCA

OCA is a national organization dedicated to advancing the political, social, and economic well-being of Asian Pacific Americans (APAs). Through the 80 chapters and affiliates from across the United States, OCA members engage in voter registration, mobilization, and protection efforts for the traditionally disenfranchised class including but not limited to the APA population. OCA has local chapters in Arizona, Georgia, Texas, Virginia, California, Florida, New York, and Michigan, which are or include Section 5-covered jurisdictions.

Sikh American Legal Defense and Education Fund (SALDEF)

The Sikh American Legal Defense and Education Fund (SALDEF) is the oldest Sikh American civil rights and educational organization in the United States. SALDEF works to empower Sikh Americans and ensure the protection of their civil rights, including their voting rights.

South Asian Americans Leading Together (SAALT)

South Asian Americans Leading Together (SAALT) is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. As an organization that is committed to the importance of civic engagement and ensuring that the South Asian community and all immigrant communities have the fundamental right to vote and fully participate in the election and political process, SAALT joins this brief to ensure that Section 5 of the Voting Rights Act continues to protect these rights for all Americans.

South Asian Bar Association of Northern California (SABA-NC)

The South Asian Bar Association of Northern California (SABA-NC) was founded in 1993 to ensure that Bay Area South Asian lawyers were provided an avenue to develop professionally, network among peers and volunteer within the South Asian community. SABA-NC supports and hosts fundraisers for South Asian community support and social service organizations and facilitates pro bono legal services to those in need.

SABA-NC has supported and participated in voter registration drives and voter protection poll monitoring projects.

Southeast Asia Resource Action Center (SEARAC)

SEARAC was founded in 1979 to facilitate the relocation of Southeast Asian refugees into American society as well as the development of nonprofit organizations led by and for Southeast Asians. SEARAC's principal mission is to advance the interests of Southeast Asian Americans by promoting community empowerment and leadership development, as well as by advocating for and representing the diverse Southeast Asian American community on issues and concerns such as education, health care, safety, economic development, and civil rights. The Southeast Asian American population is spread throughout the United States, with high concentrations in states such as California, Texas, and Louisiana. SEARAC's work with community-based organizations that serve Southeast Asian American communities includes working with organizations in Section 5 jurisdictions such as New Orleans, Merced, and Houston.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF OF JOAQUIN AVILA, NEIL BRADLEY, JULIUS CHAMBERS, U.W. CLEMON, ARMAND DERFNER, JOSE GARZA, FRED GRAY, ROBERT MCDUFF, ROLANDO RIOS, ROBERT RUBIN, EDWARD STILL, ELLIS TURNAGE, AND RONALD WILSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE DISTINCT AND COMPLEMENTARY FUNCTIONS OF LITIGATION AND PRECLEARANCE ARE BOTH NECESSARY TO COMBAT PERSISTENT AND WIDESPREAD DISCRIMINATION IN COVERED JURISDICTIONS 5

A. Section 5 Continues To Thwart Discrimination In Covered Jurisdictions That Would Evade Section 2 Enforcement 8

B. Section 2 Litigation Remains Too Slow And Resource-Intensive To Police Discrimination In Covered Jurisdictions Without Section 5 Preclearance 15

1. Section 5 Preclearance Is Necessary Because Case-by-Case Enforcement Alone Remains Too Inefficient to Protect Minority Voting Rights 17

2. The High Cost of Section 2 Litigation Makes Case-by-Case Enforcement of the Voting Rights Act Impracticable and More Burdensome for Covered Jurisdictions 24

TABLE OF CONTENTS – Continued

Page

3. The Lack of Experienced Voting Rights Attorneys Makes Enforcement by Section 2 Alone Impracticable 28

C. Only Section 5 Preclearance Can Keep Up With The Volume Of Discrimination That Takes Place At The Local Level 30

II. THE DETERRENT EFFECT OF SECTION 5 CANNOT BE MINIMIZED OR IGNORED 32

A. Substantial Evidence Supports Congress' Finding That Section 5 Deters Covered Jurisdictions From Enacting Discriminatory Practices 33

B. Section 5's Deterrent Effect Is Critical At The Local Level Where Voters Are Most Vulnerable To Discrimination And Have The Least Access To The Resources To Bring Section 2 Suits 37

CONCLUSION 40

APPENDIX A

Listing of Amici Curiae A1

TABLE OF AUTHORITIES

Page

CASES

Beer v. United States, 425 U.S. 130 (1976) 5

Bone Shirt v. Hazeltine, No. Civ. 01-3032-KES, 2006 WL 1788307 (D.S.D. June 22, 2006) 29

Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988) 21

City of Boerne v. Flores, 521 U.S. 507 (1997) 6

City of Rome v. United States, 446 U.S. 156 (1980) 17

Dillard v. Baldwin County Bd. of Educ., 686 F.Supp. 1459 (M.D. Ala. 1988) 12, 13

Dillard v. Chilton County Bd. of Educ., 699 F.Supp. 870 (M.D. Ala. 1988) 12, 13

Dillard v. Chilton County Comm'n, 447 F.Supp.2d 1273 (M.D. Ala. 2006) 13

Dillard v. City of Greensboro, 213 F.3d 1347 (11th Cir. 2000) 13, 26

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 1

Harper v. City of Chicago Heights, Nos. 87 C 5112, 88 C 9800, 2002 WL 31010819 (N.D. Ill. Sept. 6, 2002) 26

LULAC v. Perry, 548 U.S. 399 (2006) 14, 21

LULAC v. Perry, No. Civ. 2:03-CV-354, 2006 WL 3069542 (E.D. Tex. Aug. 4, 2006) 14

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Page

Major v. Treen, 700 F.Supp. 1422 (E.D. La. 1988) 26

Mississippi State Chapter Operation PUSH v. Mabus, 788 F.Supp. 1406 (N.D. Miss 1992) 26

Mississippi State Chapter, Operation PUSH v. Allain, 674 F.Supp. 1245 (N.D. Miss. 1987) 11

Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991) 38

Moultrie v. Charleston County, No. Civ. 2:01-cv-00562-PMD (D.S.C. Aug. 8, 2005) 25, 28

Perkins v. Matthews, 400 U.S. 379 (1971) 31, 32

Perry v. Perez, 132 S. Ct. 934 (2012) 1

Reynolds v. Sims, 377 U.S. 533 (1964) 17

Rogers v. Lodge, 458 U.S. 613 (1982) 17

Shelby County v. Holder, 811 F.Supp.2d 424 (D.D.C. 2011) 12

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .... *passim*

Symm v. United States, 439 U.S. 1105 (1979) 23

Tangipahoa Citizens for Better Government v. Parish of Tangipahoa, No. Civ. A.03-2710, 2004 WL 1638106 (E.D. La. July 19, 2004) 23, 24

Teague v. Attala County, 92 F.3d 283 (5th Cir. 1996) 22

Teague v. Attala County, No. Civ. A.191CV209DD, 1995 WL 1945387 (Mar. 1, 1995) 22

TABLE OF AUTHORITIES – Continued

Page

Thornburg v. Gingles, 478 U.S. 30 (1986) 18

United States v. Charleston County, No. Civ. 2:01-cv-00155-PMD (D.S.C. May 24, 2002)............20

United States v. Charleston County, 2003 WL 23525360 (D.S.C. Aug. 14, 2003)............................21

United States v. Charleston County, 316 F.Supp.2d 268 (D.S.C. 2003)...............................9, 10

Williams v. City of Dallas, 734 F.Supp. 1317 (N.D. Tex. 1990) 21

Williams v. McKeithen, No. Civ. A. 05-1180, 2005 WL 2037545 (E.D. La. Aug. 8, 2005) 19

Young v. Fordice, 520 U.S. 273 (1997) 12

STATUTES AND RULES

42 U.S.C. §1973 (Section 2)................................*passim*

42 U.S.C. §1973c (Section 5) ....*passim*

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An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006)...............32, 39

TABLE OF AUTHORITIES – Continued

Page

Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act Of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) 25

H.R. Rep. No. 91-397 (1970) 6

H.R. Rep. No. 94-196 (1975) 7

H.R. Rep. No. 109-478 (2006) .... *passim*

Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the H. Comm. on the Judiciary, 109th Cong. (2006) 8, 26, 27, 35

Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry, 109th Cong. (2006) 13, 38

S. Rep. No. 94-295 (1975) 9, 18

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The Continuing Need for Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

Page

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Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006)..30, 37

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Page

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INTEREST OF AMICI CURIAE[1]

Amicus curiae are long-serving members of the voting rights bar who each bring to bear decades of experience litigating hundreds of actions under Sections 2 and 5 of the Voting Rights Act of 1965 ("VRA"). Amici have represented minority voters before this Court in cases spanning more than 50 years from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), through *Perry v. Perez*, 132 S. Ct. 934 (2012).

Amici have personally and repeatedly witnessed the efficient and effective interplay between Section 2 litigation and the Section 5 preclearance process in covered jurisdictions; experienced the burdens that Section 2 litigation imposes on minority voters, jurisdictions, and courts; and witnessed firsthand the strong deterrent effect of Section 5 preclearance. Amici provided Congress with extensive evidence of their experiences through testimony and reports submitted during the hearings on the 2006 reauthorization.

Amici submit this brief to urge the Court to give due consideration, as Congress did, to the practical consequences of attempting to fill the void left by Section 5 with case-by-case-litigation under Section 2, including the discrimination it would leave unremedied, as well as the burdens it would place on courts and litigants – including the covered jurisdictions themselves. Amici have a professional interest in the outcome of this case because, if Section 5 were struck down, they – along with the small number of colleagues with the experience and expertise necessary to litigate such cases – would be left to take up the task, as best they could, of enforcing the VRA in covered jurisdictions through case-by-case litigation. Amici submit this brief to support Congress' finding that Section 2 litigation is not yet an adequate substitute for Section 5 preclearance.

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[1] This brief is filed with the consent of all parties. Blanket consents are on file with the clerk. No counsel for any party authored this brief in whole or in part, nor did any person other than amici and their counsel make a monetary contribution to the preparation or submission of this brief.

◆

SUMMARY OF ARGUMENT

Congress enacted Section 5 in 1965 because voting suits were "unusually onerous to prepare," "exceedingly slow," and, even when successful, could not stop offending jurisdictions from enacting new discriminatory measures. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). Since then, Section 2 litigation and Section 5 preclearance have operated effectively as the sword and shield of voting rights enforcement. Petitioner's assertion that case-by-case litigation under Section 2 can effectively replace Section 5 preclearance ignores the burdens of Section 2 litigation and the benefits of Section 5 preclearance. An extensive legislative record underlies Congress' finding that Section 5 remains necessary.

First, Congress considered evidence that Section 5 performs a distinct, prophylactic function, which case-by-case litigation alone could not replace. While Section 2 seeks to eradicate existing discriminatory election practices, Section 5 preclearance can block discriminatory changes to jurisdictions' voting practices before they take effect. Section 5 maintains the progress achieved through litigation and prevents backsliding, by assigning to covered jurisdictions the burden of demonstrating that proposed changes have no discriminatory purpose or retrogressive effect on minority voting rights. Thus, Section 5 "shift[s] the advantage of time and inertia" from the perpetrators of discrimination to the victims. *Katzenbach*, 383 U.S. at 328.

Second, Congress considered compelling evidence that Section 2 litigation is too cumbersome and expensive to perform Section 5's preemptive role in preventing new discriminatory changes before they take effect. The voting rights bar lacks the numbers and resources to address the current volume of potential Section 2 litigation, let alone to prosecute the vast number of Section 2 lawsuits that would be necessary to block all the discriminatory changes that would be implemented without Section 5. Even when available resources permit investigation and filing a complaint, the slow pace of Section 2 litigation would leave discriminatory voting practices in effect. Challenges of timing, the difficulty of showing a reasonable likelihood of success before discovery, the need for expert analysis, and the natural hesitance of federal courts to interfere with scheduled elections make preliminary injunctions especially difficult to obtain in Section 2 cases. Candidates elected during the pendency of litigation enjoy the benefits of incumbency, even if litigation is ultimately successful and the election declared illegal. Section 2 litigation is also unusually expensive, both for plaintiffs and ultimately for taxpayers who must bear the expense of defending litigation (including plaintiffs' attorneys' fees, when litigation is successful). On the other hand, Section 2 plaintiffs' recovery of fees and costs is uncertain and often takes years. By comparison, Section 5 submissions are quick and inexpensive for covered jurisdictions to prepare and much more efficient to resolve.

Third, Section 5 preclearance has a deterrent effect that Section 2 litigation does not. Petitioner asserts that Congress' conclusion that Section 5 deters covered jurisdictions from enacting discriminatory practices is based on "supposition and conjecture." The legislative record disproves this assertion. Congress received extensive testimony demonstrating the deterrent effect of preclearance, supported by numerous examples of discriminatory voting changes that covered jurisdictions proposed or considered but ultimately discarded due to concerns that the change might not be precleared. By contrast, Section 2 is a relatively weak deterrent because litigation can only dismantle discrimination on a piecemeal basis, leaving challenged practices in effect until minority voters are able to find the resources to sue and prevail in slow, costly litigation.

In sum, the record before Congress supports the conclusions that a shift from a comprehensive enforcement regime to a purely reactive one, dependent entirely on Section 2, would leave new and backsliding discrimination unaddressed; would overburden not only the Courts but also the covered jurisdictions with expensive litigation; and would unleash discriminatory laws that Section 5 has deterred.

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ARGUMENT

I. THE DISTINCT AND COMPLEMENTARY FUNCTIONS OF LITIGATION AND PRECLEARANCE ARE BOTH NECESSARY TO COMBAT PERSISTENT AND WIDESPREAD DISCRIMINATION IN COVERED JURISDICTIONS.

Congress designed the VRA to provide a comprehensive voting rights enforcement scheme that both remedies existing discriminatory practices and preserves resulting gains. *Beer v. United States*, 425 U.S. 130, 140-41 (1976).

Section 5 preclearance was enacted to bolster an ineffective enforcement regime that had relied solely on slow and costly case-by-case litigation to eradicate entrenched discrimination. *See* H.R. Rep. No. 109-478 at 66 (2006) (noting that failing to reauthorize Section 5 "would reverse the burden of proof and restore time consuming litigation as the principal means of assuring the equal right to vote") (quoting H.R. Rep. No. 91-397 (1970)); *Katzenbach*, 383 U.S. at 314, 327-28; *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (noting the necessity of Section 5 due to "the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation") (internal citations omitted). Section 2 aims to eradicate existing discriminatory voting practices nationwide, 42 U.S.C. §1973(a), while Section 5 preserves those gains and prevents backsliding by blocking jurisdictions with grave records of discrimination from enacting new retrogressive or purposefully discriminatory voting changes, *id.* at §1973c(a). Congress, in repeatedly reauthorizing Section 5, and this Court, in repeatedly upholding it, have been less concerned with instances of gamesmanship than with "the slow, costly character of case-by-case litigation." *Flores*, 521 U.S. at 526. Nonetheless, the legislative record shows that Section 5 continues to thwart attempts by covered jurisdictions to evade judgments and consent decrees that result from Section 2 litigation, in spite of Petitioner's contrary assertion. *See* Pet. Br. 25.

While Section 2 litigation is vital to remedy existing discriminatory voting practices, it is insufficient. *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005) (*History, Scope, & Purpose*); *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th

Cong. 149 (2006) (*Modern Enforcement*). Without Section 5 preclearance to preserve the gains of Section 2 litigation, covered jurisdictions could simply adopt different but equally discriminatory voting procedures and then defy minority voters "to sustain the burden of proving that the new law, too, was discriminatory." H.R. Rep. No. 94-196 (1975) at 57-58; *see History, Scope, & Purpose* 82-83. Even if minority voters can muster the resources to sue, these new discriminatory practices and procedures can remain in effect for years while litigation is pending. *History, Scope, & Purpose* 92, 97, 101; *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 97 (2006) (*Evidence of Continued Need*); *The Continuing Need for Section 5 Preclearance*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (*Continuing Need*). But Section 5 preclearance "shift[s] the advantage of time and inertia" to minority voters by placing a limited burden on covered jurisdictions to demonstrate only that their changes have neither the purpose nor effect of making minority voters worse off. *Katzenbach*, 383 U.S. at 314. Because preclearance submissions are, by orders of magnitude, less expensive than litigation, Section 5 spares minority voters the burden of prosecuting Section 2 cases and spares covered jurisdictions the substantial cost of defending such lawsuits. *See infra* Section I.B.2.

Preclearance also ensures that all proposed changes receive meaningful and expeditious review.

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the H. Comm. on the Judiciary, 109th Cong. 11-13 (2006) (*Policy Perspectives*). This scrutiny is especially important for local-level changes that might otherwise go unnoticed, but affect matters of daily importance including education, transportation, and property taxation. *See Evidence of Continued Need* 1505; *Continuing Need* 15. Without preclearance, minority voters and the voting rights bar lack the resources to review more than a tiny fraction of the more than 14,000 changes proposed annually by covered jurisdictions. Department of Justice, Section 5 Changes by Type and Year;[2] *Modern Enforcement* 149; *History, Scope, & Purpose* 79, 84. The legislative record supports Congress' finding that Section 2 litigation remains an inadequate substitute for Section 5 preclearance. *See* H.R. Rep. No. 109-478 at 57.

A. Section 5 Continues To Thwart Discrimination In Covered Jurisdictions That Would Evade Section 2 Enforcement.

In 1965, Congress was presented with evidence that state and local officials attempted to circumvent federal court decisions striking down their illegal voting procedures and practices "by simply administering new and novel discriminatory schemes and devices." H.R. Rep. No. 109-478, at 7-8 (2006). In its 2006 reauthorization, Congress considered evidence that Section 5 continues to prevent covered jurisdictions from using novel devices to gut successful voting rights litigation. In each recent example discussed below, Section 5 enabled minority voters to avoid pursuing successive lengthy and costly Section 2 suits against a covered jurisdiction's efforts at circumvention.

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[2] http://www.justice.gov/crt/about/vot/sec_5/changes.php.

In 2004, Section 5 prevented Charleston County, South Carolina from making an end-run around a federal court's ruling that an at-large election system with a majority-vote requirement discriminated against minority voters. H.R. Rep. No. 109-478, at 39-40; S. Rep. No. 109-295, at 314 (2006). Before 2004, the Charleston County school board used an at-large system with no majority requirement. *Evidence of Continued Need* 1946. By contrast, the county council was elected under an at-large system with a majority vote requirement that made it difficult for members of the African-American community to elect their candidates of choice. *Id.*; *United States v. Charleston County*, 316 F.Supp.2d 268, 274, 294 (D.S.C. 2003). In 2001, the federal Department of Justice (DOJ) and minority voters initiated parallel Section 2 actions that finally ended the county council's discriminatory system. *Id.* at 271-72. Against a backdrop of recent and longstanding intentional discrimination against black voters in Charleston County, *id.* at 286 n.23, the court found the council's at-large system had a discriminatory effect in violation of Section 2, *id.* at 306. A month after the district court held that the county council's method of election violated Section 2, the South Carolina General Assembly, "led by the Charleston legislative delegation," enacted a law that adopted a de facto majority vote requirement for the county school board, "essentially recreating the electoral system for county council." *Evidence of Continued Need* 1946. The Attorney General objected and stopped this attempt at retrenchment before it could take effect. *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 80, 85 (2005) (*Scope & Criteria*). As plaintiffs' counsel testified before the House, "[w]e won, and as soon as we won . . . the legislature adopted the exact same election system for the school board." *Id.* at 80.

Section 5 also thwarted the repeated efforts of the city of Seguin, Texas to suppress minority turnout and dilute minority voting strength. Latino voters successfully sued the city for Section 2 violations three times between 1978 and 1993 over redistricting plans designed to maintain an Anglo city council in the majority-minority city. Nina Perales et al., *Voting Rights in Texas: 1982-2006*, 29 (June 2006) (*Texas*

Report).[3] When 2000 census figures showed Latinos poised to elect a majority of the city council, the Attorney General objected to a proposed redistricting designed to preserve the Anglo majority. *Id.* The city subsequently corrected its map, "but then closed its candidate filing period so that [an] Anglo incumbent would run for office unopposed." *Id.* Latino voters then filed a successful Section 5 suit, the election was enjoined, and, after the parties negotiated a new election date, the action was settled, "and today, a Latino majority serves on the Seguin City Council." *Id.*

As a third example, Section 5 has also blocked attempts in Mississippi to backslide on a statewide scale. *See, e.g.*, S. Rep. No. 109-295 at 224. Black voters there were able to bring a successful Section 2 action against the state's century-old dual registration system for state and municipal elections, originally "enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890." *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F.Supp. 1245, 1251 (N.D. Miss. 1987); *Modern Enforcement* 152. The district court ruled the dual-registration system illegal in 1987 and its judgment was affirmed in 1991, prompting the state to adopt a unitary registration system for all elections. *Modern Enforcement* 152. But only four years later, Mississippi re-enacted dual-registration for state and federal elections and refused to submit the plan for preclearance until ordered to by this Court. *Modern Enforcement* 16; *Young v. Fordice*, 520 U.S. 273, 275 (1997). "Only after the DOJ objected [to the state's preclearance submission for the dual registration plan] did Mississippi return to the unitary registration system it had adopted after the *Operation PUSH* decision." *Modern Enforcement* 149.

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[3] *Available at* http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf.

Numerous Alabama localities provide a fourth example. In 1986, a federal court found that a defendant class of 183 cities, counties, and school boards in Alabama (including Shelby County) violated Section 2 by switching from single-member to at-large elections and enacting "numbered place" and "anti-single shot" voting procedures "for the purpose of minimizing black voting strength." *Dillard v. Baldwin County Bd. of Educ.*, 686 F.Supp. 1459, 1461 (M.D. Ala. 1988); *see Shelby County v. Holder*, 811 F.Supp.2d 424, 442 (D.D.C. 2011); *History, Scope, & Purpose* 3201. In one spinoff case, the Chilton County Commission admitted that its at-large voting system violated Section 2 and it entered into a court-approved settlement that made temporary changes until the Commission proposed and the state legislature enacted a new set of procedures. *History, Scope, & Purpose* 3202; *Dillard v. Chilton County Bd. of Educ.*, 699 F.Supp. 870, 871 (M.D. Ala. 1988). Over a decade later, the temporary system remained and an all-white group intervened to ask the court to invalidate the 1988 settlement. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry*, 109th Cong. 379-80 (2006) (*Legislative Options*); *see Dillard v. Chilton County Comm'n*, 447 F.Supp.2d 1273, 1275 (M.D. Ala. 2006). In 2003, the Chilton County Commission adopted a resolution at intervenors' request urging the passage of a local act restoring a voting system that the Commissioners, the plaintiffs, and the district court had *fifteen years earlier* all agreed violated Section 2. *Legislative Options* 379-80. However, Section 5 and the DOJ's refusal to preclear the "new" system prevented its implementation. *Id.* at 380. Section 5 has prevented other *Dillard* jurisdictions from backsliding (and from circumventing settled rules) as well. *See Evidence of Continued Need* 452-55 (discussing post-*Dillard* objections and further litigation against City of Foley and Baldwin County); *Legislative Options* 376-77 (discussing post-*Dillard* objections to proposed changes in Camden and Valley). "The preclearance provisions of Section 5 . . . were indispensable" to preserving the gains of the *Dillard* litigation on a statewide scale. *Legislative Options* 380; *see* S. Rep. No. 109-295, at 127.

The legislative record contains numerous other examples of Section 5 protecting voters in covered jurisdictions from similar evasive maneuvers. *See, e.g.*, H.R. Rep. No. 109-478 at 38 (Section 5 objection in 1989 blocked redistricting plan adopted in Lancaster, South Carolina after settlement of Section 2 claims, which would have added additional city council seats, watering down influence of black voters and protecting white incumbents); *Texas Report* 23 (after settling Section 2 action by agreeing to implement single-member districts, Haskell Consolidated Independent School District attempted to return to at-large elections but was stopped by DOJ objection); *History, Scope, & Purpose* 82-83 (after settling Section 2 action by agreeing to at-large elections, City of Freeport, Texas drew objection in 2002 for attempting to reinstitute at-large election); *Evidence of Continued Need* 1965-66 (Section 5 objection in 1994 blocked Barnwell, South Carolina's attempt to adopt a discriminatory majority-vote requirement that a district court had enjoined in 1986, after the city ignored Section 5 objection to the city's 1984 proposal to adopt the same majority-vote requirement); *Evidence of Continued Need* 1619 ("Between 1982 and 2003, [eleven Louisiana] parishes were 'repeat offenders,' and thirteen times the DOJ noted that local authorities were merely resubmitting objected-to proposals with cosmetic or no changes").

The import of Section 5 has been confirmed by post-reauthorization experience. After this Court held that Texas' congressional redistricting plan violated Section 2, *League of United Latin American Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 442 (2006), the district court redrew the boundaries and ordered special elections, with runoff elections required if no special election candidate received more than 50% of the vote. Civ. 2:03-CV-354, 2006 WL 3069542 (E.D. Tex. Aug. 4, 2006). After no candidate in district 23 received a majority, the Secretary of State scheduled the runoff election for December 12, which was a Catholic feast day when many Latino voters would attend an after-work mass, but did not submit the date for preclearance. Compl. at 2, *LULAC v. Perry*, No. 5:06-cv-010460 (W.D. Tex. Dec. 1, 2006). The Texas Secretary of State also failed to preclear a drastically shortened early voting period that did not include any weekend days. *Id.* at 2-3. LULAC subsequently filed a Section 5 action to enjoin the election and compel preclearance. *Id.* Within four days, the government relented and modified early voting dates and times. *See* Order, *LULAC v. Perry*, No. 5:06-cv-010460 (W.D. Tex. Dec. 5, 2006).

If case-by-case litigation were the sole means of voting rights enforcement, authorities in covered jurisdictions could have used these means of circumvention to discriminate against minority voters despite not only the presence of Section 2 but also the existence of a Section 2 *judgment*. With effective Section 5 enforcement, these persistent attempts at discrimination were promptly and effectively thwarted.

B. Section 2 Litigation Remains Too Slow And Resource-Intensive To Police Discrimination In Covered Jurisdictions Without Section 5 Preclearance.

The House Committee on the Judiciary "k[new] from history that case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens," and "f[ound] that Section 2 would be ineffective to protect the rights of minority voters." H.R. Rep. No. 109-478, at 57. Section 2 actions have become increasingly complex and resource-intensive in recent years. Exacerbating those burdens, officials that benefit from incumbency due to a jurisdiction's discriminatory voting practice have an incentive to prolong litigation to keep the practice in effect and access to taxpayer funds to defend themselves. *See Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4-5 (2005) (*Preclearance Standards*). Unfortunately, the burdens of Section 2 litigation can prevent minority voters from pursuing claims altogether. *Evidence of Continued Need* 1620. And even when a minority voter is ready and willing to pursue claims, civil rights organizations and the few members of the voting rights bar may not have the time or funding to take such resource-intensive cases. *Modern Enforcement* 149; *Continuing Need* 15.

Congress intended Section 5 to help level the playing field. Section 5 compensates for Section 2's shortcomings by shifting the burden to covered jurisdictions and the federal government to work cooperatively and expediently to protect the right of minority voters to cast a fair ballot in every election.

1. Section 5 Preclearance Is Necessary Because Case-by-Case Enforcement Alone Remains Too Inefficient to Protect Minority Voting Rights.

The "unusually onerous" nature of voting rights litigation has always been the key reason for the preclearance remedy. *Katzenbach*, 383 U.S. at 314. Ferreting out evidence of discriminatory intent requires rigorous investigation into official decision-making. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("[D]etermining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (citation and internal quotation marks omitted).

Congress also considered evidence that litigation is more onerous today because modern voting discrimination, including vote dilution, is "more subtle than the visible methods used in 1965." H.R. Rep. No. 109-478, at 6. Although modern discrimination may be more subtle, Congress and this Court have each long recognized that vote dilution is no less effective than its antecedents at denying minorities effective political participation. *See id.*; *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *see also City of Rome v. United States*, 446 U.S. 156, 181 (1980) ("'As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength'") (quoting S. Rep. No. 94-295, at 15-16 (1975), 1975 U.S.C.C.A.N 782-785). Therefore, Congress amended the VRA in 1982 to fight vote dilution by permitting Section 2 claims to be proven on the basis of discriminatory results alone. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 7 (2005) (*Impact and Effectiveness*). But proving discriminatory effect requires not only rigorous investigation, but expert testimony on numerous factors, including geographic compactness; political cohesion; racially-polarized voting; the history of discrimination; discrimination-enhancing devices; candidate slating processes; the effect of socioeconomic disparities on political participation; racial campaign appeals; the extent of minority office holding; responsiveness to minority needs; and the policy underlying the challenged practice. *See Thornburg v. Gingles*, 478 U.S. 30, 36-38 (1986); *Continuing Need* 9. "[I]n a typical voting rights case, you need probably three experts: a demographer, to draw plans; a statistician, to analyze voting patterns; and a political scientist or historian, to talk about what . . . the present-day impact of race is in a jurisdiction." *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 69 (2005).

The Federal Judicial Center's analysis of tens of thousands of cases confirms that voting cases are not only among the most time- and resource-intensive, but that they have become significantly more so in recent years. Federal Judicial Center, "2003-2004 District Court Case-Weighting Study," Table 1 (2005) (concluding that voting cases consumed the sixth-most judicial resources out of sixty-three types of cases). The study assigned voting cases a weight of 3.86 – meaning such cases take nearly four times the work of an average case. *Id.* In comparison, antitrust cases were assigned a weight of 3.45. *Id.* The FJC also concluded that voting cases had become much more burdensome over time, finding voting case weights "increased significantly" from 1993 to 2004. *Id.* at App'x Z, at 4 & attach. 2.

In practical terms, Section 2 litigation often operates without regard to the urgency of the political process, leaving elections to be held under illegal conditions as cases crawl through the courts. *Continuing Need* 15; *Evidence of Continued Need* 92. Preliminary injunctions in Section 2 cases are extraordinarily difficult to obtain in practice. To begin, gathering the evidence necessary to establish at the preliminary injunction stage plaintiffs' likelihood of success on the merits can be an insurmountable challenge in the short timeframe before an imminent election. *See, e.g.*, *Williams v. McKeithen*, Civ. A. 05-1180, 2005 WL 2037545, at *3 (E.D. La. Aug. 8, 2005) (denying preliminary injunction motion filed against a special election qualifying period because "Plaintiffs might very well prevail on their claims following a trial on the merits but at this time

Plaintiffs are relying far too heavily on the results obtained in other cases, all of which were determined following a full trial on the merits and not on a motion for a preliminary injunction.").

Moreover, experience confirms that it asks a great deal of a district court judge, with an incomplete record and limited time, to intervene to stop or alter an upcoming election, even if the plaintiffs' case is meritorious. For example, in one such case the district court denied plaintiffs' request for a preliminary injunction against a discriminatory at-large election system, notwithstanding its a finding that plaintiffs were likely to succeed on the merits. *United States v. Charleston County*, 2:01-cv-00155-PMD, at 4 (D.S.C. May 24, 2002). "[A]ssum[ing] a posture of deference to the established electoral scheme," the court expressed its confidence that the county would respond promptly if violations were established and noted that the cost of staying the scheduled election and holding a special election could amount to $100,000. *Id.* After trial, the court found a violation, but the county did not rush to a remedy; instead attempting to delay elections for the new majority-minority districts, fighting the suit for another two years, and spending $2 million of public funds – or the cost of 20 special elections – to do so. *Scope & Criteria* 84-85. However, the district court rejected the county's proposed election schedule, noting that it "would have the effect of postponing a full and complete remedy nearly six years from the filing of this lawsuit." *Charleston County*, 2003 WL 23525360, at *3 (D.S.C. Aug. 14, 2003)

Indeed, in the Fifth Circuit, which contains three of the states that have drawn the most objections, precedent dictates that "district courts should not enjoin state or municipal elections if there is 'other corrective relief [that] will be available at a later date in the ordinary course of litigation,'" such as a special election. *Williams v. City of Dallas*, 734 F.Supp. 1317, 1367 (N.D. Tex. 1990) (finding liability and ordering special election after having denied preliminary injunction) (quoting *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988)). But that leaves the results of a discriminatory election in place while the case is litigated and allows its effects to linger afterwards. As Congress heard, a candidate elected under discriminatory conditions still "enjoys an advantage" as the incumbent entering a special election. *Evidence of Continued Need* 97.

Courts' reluctance to grant preliminary injunctions in voting cases has resulted in numerous illegal elections. Minority voters in Texas initiated a Section 2 action challenging the state's congressional redistricting plan in 2003 and prevailed in 2006, but the 2004 congressional elections were held using a map that this Court recognized "bears the mark of intentional discrimination [against Latino voters] that could give rise to an equal protection violation," *LULAC*, 548 U.S. at 440. In Attala County, Mississippi, black voters were denied a preliminary injunction and endured elections under a discriminatory map over five years of litigation before the Fifth Circuit rendered judgment in their favor, noting that the county's evidence had failed to "explain why blacks *alone* [had] been essentially shut out of the political processes in the county." *Teague v. Attala County*, 92 F.3d 283, 294-295 (5th Cir. 1996) (emphasis in original); *see Teague v. Attala County*, Civ. A.191CV209DD, 1995 WL 1945387 (Mar. 1, 1995) (order denying preliminary injunction). In Cordele, Georgia in 1987, black voters were denied a preliminary injunction notwithstanding significant evidence of discriminatory effect and expert historical evidence that the city commission's at-large system was instituted with discriminatory intent. *Evidence of Continued Need* 674-75. Elections continued during the two-year litigation, which ended in a consent decree instituting four-single member-districts – two of which were majority-black – in place of the at-large system that had elected only one African-American commissioner in history. *Id.* Cordele's example demonstrates that the theoretical availability of preliminary relief is, in many cases, fool's gold.

The two years from complaint to resolution in Cordele was quick for a Section 2 suit. Because "2 to 5 years is a rough average," multiple illegal elections could occur during the pendency of ultimately successful Section 2 litigation. *History, Scope, & Purpose* 101. Moreover, a challenged practice may remain in effect for several election cycles before generating "the evidence [necessary] to persuade the court that the challenged election mechanism is dilutive." *Id.*

By contrast, Section 5 enables prompt responses when time is of the essence. For example, in *Symm v. United States*, 439 U.S. 1105 (1979), this Court upheld that the students at historically-black Prairie View A&M University had the right to register and vote in Waller County. S. Rep. No. 109-295, at 334. In 2004, the white district attorney threatened Prairie View students with prosecution for illegal voting if they voted in an election in which a fellow student was running for a seat on the county commissioner's court. *Id.* The district attorney backed down after the students sued; however, at the last minute, the county governing body reduced the availability of early voting at the polling place near Prairie View A&M – an important change because the primary election was scheduled during the students' spring break. *Id.* The NAACP filed a Section 5 enforcement action to enjoin the county from implementing this change without preclearance, and county officials abandoned the change. *Id.*

When Section 2 operates in concert with Section 5, covered jurisdictions can work with the federal government and minority voters to implement new, non-discriminatory practices in a timely manner. For example, in September 2003, minority voters in Tangipahoa Parish, Louisiana brought a Section 2 suit challenging that year's redistricting plan for failing to reflect black voting strength. *See Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, No. Civ. A.03-2710, 2004 WL 1638106, at *1 (E.D. La. July 19, 2004). By November 2003, the parish had submitted and been denied preclearance for both its original and a revised map. *Id.* Upon receiving two objection letters, the parish designed an amended plan to address the Attorney General's concerns and held three public hearings on the new plan. *Id.* The amended plan was precleared in January 2004. *Id.* The parish held special elections under the precleared plan in March, a mere seven months after plaintiffs' filed their Section 2 complaint, and the plaintiffs' did not oppose defendants' motion to dismiss the Section 2 action as moot. *Id.* at *1-2. Section 5 prevented the implementation of the objectionable plan and timely protected against the consequences of an illegal election.

2. The High Cost of Section 2 Litigation Makes Case-by-Case Enforcement of the Voting Rights Act Impracticable and More Burdensome for Covered Jurisdictions.

Congress considered evidence that neither minority voters nor the "very small" voting rights bar can afford the "huge amounts of resources" necessary to prosecute the volume of additional Section 2 cases that would arise in the absence of Section 5 preclearance. *Continuing Need* 15. Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs for claims that promise no damage awards. *Impact and Effectiveness* 42. These costs have only grown as the complexity of Section 2 litigation has increased. Testifying before the House, former DOJ voting section chief J. Gerald Hebert "estimate[d] that the cost . . . to bring a vote dilution case through trial and appeal, runs close to a half a million dollars." *Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act Of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 65 (2006). Mr. Hebert's estimate is a conservative one – especially considering that taxpayers are not only responsible for the costs of defending jurisdictions in Section 2 litigation, but for paying fee awards to plaintiffs as well. In *Charleston County*, the court awarded Plaintiffs' counsel $712,027.71 in fees and costs after four and half years of litigation, inclusive of nearly 1800 hours from three attorneys – but exclusive of the fees and costs accrued by DOJ attorneys prosecuting the parallel action for the United States. *See* Order at 11, *Moultrie v. Charleston County*, No. 2:01-cv-00562-PMD (D.S.C. Aug. 8, 2005). The cost of the county's defense, which relied on more than double the number of attorneys, *id.* at 10, was upwards of $2 million. *Scope & Criteria* 85.

In a recent successful challenge to the State of Texas' redistricting plans, plaintiffs expended fees and costs in the amount of $2,096,397.36 – inclusive of fees for 4461.38 hours for eight attorneys and a paralegal; expert witness fees of $186,966.47; and out-of-pocket costs of $101,614.39.[4] If the state's costs of defending the suit approach plaintiffs', Texas taxpayers may be on the hook for more than $4 million.[5]

By comparison, preclearance submissions are a bargain. *Policy Perspectives* 313. "To submit the paperwork for a major election-law change can cost a local government $1,000 to more than $5,000, and for a minor one, $500 to $1,000. . . ." Peter Hardin, *Bailouts from US Voting Laws: State Localities Win Relief from Having to Get Federal Clearance for Each Change in Election Laws*, Rich. Times Dispatch, Mar. 16, 2006, at B-1; *see Evidence of Continued Need* 2683 (estimating average cost of submissions at $500). Moreover, many covered jurisdictions understand preclearance to be an efficient, cost-effective, and cooperative process that offers insurance against costly litigation. *See Policy Perspectives* 13, 312-14 (testimony of Donald Wright, Gen. Counsel, North Carolina State Board of Elections); *see generally* Brief for New York, et al., as *Amici Curiae* in Support of Respondent.

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[4] Plaintiffs' Mot. for Interim Attorneys' Fees and Costs at 18-21, *Perez v. State of Texas*, No. 11-CA-360-OLG-JES-XR (W.D. Tex. June 19, 2012).

[5] Attorney fee awards for Section 2 litigation are not windfalls. *Continuing Need* 15 ("And let me tell you, from having litigated the cases and having litigated the attorneys' fees issues after the cases, this is not a way of getting rich. It is not even a way of making a living."). More accurately they represent long overdue pay for years of work and reimbursement for dearly paid expert witness fees and costs. *See, e.g.*, *Mississippi State Chapter Operation PUSH v. Mabus*, 788 F.Supp. 1406, 1407, 1414, 1423-24 (N.D. Miss 1992) (prevailing party recovered $145,149 in fees and $23,728 in costs more than seven years after litigation initiated, reduced from requests for $933,633 in fees and $92,264 in costs); *Major v. Treen*, 700 F.Supp. 1422, 1453 (E.D. La. 1988) (prevailing party recovered $335,864 and $28,288 in costs five years after a favorable judgment); *Harper v. City of Chicago Heights*, Nos. 87 C 5112, 88 C 9800, 2002 WL 31010819, at *3 (N.D. Ill. Sept. 6, 2002) (awarding $385,661.84 in fees after a decade of litigation). Plaintiffs and counsel who bring claims risk partial or total non-recovery, *see History, Scope, & Purpose* 92 ("although there is some attorney fees involved, you can never get back the money you put into Section 2 cases"); *see, e.g.*, *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354 (11th Cir. 2000) (reducing fee award for "700 hours of lawyer time for nearly ten years of litigation" to $61,969, less than a quarter of the $253,530 plaintiff's counsel requested, because even though plaintiffs prevailed, the district court did not agree entirely with their proposed plan), and also risk the possibility that costs may be assessed against them, even where plaintiff's case has merit.

Indeed, while Petitioners make much of the "federalism costs" of Section 5, they fail to consider the costs to covered jurisdictions of the alternative: case-by-case litigation of Section 2 claims. There can be no serious dispute that the Section 5 preclearance process is a far more efficient and less costly way to resolve potential disputes than full-scale litigation in federal courts. The fees and costs incurred by covered jurisdictions in one significant litigation would pay for several hundred, if not more than a thousand, preclearance applications.

3. The Lack of Experienced Voting Rights Attorneys Makes Enforcement by Section 2 Alone Impracticable.

Congress considered evidence that there is only "a very small bar of people who do Section 2 litigation and who have the expertise to do it." *Continuing Need* 15. The costs and risks described above make Section 2 litigation generally "undesirable." Order at 11, *Moultrie*, No. 2:01-cv-00562-PMD (noting that voting rights cases are generally undesirable due to their controversial nature and risk of non-recovery). As few attorneys make themselves available for these cases, minority voters are often left without anyone to bring their claims. The unavailability of experienced voting rights attorneys and of sufficient financial resources is even more acute for minority voters in rural communities and for claims against local governments. *History, Scope, & Purpose* 84 ("Voters in these communities do not have access to the means to bring [Section 2] litigation"); *Continuing Need* 15 ("When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on."); *Evidence of Continued Need* 1620 (noting local communities' "limited access to the expertise and resources of the handful of organizations and attorneys with VRA experience"). For example, since 1995 only two attorneys in Mississippi, Ellis Turnage and Robert McDuff, have brought Section 2 cases resulting in reported decisions. *See* Ellen Katz & The Voting Rights Initiative, VRI

Database Master List (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls (Katz Database). "The legal resources did not exist in Mississippi in the past forty years to bring a lawsuit in lieu of every one of the 169 objections that have been issued, and they will not exist in the future." *Modern Enforcement* 149.

Indeed, many Section 2 cases would not be possible without the assistance of a small group of national civil rights law firms. In South Dakota, Native American voters have had difficulty finding members of the local bar who are willing to represent them in Section 2 actions without the resources and expertise of the ACLU. *See Bone Shirt v. Hazeltine*, Civ. 01-3032-KES, 2006 WL 1788307, at *3 (D.S.D. June 22, 2006). Resources of these organizations are limited, however, and the scope of their work is national. *Continuing Need* 15; *Evidence of Continued Need* 1620. In fact, two of the major firms, the NAACP Legal Defense and Education Fund and the Lawyers' Committee for Civil Rights Under Law have only four and five lawyers, respectively, dedicated to their respective voting rights practices.[6] The voting rights bar and minority plaintiffs are simply not equipped with the money or personnel to take on significantly more Section 2 litigation. *Continuing Need* 15. Congress accordingly recognized that "Section 2 would be ineffective to protect the rights of minority voters, especially in light of the increased activity under Section[ ] 5 . . . over the last 25 years." H.R. Rep. No. 109-478 at 57.

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[6] *See* "Our Staff," http://www.naacpldf.org/staff; "About us," http://www.lawyerscommittee.org/about?id=0002.

C. Only Section 5 Preclearance Can Keep Up With The Volume Of Discrimination That Takes Place At The Local Level.

Section 5 preclearance continues to be necessary because most illegal practices occur at the local level, where they receive the least scrutiny – and where national organizations focused on "impact" litigation are least likely to offer assistance. Indeed, local governments have drawn the overwhelming majority of Section 5 objections. *See* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act,* 84 NEB. L. REV. 605, 612-13 (2005) (observing that 37 of 40 Section 5 objections from 2000 to 2005 pertained to local voting changes); *see also Evidence of Continued Need* 1505 ("[I]t is important to note first that the great majority of Section 5 objections have affected local governments."). Congress considered evidence that the continued need for Section 5 is most evident on the local level, where proposed changes receive the least scrutiny and Section 2 litigation is rarely a practical option. *See Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11-12 (2006) (*Benefits and Costs*).

Section 5 preclearance has brought to light and corrected acts of voting discrimination that would have otherwise gone unnoticed and unchallenged. *Evidence of Continued Need* 1623-24 (listing instances in which minority voters learned of discriminatory changes due only to Section 5). Moved polling places present the most obvious example. In 1994, the St. Landry Parish Police Jury moved a polling place from a black neighborhood to a location preferred by white voters, after a white alderman told the police jury that whites were uncomfortable walking into a black neighborhood to vote. *Evidence of Continued Need* 1623. The police jury moved the polling place "[w]ithout holding a public hearing, seeking any further public input, or advertising the change in any way." *Id.* The move did not receive scrutiny until DOJ officials reviewed the preclearance submission and subsequently informed leaders in the black community, who "expressed vehement opposition" because the new polling place "had been the site of historical racial discrimination and many African-American citizens did not feel welcome there." *Id.* The Attorney General objected to the change. *Id.*

"In situations such as this, Section 2 litigation, which is very expensive, complex, and time consuming, is no substitute for Section 5 preclearance." *Id.* Moreover, in the case of a moved polling place, preventative litigation could be impossible because voters may not even notice a polling place has moved until "[t]he abstract right to vote . . . becomes a reality at the polling place on election day." *Perkins v.*

Matthews, 400 U.S. 379, 387 (1971). The scale of review necessary to ensure that such changes are not discriminatory is enormous. Between 2000 and 2009, the DOJ reviewed 31,522 changes to polling places.[7] In fact, between 2000 and 2009, DOJ records show that covered jurisdictions submitted 170,223 proposed changes, the overwhelming majority of them local. *Id.* There can be no doubt that absent preclearance, no more than a tiny fraction of these proposed changes would receive any review at all. Only Section 5 preclearance can make manageable the otherwise unmanageable task of spotting and investigating discrimination in covered jurisdictions.

II. THE DETERRENT EFFECT OF SECTION 5 CANNOT BE MINIMIZED OR IGNORED.

"[T]he existence of Section 5 itself functions as a deterrent to both retrogression and broader forms of voting discrimination in the covered jurisdictions." *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 160 (2006) (Introduction to the Expiring Provisions); *see Modern Enforcement* 8, 25. In addition to giving minority voters the burden of proof and expense, Section 2 litigation can only confront discrimination on a piecemeal basis and only after the challenged practice has taken effect. *Preclearance Standards* 4-5. By shifting those burdens to covered jurisdictions and ensuring all proposed changes receive careful review before they take effect, Section 5 performs a deterrence function that Section 2 cannot.

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[7] Department of Justice, Section 5 Changes by Type and Year, http://www.justice.gov/crt/about/vot/sec_5/changes.php.

Petitioner dismisses Congress' finding that Section 5 deters covered jurisdictions from enacting discriminatory laws as "supposition and conjecture" that cannot justify its reauthorization. (Pet. Br. 39 (quotation marks omitted).) Petitioner is wrong: Congress' finding is based on substantial evidence in the legislative record, including proposed voting changes withdrawn in response to "more information request" letters ("MIRs") issued by the DOJ and statements of witnesses testifying to Section 5's deterrent effect at both the state and local level.

A. Substantial Evidence Supports Congress' Finding That Section 5 Deters Covered Jurisdictions From Enacting Discriminatory Practices.

Congress considered ample evidence that preclearance has deterred numerous VRA violations not only through objection letters, but also MIRs and the submission process itself. Petitioner's focus on the number of objections "underestimates the critical role that the DOJ [plays] in directing jurisdictions to comply" with the VRA by issuing MIRs to evaluate the potential retrogressive effect of proposed changes.

Evidence of Continued Need 2541; *Impact and Effectiveness* 64-65 (MIRs deterred 605% more changes than objections between 1999 and 2005, and recent trends in the number of objections and MIRs "suggest[ ] that MIRs are providing Section 5 with strong deterrent effect that is lost by examining only objections"). An MIR "represents a DOJ signal that the voting change might be found retrogressive (and denied preclearance) unless the jurisdiction allays the DOJ's concerns." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L. J. 174, 200 (2007). Further, a jurisdiction's decision to withdraw a proposed change in response to an MIR "is frequently a tacit admission of one or more proposed discriminatory changes," *Evidence of Continued Need* 178. For example, withdrawals in Texas, "include[d] at least fifty-four instances in which the State eliminated discriminatory voting changes after it became evident they would not be precleared by the DOJ." *Texas Report* 3; *see, e.g.*, *Evidence of Continuing Need* 1625 (concluding that "the DOJ has deterred and/or effectively blocked additional discriminatory voting changes in Louisiana" by issuing MIRs and that, "but for the prophylactic scrutiny of the Section 5 preclearance process, white officials would have successfully shut African-American citizens out of decisions with substantial impact on voters").

Section 2 litigation has no effective counterpart to MIRs. Section 2 places no obligations on jurisdictions until after a proposed change has taken effect and a complaint has been filed. While jurisdictions have to comply with DOJ requests to receive preclearance, Section 2 litigation rewards recalcitrance by leaving in place a discriminatory practice until minority voters can spot a violation and gather enough evidence to convince a court to enjoin it. *Policy Perspectives* 314; *Preclearance Standards* 4-5. Far from an effective deterrent, an enforcement scheme relying solely on Section 2 "would essentially create a perverse incentive to pass illegal plans with no immediate recourse." *Preclearance Standards* 4-5.

Moreover, without preclearance, most discriminatory changes would go unreviewed and thus unchallenged. The number of changes submitted for preclearance has increased from roughly 35,000 between 1965 and 1981 to 387,673 between 1982 and July 2005. *Evidence of Continued Need* 2540. Section 5 dramatically increases the likelihood that discriminatory changes will be caught by sending each submission to a department that "has built a tradition of excellence and meticulousness in its Section 5 review process," which makes covered jurisdictions "think long and hard before passing laws with discriminatory impact or purpose." *Impact and Effectiveness* 66 (statement of Joseph Rich, former chief, DOJ Voting Section). As a result, the submission process itself acts as a deterrent, ensuring that all proposed changes receive meaningful review, *Modern Enforcement* 8, and exposure to public scrutiny – "the best of disinfectants . . . the most efficient policemen." Louis Brandeis, Other People's Money 62 (1933). If Section

2 litigation were the only available remedy, minority voters would bear sole responsibility for costly fact-gathering on thousands of proposed changes annually to determine their impact. *Impact and Effectiveness* 42.

Section 2 casts a lesser deterrent shadow than other private rights of action because, as discussed above, the costs of Section 2 litigation are great; the number of practitioners available to pursue claims is miniscule; and the number of voting changes makes it unlikely that any one change will be challenged. Without preclearance, offending jurisdictions are more likely to discriminate, knowing that they are less likely to get caught and any discriminatory changes will remain in effect until voters successfully prosecute a Section 2 suit, which may take years. *See id.* at 43-44.

But even with the submission process and MIRs, DOJ objected to nearly three times the number of changes since the 1982 reauthorization (2,282 from 1982 through mid-2005) than between 1965 and 1981 (815 from 1965 to 1981). Congress likewise found that the absolute number of objections had not declined since the 1982 reauthorization. *Evidence of Continued Need* 172; *see* H.R. Rep. No. 109-478, at 21. Each objection represents a violation that may affect as few as several hundred voters to as many as several hundred thousand. *Continuing Need* 58-59 ("Section 5 objections have functioned to aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection.").

Based on such evidence, not "supposition and conjecture," Congress reasonably found that "[Section 5's] strength lies not only in the number of discriminatory voting changes it has thwarted, but . . . also [in] the submissions that have been withdrawn from consideration [and in] the submissions that have been altered by jurisdictions in order to comply with the [VRA]." H.R. Rep. No. 109-478, at 36.

B. Section 5's Deterrent Effect Is Critical At The Local Level Where Voters Are Most Vulnerable To Discrimination And Have The Least Access To The Resources To Bring Section 2 Suits.

Section 5's deterrent effect is most pronounced at the local level. *Benefits and Costs* 11-12. Although Petitioner largely ignores state and local voting dynamics, Section 5 represents perhaps the only line of defense minority voters have against local-level discrimination that escapes the scrutiny of the media and would otherwise require prohibitively expensive Section 2 litigation to challenge. *Continuing Need 15*; *Evidence of Continued Need* 1618-20.

Further examples of Section 5's deterrent effect on proposed local-level changes are found throughout the covered jurisdictions. In 2002, local officials in Fredericksburg, Virginia scrapped a proposal to eliminate the sole majority-black district after the city attorney explained the proposal would violate the VRA. *Evidence of Continuing Need* 362. Section 5's deterrent effect is visible throughout covered jurisdictions. *See, e.g., id.* at 1729 (noting withdrawal of submission to modify election system put in place after Section 2 litigation in *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991)); *Legislative Options* 111 (noting Monterey County, California's withdrawal of proposed polling place reductions after DOJ voiced concerns over long travel distances from minority neighborhoods to proposed sites); *see also* Pitts, *supra*, 84 NEB. L. REV. 605, at 613-14 ("Having looked at literally hundreds of redistrictings submitted to the Attorney General, I can attest to the fact that the documents provided by local officials – whether they be meeting minutes or descriptions of redistricting criteria – amply demonstrate that local officials and their demographers are acutely cognizant of the standards for approval and typically try to steer very clear of anything that would raise concerns with the Attorney General.").

Section 5 also provides an important incentive for officials to include minority voters and their representatives in contemplated changes that may have an impact on minority voting strength. *See History, Scope, & Purpose* 3200-01; Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 24 (2007) (noting that Section 5 "increases the minority community's . . . leverage in demanding accommodation of minority concerns"). For example, when the city of Rocky Mount, North Carolina annexed predominantly white neighborhoods nearby but refused to annex the traditionally African-American community of Battleboro, Battleboro residents used the prospect of a Section 5 objection to preempt this discriminatory policy and gain the benefits of municipal services and the ability to vote in local elections. *See History, Scope, & Purpose* 85.

Additionally, Congress heard extensive testimony confirming that Section 5 operates "under the radar screen [in ways] that may not appear easily in statistics." *Introduction to Expiring Provisions* 17 (testimony of Theodore Shaw); *Impact and Effectiveness* 66 (statement of Joseph Rich) (referring to "careful consideration of [the] discriminatory impact of a voting change during the legislative process, and minority elected officials reminding white officials of the need for [DOJ] review of laws under consideration"); *Continuing Need* 31 ("consultant who has had a role in drawing maps and the process," testified that "section 5 looms seriously over political cartographers and decision makers when it comes to plans."). Accordingly, Congress reasonably found, on evidence of the sort discussed herein and throughout the 15,000-page legislative record – that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 24; *see id.* (concluding that "the number of voting changes that have never gone forward as a result of Section 5" is "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes"). Section 5 "ensures that such voting changes do not discriminate against minority voters, and has been an effective shield against new efforts employed by covered jurisdictions"; and Section 5 is a "vital prophylactic tool[ ]." H.R. Rep. No. 109-478, at 21 (internal footnote omitted).

◆

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner.

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES.. iii

INTEREST OF *AMICUS CURIAE*.............................1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Fifteenth Amendment was Designed to Give Congress Adequate Authority to Protect Against Discrimination in Voting Rights and to Ensure Citizens Could Use the Vote to Attain the Equality Promised by the Other Reconstruction Amendments. 5

  A. Congress Drafted the Fifteenth Amendment to Overcome Deficiencies in its Pre-Amendment Legislative Authority to Protect Citizens' Voting Rights. 6

  B. Congress Viewed the Fifteenth Amendment as Essential for Achieving Racial Equality...10

II. The Fifteenth Amendment Provides Congress with Exceptionally Broad Powers of Enforcement...14

  A. The Fifteenth Amendment Gave Congress Primary Enforcement Authority for Protecting the Right to Vote....................15

  B. The Fifteenth Amendment Altered the Federal-State Balance to Empower Congress to Protect a Right of Extreme National Importance. 21

C. Congress's Decisions About How to Enforce the Fifteenth Amendment are Entitled to Special Deference, as This Court Has Long Recognized.........................23

III. The Fifteenth Amendment Provides Congress with the Flexibility to Address All Practices Which Abridge the Right to Vote, Including Vote Dilution.....................................26

A. The Text and History of the Fifteenth Amendment Confirm that the Framers Understood it to Prohibit All Abridgements of the Right to Vote, Not Merely Denials of that Right. 27

B. This Court's Jurisprudence Confirms the Framers' Understanding that the Fifteenth Amendment Protects Against All Abridgements of the Franchise...............31

C. The Voting Rights Act Addresses the Same Concerns that Animated the Framers of the Fifteenth Amendment and is a Valid Exercise of Congress's Fifteenth Amendment Powers. 35

CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Alexander v. United States, 509 U.S. 544 (1993) 32

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 32

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League of United Latin American Citizens v. Perry, 548 U.S. 399 (2005) 1

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INTEREST OF *AMICUS CURIAE*[1]

Named for the late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public-policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation, and to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center has focused extensively on protecting minority voting rights, including by authoring a report on minority representation and reports on other issues relating to voting rights; launching a major, multi-year initiative on redistricting; and participating as counsel or *amicus* in a number of federal and state cases involving voting and election issues. The Brennan Center has submitted *amicus curiae* briefs in a number of Supreme Court cases involving the Voting Rights Act, including *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2005).

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus curiae the Brennan Center for Justice submits this brief in support of Respondents urging affirmance of the D.C. Circuit's decision upholding the constitutionality of the preclearance and coverage provisions — Sections 5 and 4(b) — of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ("VRARA").

The Court of Appeals and Respondents persuasively demonstrate that the evidence of racially discriminatory practices in the covered jurisdictions is sufficient to show a continuing need for the preclearance provisions. The coverage formula is likewise justified when viewed in light of the deference to which Congress is entitled and the system Congress established for modifying coverage upon changed circumstances.

In this brief, *amicus* shows that the history of the Fifteenth Amendment supports special deference to Congress's findings. With the Fifteenth Amendment, the Framers elevated the right to vote as a central concern of the federal government and made Congress the primary enforcer of that right. A core purpose of the Amendment was to give Congress significantly broader, constitutionally-based legislative authority to protect citizens' right to vote from racial discrimination.

Soon after the abolition of slavery, Congress embarked on legislative efforts to enfranchise the newly emancipated former slaves. These efforts were limited by federalism concerns and were frustrated by fierce resistance in the former Confederate states. Of particularly grave concern, Congress feared it could lose its power to regulate voting in the former Confederate states once they were readmitted to the Union.

The Fifteenth Amendment was adopted to address these problems. To that end, Congress crafted two simple, straightforward, and interdependent sections. The first section elevated protection of the "right of citizens of the United States" to vote from all forms of discrimination "on account of race, color or previous condition of servitude" to constitutional status. U.S. CONST. amend. XV, § 1. To give those words their full meaning, the second section delegated to Congress broad authority to enforce these words by "appropriate legislation." U.S. CONST. amend. XV, § 2. Congress adopted these sections with the conviction that the right to vote was the right on which all other rights were founded and was therefore indispensable to achieve equality for all citizens.

Both Congress and the states recognized that the Fifteenth Amendment fundamentally altered the balance of power between Congress and the states, and gave Congress paramount authority to prohibit racially discriminatory practices that denied or abridged the right to vote, notwithstanding the states' traditional role in regulating voting and elections. This understanding of the broad authority the Framers intended to give Congress is confirmed by the vigorous enforcement legislation Congress enacted immediately after ratifying the Amendment.

The Reconstruction Congress was well aware that the former Confederate states might use various stratagems to evade the terms of the Fifteenth Amendment. The choice, therefore, to prohibit not only those practices that "deny" the right to vote on account of race, but also those that "abridge" it reflected the Framers' purpose to end all practices—whatever their form—that might diminish or lessen the value of a citizen's voting rights, including specifically dilution of their votes. This Court's subsequent precedent has honored this original intent by reading the Fifteenth Amendment's prohibition against "abridg[ing]" the right to vote to encompass protection against vote dilution.

In sum, the history of the Fifteenth Amendment confirms that its Framers entrusted to Congress the primary responsibility for determining whether and what legislation is needed to enforce and give meaning to the Amendment's prohibition of practices that deny or abridge the right to vote on account of race. In light of that history, Congress's legislative judgment that the evidence is sufficient to justify reauthorization of the Voting Rights Act's preclearance and coverage provisions is entitled to special deference.

ARGUMENT

I. The Fifteenth Amendment was Designed to Give Congress Adequate Authority to Protect Against Discrimination in Voting Rights and to Ensure Citizens Could Use the Vote to Attain the Equality Promised by the Other Reconstruction Amendments.

The history leading up to the adoption and ratification of the Fifteenth Amendment vividly demonstrates that its Framers deliberately chose to protect the right to vote as the one right that was paramount to the goal of achieving racial equality. Congress passed the Fifteenth Amendment immediately after the 1868 elections and at the end of a two-year period in which it had expanded black enfranchisement as far as possible through ordinary legislation. The limits imposed on such legislation by federalism, pervasive violence, obstructionist practices, and the looming readmission of the former Confederate states convinced Congress that its authority to protect black enfranchisement was fragile and tenuous.

Congress responded by passing a constitutional amendment that would prohibit practices by the states that "denied or abridged" the right to vote "on account of race" and would give Congress adequate authority to enforce its terms through appropriate legislation. Congress adopted the Fifteenth Amendment with the solemn understanding that protecting the right to vote against racial discrimination was indispensable to securing the equality promised by the other Reconstruction Amendments, and that the right to vote was the right on which all other rights depended. Congress's authority to enforce the Fifteenth Amendment should be interpreted in light of that understanding.

A. Congress Drafted the Fifteenth Amendment to Overcome Deficiencies in its Pre-Amendment Legislative Authority to Protect Citizens' Voting Rights.

In 1867 and 1868, prior to passage of the Fifteenth Amendment, Congress enacted a series of aggressive statutes designed to extend black male enfranchisement as far as Republicans believed possible without another constitutional amendment — namely, in territories over which Congress had plenary control and in the former states of the Confederacy then still under federal military authority.[2] From the beginning, Congress believed that the success of voting rights laws depended on forceful legislation, including ancillary civil and criminal enforcement mechanisms, to ensure that those rights could be meaningfully exercised.

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[2] Although U.S. Const. art. I, § 4, and U.S. Const. art. II, § 1, cl. 4, gave Congress power to regulate federal elections, Congress had not frequently used its Article I powers. Congress did not pass any regulations of federal elections until 1842 and did not pass comprehensive regulations until 1870 as part of the First Enforcement Act. *See Ex parte Siebold*, 100 U.S. 371, 382-84 (1879); *Ex parte Yarbrough (The Ku Klux Klan Cases)*, 110 U.S. 651, 662 (1884) (noting that, before the Enforcement Acts, Congress had, "through long habit and long years of forbearance ... in deference and respect to the states, refrained from the exercise of these powers").

Congress first passed legislation enfranchising blacks in the District of Columbia, overcoming a presidential veto. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867); *see also* William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 30 (1965). Because Congress realized that enfranchisement on paper would not necessarily produce enfranchisement in practice, it also included two sections penalizing interference with the voting rights established by the Act. *See* 14 Stat. 375, §§ 2, 3. Congress then passed legislation enfranchising blacks in other federal territories. *See* An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867); An Act for the Admission of the Territory of Nebraska into the Union, ch. 36, 14 Stat. 391, § 3 (1867).

Most significantly, in the First Reconstruction Act, Congress refused to re-admit the former Confederate states into the Union unless the states amended their constitutions to allow voting by male citizens "of whatever race, color, or previous condition." An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, § 5 (1867) ("First Reconstruction Act"). To prevent backsliding, Congress also required that, in the future, "the constitutions of neither of [the readmitted states] shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State." An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to Representation in Congress, ch. 70, 15 Stat. 73, § 1 (1868). Congress was acutely aware that the fragile gains it had achieved could easily be rolled back if left unprotected.

Although Congress succeeded in formally enfranchising blacks throughout the former Confederacy and federally controlled territories by the end of 1868, those legal rights were almost immediately undermined by violence, intimidation, and obstructionist practices. The period leading up to the 1868 election saw one of the greatest waves of racial violence in American history. *See, e.g.*, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 342-44 (1st Perennial Classic ed. 2002); Gilles Vandal, *Rethinking Southern Violence* 93-94 (2000); Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 101 (1971). The connection between violence and suffrage was both explicit and pervasive. For example, L.N. Trammell, who eventually became president of the Georgia Senate when the Democrats gained control in 1871, demanded in March 1868 that "'the negroes should as far as possible be kept from the polls,'" adding that "'the organization of the KKK might effect this more than anything else.'" Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 21 (2003); *see also* Lee W. Formwalt, *The Camilla Massacre of 1868: Racial Violence as Political Propaganda*, 71 Ga. Hist. Q. 400, 402-03 (1987).

The southern resistance did not end once the ballots were counted. In 1868, the Klan assassinated a black Republican congressman from Arkansas and three black members of the South Carolina state legislature. Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* 3 (2008). And in the summer of 1868, Georgia's governor—despite the State's ratification of the Fourteenth Amendment—asserted that the state constitution did not permit blacks to hold legislative office and expelled 32 black representatives from the state assembly, prompting Congress to place Georgia under military rule. *See* McDonald, *Voting Rights Odyssey*, at 23.

The Congress that drafted the Fifteenth Amendment was well aware of this devastating bloodshed and properly understood it as an effort to nullify the First Reconstruction Act's establishment of voting rights for southern blacks. *See* Foner, *Reconstruction*, at 342-44; Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement, 1850-2002*, 109 Am. J. Soc. 559, 560 (2003).

The Congress drafting the Fifteenth Amendment feared that as the Confederate states began to return to the Union, and Congress lost plenary control over these areas, Congress's power to protect black voting rights in those states would vanish. "Now that most of the ex-Confederate States had been in measure rehabilitated it was realized that the practically complete control which Congress had exercised over them was gradually slipping away and must eventually come to an end." John Mabry Mathews, *Legislative and Judicial History of the Fifteenth*

Amendment 20 (1909). In theory, the former Confederate states were bound in perpetuity never to amend their constitutions to disenfranchise their citizens on account of race, but "[t]he fear was freely expressed however that the theory of the equality of the States was too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable." *Id.* at 18. At a time when enforcement was most needed, Congress thus faced the possibility of losing its legal authority to protect the right to vote.[3]

The Fifteenth Amendment was therefore necessary to "supply[] a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions." Mathews, *History of the Fifteenth Amendment* at 21.

B. Congress Viewed the Fifteenth Amendment as Essential for Achieving Racial Equality.

The urgency for adopting the Fifteenth Amendment to remedy existing deficiencies in Congress's authority to protect voting rights reflected Congress's view that the franchise was

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[3] Congressional Republicans also believed that the Fifteenth Amendment was necessary to empower Congress to override referenda opposing suffrage in Northern states and enfranchise blacks in the loyal states that had never seceded. *See, e.g.*, Cong. Globe, 40th Cong., 3d Sess. 555 (1869).

"[t]he centerpiece of Reconstruction." J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 135, 136 (Bernard Grofman & Chandler Davidson eds. 1992). Through the Fourteenth Amendment, Congress and the states had already guaranteed equal protection generally. But the Framers of the Fifteenth Amendment singled out the right to vote for special protection. They recognized the right to vote as a fundamental right needed to secure all others.

"Without the elective franchise," they asked, "what insurance has a man of his life, what security for his liberties, what protection in his pursuit of happiness?" Cong. Globe, 40th Cong., 3d Sess. app. 100 (1869) (statement of Rep. Hamilton). Congress knew that the ballot box could ultimately provide more lasting protections than piecemeal legislation: "[T]he ballot was absolutely essential to [the] protection against oppression and wrong in a thousand forms where the general law would be powerless." Thomas M. Cooley, *Impartial Suffrage Established*, *in* II Joseph Story, *Commentaries on the Constitution of the United States* 718 (Melville Madison Bigelow, ed., 5th ed. 1891). "A man with a ballot in his hand is the master of the situation. He defines all his other rights. What is not already given him, he takes.... The Ballot is opportunity, education, fair play, right to office, and elbow-room." William Gillette, *Retreat from Reconstruction, 1869-1879* 23 (1979) (quoting Wendell Phillips).

In drafting the Fifteenth Amendment, the Framers sought to leave nothing to chance, ensuring that this foundational principle of electoral equality received full constitutional protection, both in theory and in practice. Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise," the Framers sought to create a broad amendment that would successfully prevent discrimination in all facets of voting. Cong. Globe, 40th Cong., 3d Sess. 725 (1869) (statement of Rep. Pile).

To ensure that Congress would be able to protect the right to vote against evolving threats, the two clauses of the Fifteenth Amendment were designed to serve complementary purposes. First, the substantive guarantee in the first section of the Amendment would consolidate the formal gains that had been previously made and ensure that they were not rolled back by future electoral majorities. The Amendment would set a constitutional floor to "make it impossible, if the Democrats ever returned to power in Washington, to repudiate Negro voting, North or South." Gillette, ***Right to Vote,*** at 73; *see also* Cong. Globe, 40th Cong., 3d Sess. app. 97 (1869) (statement of Rep. Bowen) ("This rule ... should be established by constitutional amendment ... otherwise it will be subject to change, and thus of uncertain duration and use."); *id.* at app. 102 (statement of Rep. Broomall) ("Laws may be repealed, and it is not advisable that so important a principle of republican government should be left to the caprices of party. Its proper place is in the organic law."). The first section also extended protections of voting rights against interference by the states, notwithstanding the states' role in administering elections.

Second, the enforcement power provided in the second section of the Amendment would give Congress continuing constitutional power to protect black suffrage: It gave Congress "a general commission to make detailed statutes" protecting against racial discrimination in voting. Richard Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* 103 (2004). The power given to Congress to protect the franchise thus provided an "alternative to ... the continued military occupation of the South." Vikram D. Amar & Alan E. Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 940-41 (1998). And it gave Congress power to protect the right to vote in the North, where elections had been under the exclusive control of the states. Gillette, *Right to Vote*, at 73.

By codifying a prohibition on racial discrimination in voting as part of the Constitution, the Framers of the Fifteenth Amendment thus singled out the right to vote as a uniquely important right. With the Fifteenth Amendment, Congress enshrined the right to vote as a centerpiece of Reconstruction and as a foundational constitutional guarantee of racial equality.[4] By creating a nationwide ban on racial discrimination in voting and providing Congress a new source of power to enforce that right, the provisions of the Fifteenth Amendment were designed to ensure that recent gains in enfranchisement would be doubly protected, both from future electoral rollbacks and from attempts to undermine the formal promise of racial equality in voting through more invidious methods.

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[4] The debates surrounding the passage of the Fifteenth Amendment make clear that the final version of the Amendment was also understood to protect racial groups other than those of African descent. *See Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th

II. The Fifteenth Amendment Provides Congress with Exceptionally Broad Powers of Enforcement.

Conscious of the importance and fragility of the right to vote, the Framers used the Fifteenth Amendment to confer extensive powers upon Congress to prevent racial discrimination in voting. The Amendment entrusted Congress with primary authority for enforcement as well as sweeping powers to accomplish this task. With the Amendment, the Framers consciously altered the balance of federalism, providing powers to Congress

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Cong. 698 (1975) (noting that some legislators opposed the Fifteenth Amendment precisely because it would protect more than just blacks and that California and Oregon refused to ratify the Amendment because of "fear that it would lead to enfranchisement of Chinese Persons"). Indeed, the Reconstruction Senate "twice rejected ... a provision which stated that: 'Citizens ... of African descent shall have the same right to hold office ... as other citizens.'" *Id.* Additionally, this Court's precedent establishes that Latinos, Asian Americans, and Native Americans are protected by the Fifteenth Amendment. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (holding that because "[a]ncestry can be a proxy for a race," discrimination based on common ancestry or culture violates the Fifteenth Amendment).

that traditionally had been reserved to the states. Mindful of this commitment of broad power to Congress, this Court has, ever since the Amendment's passage, recognized that Congressional action under the Fifteenth Amendment is entitled to special deference.

A. The Fifteenth Amendment Gave Congress Primary Enforcement Authority for Protecting the Right to Vote.

The Fifteenth Amendment vested Congress with primary authority for enforcing the new constitutional guarantee against racial discrimination in voting, and with wide remedial powers to achieve that goal. Based upon its experience with prior efforts to enfranchise blacks in the District of Columbia, federal territories, and former Confederate states, Congress knew that the Fifteenth Amendment would require a vigorous enforcement mechanism. "[T]here was never any difference of opinion among the friends of the measure, either as to the desirability of including ... [an enforcement provision] in the Amendment or as to the form which it should assume." Mathews, *History of the Fifteenth Amendment*, at 36 n.55.

Indeed, Republicans who preferred a broader constitutional amendment were willing to accept a narrower version of the first section of the Fifteenth Amendment precisely because the second section would provide Congress with additional enforcement power to transform the negatively phrased first section into a positive guarantee:

> If there were nothing at all here except the first section I might see a great deal of weight in [a concern that the first section's purely negative formulation leaves states able to devise indirect means of disenfranchising African-Americans]. But there happens to be added to that a second section, giving to Congress the express power to enforce the prohibition. The result of the whole matter is that if we amend this first section [to a form almost identical to the one ultimately enacted], ... by the second section Congress is invested with express authority to enforce the limitation.

Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham); *see also id.* at 1625 (statement of Sen. Howard).

Opponents of the Amendment similarly noted that the enforcement clause would give Congress substantial discretion to determine the scope of its own enforcement power. *See id.* at app. 163 (statement of Sen. Saulsbury) (warning that enforcement clause language "leav[es] [the] legitimate and proper meaning [of 'appropriate' legislation] to be determined by each particular head in this Senate Chamber and in the House of Representatives" and asking "[u]nder the exercise of the power to carry this amendment into execution by appropriate legislation what cannot you do?").

Almost immediately after the Amendment was ratified, Congress enacted the Enforcement Act of 1870, which reflected Congress's belief that the

Amendment was designed to give Congress broad enforcement powers to pass affirmative legislation protecting against racial discrimination in voting. *See* Mathews, *History of the Fifteenth Amendment*, at 78-79. Supporters of the bill, almost all of whom had voted for the Amendment sixteen months earlier, invoked Congress's broad power when discussing the Act. For example, Senator Carpenter stated that "[t]his amendment to the Constitution is ample and full, and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). Representative Davis similarly argued that "[i]n amending the Constitution of the United States the people have seen fit to clothe Congress with the power to enforce by appropriate legislation.... No broader language could be adopted than this with which to clothe Congress with power." *Id.* at 3882.

Senator Morton referred to "the spirit and the true intent of the fifteenth amendment" while rebutting arguments that the 1870 enforcement legislation intruded too far on the sovereignty of the states. *Id.* at 3670. Recalling the 1868 debates, Morton argued that the Fifteenth Amendment's purpose was to ensure that "the colored man, so far as voting is concerned, shall be placed upon the same level and footing with the white man, and that Congress shall have the power to secure him that right.... We know that the second Section was put there for the purpose of enabling Congress itself to carry out the provision. It was not to be left to State legislation." *Id.* And Senator Howard similarly warned that the Amendment should not be given a "narrow construction" that would prevent Congress from "apply[ing] the remedies which are proper in the case to punish individuals for interrupting, preventing, delaying, or hindering the colored man from the peaceful and free exercise of his right of suffrage; which was the great object we had in view in proposing this amendment to the people of the United States." *Id.* at 3655.

Congress ultimately enacted seven suffrage-related sections as part of the 1870 Enforcement Act, powerfully demonstrating that the Forty-First Congress viewed the Fifteenth Amendment's enforcement clause as a substantial source of authority. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140. Section 1 of the Enforcement Act simply restated the core principle behind the Fifteenth Amendment without creating any enforceable rights. But each of the other six sections contained an aggressive, affirmative mandate that was national in scope. Sections 2 and 3 of the Enforcement Act prohibited discrimination in voter registration and provided remedies to voters for any such violation. *See* 16 Stat. 140, §§ 2, 3. Sections 4, 5, and 6 targeted a broad range of methods of voter intimidation, ranging from outright violence, *id.* § 4, to retaliation by landlords and employers, *id.* § 5, to conspiracies to "threaten, or intimidate any citizen with intent to prevent or *hinder* his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same," *id.* § 6 (emphasis added). Finally, Section 23 permitted a candidate for office who lost "by reason of the denial to any citizen or citizens ... of the right to vote, on account of race, color, or previous condition of servitude" to sue to "recover possession" of the office, thereby nullifying a state election. *Id.* § 23. Taken together, this set of bold provisions makes clear that the contemporary Congress was not "constrained by traditional theories of federalism." Kousser, *The Voting Rights Act and the Two Reconstructions*, at 139. Congress understood its enforcement power to be extremely broad, encompassing a range of prophylactic measures not compelled by the first clause of the Fifteenth Amendment, but which Congress nonetheless deemed necessary to achieve the Amendment's objectives.

A year after passing the 1870 Enforcement Act, Congress went even further, amending Section 20 of the Act to place congressional elections more firmly under federal control. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 ("1871 Enforcement Act"). The amendments provided for the appointment of federal observers with detailed supervisory powers over the electoral process, from registration to the certification of returns. *Id.* § 2; *see also* VI James Ford Rhodes, *History of the United States from the Compromise of 1850 to the McKinley-Bryan Campaign of 1896* 423 (1906). These broad enforcement acts "were comprehensive ... but the fact is that they did not go beyond the intent of the Fifteenth Amendment." Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. So. Hist. 202, 204 (1962).

In addition to the provisions in the 1871 Enforcement Act, the Ku Klux Klan Act of 1871 authorized the President to deploy the army to respond to "insurrection, domestic violence, unlawful combinations, or conspiracies" that had the effect of depriving citizens of "any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act," including the Fifteenth Amendment's guarantee of equal suffrage. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 3.

These enforcement laws, which were enacted by substantially the same Congress that drafted the Fifteenth Amendment, are entitled to special weight in construing the Amendment. Like the first Congress in 1789, the Congress in 1870 "must have felt, with peculiar force, the obligation of providing efficient means by which [a] great constitutional privilege should receive life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning.'" (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888))). The enforcement legislation reflects the contemporary understanding that the Fifteenth Amendment entrusted to Congress primary responsibility for protecting against racial discrimination in voting and vested Congress with all the powers necessary for accomplishing that task.

B. The Fifteenth Amendment Altered the Federal-State Balance to Empower Congress to Protect a Right of Extreme National Importance.

By vesting Congress with broad powers of enforcement, the Fifteenth Amendment radically altered the balance of power between the federal government and the states with respect to regulation of the franchise. The Amendment was passed against a status quo in which the states had exercised control over the franchise and Congress's control, as a practical matter, had been limited to protecting the right to vote in federal territories. As late as 1866, even among northern Republicans, "[t]here was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments." Mathews, *History of the Fifteenth Amendment,* at 12. The Fifteenth Amendment broke with that status quo by transferring ultimate power to protect against racial discrimination in voting away from the states and to the federal government—even with respect to the states' own elections. *See id.* at 36. The Congress that passed the Fifteenth Amendment and the states that ratified it determined that the traditional federal-state balance had been insufficient to protect against racial discrimination in voting.

Supporters and opponents of the Fifteenth Amendment recognized that the Amendment would transfer to the federal government responsibility over an area that had once been left exclusively to the states. For example, Senator John Pool, a strong supporter of the Amendment, explained that: "If a State by omission neglects to give every citizen within its borders a free, fair, and full exercise and enjoyment of his rights, it is the duty of the United States Government to go into the State." Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1030 (1995). Senator Bayard, an opponent of the proposed Amendment, contrasted the power provided by the Amendment with the autonomy states had previously enjoyed over their own elections: "The Federal Government in the past has neither attempted to usurp the power as within the limits of the Constitution, nor has it been yielded by the States or their people." Cong. Globe, 40th Cong., 3d Sess. app. 166 (1869).

Even some abolitionists and former Republicans protested the Amendment's intrusion on principles of state sovereignty. James Doolittle, a Wisconsin Republican who supported the abolition of slavery but believed questions of voting were best left to the states, predicted that the power to enforce the Fifteenth Amendment would give Congress complete control over state elections:

> [T]he power to enforce it of necessity implies power over the elections of the States. In order to give the colored man of the States the right to vote at the elections in the States, to secure to his vote a fair count, and to make sure that if his vote be counted and determine the result that the person elected shall have the office, will draw to this Government the

> power to control the elections themselves. It is impossible to separate the two.

Id. at app. 151.

Thus, both proponents and opponents of the Amendment understood it to dramatically alter the status quo by establishing the federal government, and Congress in particular, as the ultimate protector against racial discrimination in voting. As this Court recognized soon after the Amendment's passage: "The fifteenth amendment of the constitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." *Ex parte Yarbrough (The Ku Klux Klan Cases)*, 110 U.S. 651, 664 (1884).

C. Congress's Decisions About How to Enforce the Fifteenth Amendment are Entitled to Special Deference, as This Court Has Long Recognized.

As *Yarbrough* shows, this Court has long recognized that the Fifteenth Amendment vested Congress with broad powers to protect against racial discrimination. In the years immediately following the Amendment's ratification, this Court shared the contemporary understanding that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government and vested Congress with broad powers to enforce the Amendment's prohibition on racial discrimination in voting. Even as it placed severe restrictions on Congress's efforts to enforce the Reconstruction Amendments in the 1870s and 1880s, the Court signaled that Congress's authority to enforce the Fifteenth Amendment was greater than its authority to enforce the Fourteenth Amendment.

The Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1876), illustrates its differing approaches to the Fourteenth and Fifteenth Amendments. The Court in *Cruikshank* overturned the convictions of white supremacists who led the infamous Colfax Massacre, "the bloodiest single act of carnage in all of Reconstruction," Foner, *Reconstruction*, at 530, and "the largest murder of African Americans in American history," Kousser, *The Voting Rights Act and the Two Reconstructions*, at 160. While the decision led to "disastrous" interference with Reconstruction, for example by imposing insurmountable burdens of proof on the prosecution, *id.*, it actually upheld the constitutionality of the Enforcement Acts and affirmed that Congress had particularly broad authority with respect to the Fifteenth Amendment. *See* Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in* Reese *and* Cruikshank 106 (2001) (noting that *Cruikshank* was a surprisingly "narrow" decision that "clearly and explicitly confirmed congressional authority" to protect against racial discrimination in voting).

The *Cruikshank* Court pointedly did not invalidate Congress's power to protect equal suffrage, and it affirmed that the Fifteenth Amendment (unlike the Fourteenth) created "a new constitutional right" that Congress could protect against individual interference. *Cruikshank*, 92 U.S. at 555. The Fifteenth Amendment, the Court explained, had established the "exemption from discrimination in the exercise of" the right to vote as a "necessary attribute of national citizenship." *Id.* Congress had primary responsibility for protecting against racial discrimination in voting because "[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States." *Id.* at 556. And within this intersection of race and voting, primary responsibility was vested in Congress, not the states.

This Court's early interpretation of the Amendment thus shows that Congress's Fifteenth Amendment power is sweeping, and that so long as Congress is acting to prevent racial discrimination in voting, this Court will defer to Congress's judgment about how best to do that. Thus, "[o]n the rare occasions when the Court has found an unconstitutional exercise of [Fifteenth Amendment] powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965);

H.R. Rep. No. 89-439, at 17 (1965). That remains true today.

III. The Fifteenth Amendment Provides Congress with the Flexibility to Address All Practices Which Abridge the Right to Vote, Including Vote Dilution.

The language and history of the Fifteenth Amendment confirms that Congress, in reauthorizing Section 5 and Section 4(b) of the Voting Rights Act, properly considered current evidence of vote dilution through racial gerrymandering to justify the continued need for these sections. The Framers of the Fifteenth Amendment considered vote dilution an abridgement of the right to vote that diminished the franchise's value and potency.

The Framers understood the Fifteenth Amendment as having a broad substantive sweep, prohibiting not only denials of the right to vote but also more indirect abridgements of the franchise, such as vote dilution. Indeed, the text of the Amendment confirms that its Framers were interested not only in protecting against outright denials of the right to vote, but also in guarding against any "abridge[ment]" of the right. Honoring the intentions of the Framers, this Court has continually confirmed that the Fifteenth Amendment confers upon Congress broad, flexible powers to address all practices which diminish or devalue the right to vote. In light of this history, the VRARA is a valid exercise of Congress's extensive enforcement powers and is fully consistent with the intent of the Fifteenth Amendment's drafters.

A. The Text and History of the Fifteenth Amendment Confirm that the Framers Understood it to Prohibit All Abridgements of the Right to Vote, Not Merely Denials of that Right.

Both the text and the history of the Fifteenth Amendment show that the Framers were concerned with far more than outright denials of the franchise on the basis of race. The Framers consciously chose to prohibit both denials *and abridgments* of the right to vote. For the Framers and their contemporaries, an abridgment of the right to vote implied a diminution of the right to vote that fell short of a denial. Indeed, contemporary dictionary definitions demonstrate that to "abridge" means something quite different than to "deny." The 1865 edition of Noah Webster's authoritative *American Dictionary of the English Language* defines "abridge" as "[t]o lessen; to diminish; as to *abridge* labor; to *abridge* power or rights." Noah Webster, *An American Dictionary of the English Language* 6 (1865). By using the word "abridge," in addition to the word "deny" in the Fifteenth Amendment, the Framers plainly sought to reach acts of interference with the right to vote that did not result in a complete denial of the franchise, including through dilution of the vote that "diminishes" and "lessens" the franchise's effectiveness.

As Representative George Boutwell, who managed the Amendment in the House of

Representatives emphasized, "The amendment which we propose secures the people against *any abridgment of their electoral power*, either by the United States or by the States." Cong. Globe, 40th Cong., 3d Sess. 560 (1869) (statement of Rep. Boutwell) (emphasis added). *See also* Vallely, *The Two Reconstructions*, at 102.

Reflecting this broad understanding of disenfranchisement as reaching abridgements of the right to vote that fell short of outright denial, the Framers of the Fifteenth Amendment closely tied the right to vote to representation. Of the former slaves, one Senator noted: "[W]e must sooner or later see to it that they are citizens possessed of the right to vote and to be represented in the legislative bodies who have control of their persons and their property." Cong. Globe, 40th Cong., 3d Sess. 986 (1869) (statement of Sen. Howard). In the eyes of the Framers, the Amendment would provide the former slave not merely a nominal vote, but also a real voice in the political process, and thus "place in the hand of the black man of Georgia a rod of power before which all politicians quail." Cong. Globe, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart).

The Framers of the Fifteenth Amendment were well aware of the problems of vote dilution through gerrymandering as a means of abridging the right to vote. In debates concurrent with the passage of the Fifteenth Amendment, members of the Fortieth Congress discussed their concerns about the problems of gerrymandering as a means of diluting the vote. *See, e.g.*, Cong. Globe, 40th Cong., 3d Sess. app. 268-69 (1869) (Report of Sen. Buckalew). They worried that redistricting inherently "secure[s] an unjust measure of power to [its] authors, and it may be expected that each successive district apportionment will be more unjust than its predecessor." *Id.* at 269. This concern, which was initially focused on partisan gerrymandering, grew as the first racial gerrymanders began to appear during and immediately after Reconstruction in the former Confederate states and the neighboring border states. *See, e.g.*, Goldman, *Reconstruction and Black Suffrage*, at 65; Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 105 (2000); Chandler Davidson, *The Voting Rights Act: A Brief History*, *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 10 (Bernard Grofman & Chandler Davidson eds. 1992). As early as 1867, Maryland "reoriented representation toward the plantation counties at the expense of Baltimore and the small farming regions to its north and west" as part of an "ingenious method[] of limiting black voting power." Foner, *Reconstruction*, at 422. In Mississippi, "Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." *Id.* at 590.

For the Framers, this gerrymandering and vote dilution represented a form of disenfranchisement, trampling on minority rights. In the partisan context, members of Congress spoke of "the entire disenfranchisement of minorities, which is done in almost every State by gerrymandering," and noted that, "[t]he disenfranchisement suffered through one decade by a political party may be repeated upon it in the next with increased severity." Cong. Globe, 40th Cong., 3d Sess. app. 212, 269 (1869) (statement of Rep. Ashley, Report of Sen. Buckalew). For the authors of the Fifteenth Amendment, the right to vote did not exist in isolation, but rather was closely tied to the district in which one voted. Through districting, they realized, a majority could effectively deprive a minority of the franchise. Thus, the Framers understood that the "elective franchise" encompassed "the right to vote by ballot in *convenient election districts*." Cong. Globe, 40th Cong., 3d Sess. 1226 (1869) (statement of Rep. Lawrence) (emphasis added).

Opponents of the Fifteenth Amendment shared this understanding of disenfranchisement, arguing perversely that black suffrage would dilute the votes of the white population, and thus disenfranchise the nation's Anglo citizens. "If we introduce these votes which are to be cast" they noted, "it is an injury, a positive injury, to those who have the right to vote ... it impairs and weakens the weight and force of the legal votes which are cast." Cong. Globe, 40th Cong., 3d Sess. 910 (1869) (statement of Sen. Vickers).

Thus, the text and contemporaneous history of the Fifteenth Amendment show that the Framers were concerned with the problems of gerrymandering and vote dilution as an abridgement of the right to vote.

B. This Court's Jurisprudence Confirms the Framers' Understanding that the Fifteenth Amendment Protects Against All Abridgements of the Franchise.

The last century of this Court's jurisprudence confirms what is manifest in the history and text of the Fifteenth Amendment: The Fifteenth Amendment reaches not only outright denials of access to the ballot box, but also more indirect abridgments of the franchise. This Court has made clear that assessment of whether a restriction "abridge[s]" the right to vote under the Fifteenth Amendment requires a comparison "with a hypothetical alternative ... to what the right to vote *ought to be*." *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 334 (2000) (emphasis in original).

This broad reading of "abridge" as a comparison to the ideal version of the right to vote accords with the Framers' original understanding of the term and comports with this Court's interpretation of "abridge" more generally in the voting rights context as encompassing infringements of a protected right that are something less than an outright denial. Notably, this Court has interpreted the parallel language of Section 2 of the Voting Rights Act, which "track[s], in part, the text of the Fifteenth Amendment," *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009), to prohibit indirect interference with the right to vote, primarily through vote dilution. *See e.g., Thornburg v. Gingles,* 478 U.S. 30 (1986); *Johnson v. DeGrandy,* 512 U.S. 997 (1994); *see also Northcross v. Bd. of Educ. Of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (stating that the similarity in the language of two provisions is "a strong indication that the two statutes should be interpreted *pari passu*.").[5]

Just as this Court's precedent has given full meaning to the prohibition against any "abridge[ment]" of the right to vote, so too it has confirmed the Framers' understanding of "what the right to vote *ought to be*," *Bossier II*, 528 U.S. at 334, both before and after the passage of the Voting Rights Act. Throughout the course of the last century, this Court's Fifteenth Amendment jurisprudence prohibited indirect methods of racial discrimination in voting. As early as *Guinn v. United States*, which struck down an Oklahoma grandfather clause, this Court has noted that the Fifteenth Amendment extends far beyond "express words of ... exclusion." 238 U.S. 347, 364 (1915). "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination," reaching all "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

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[5] Similarly, in the context of the First Amendment, this Court has read the term "abridge" to include restrictions on speech that fall far short of outright prohibition of speech. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (noting that government action can "abridg[e] the freedom of speech ... in many ways" including through "overbroad laws that chill speech") (internal quotation marks omitted); *Alexander v. United States*, 509 U.S. 544, 566 (1993) (Kennedy, J., dissenting) (observing that government action "may abridge speech in a direct way by suppressing it, or in an indirect way by chilling its dissemination").

In keeping with the Framers' intentions, this Court has long recognized that these prohibited "contrivances" include the practice of diluting minority votes via improper vote counting. In affirming a conviction for the refusal to count valid ballots, this Court explained that "the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386 (1915); *see also United States v. Saylor*, 322 U.S. 385, 388 (1944) (affirming conviction for ballot box stuffing). In the one-person, one-vote context, this Court has expressly noted that "[i]f a State in a statewide election weighted ... the white vote more heavily than the Negro vote," such action would "deny[] or abridg[e] a Negro's right to vote" in violation of the Fifteenth Amendment. *Gray v. Sanders*, 372 U.S. 368, 379 (1963). "None could successfully contend that this discrimination was allowable." *Id.*

These cases viewing vote dilution in its various forms as an abridgement of the right to vote extend to the recognition that the Fifteenth Amendment prohibits race-based gerrymandering and intentional vote dilution in redistricting. As this Court noted over five decades ago, "[a] statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is the redefinition of municipal boundaries." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). In *Gomillion*, this Court explicitly held that the Fifteenth Amendment does not "sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." *Id.* at 345. Like the Framers of the Fifteenth Amendment, the *Gomillion* Court recognized that gerrymandering had the potential to disenfranchise by rendering access to the voting booth meaningless: "[T]he Alabama Legislature has not merely redrawn the Tuskeegee city limits ... it is more accurate to say that it has deprived the petitioners of the municipal franchise." *Id.* at 347.[6]

Since *Gomillion*, this Court has continued to treat claims of intentional vote dilution as cognizable under the Fifteenth Amendment. *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964), decided four years after *Gomillion*, reiterated that plaintiffs alleging vote dilution in redistricting may state a claim under the Fifteenth Amendment. *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977); *City of Mobile v. Bolden*, 446 U.S. 55, 62-63 (plurality opinion); *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 481 (1997) (noting that "a plaintiff" may "bring[] a constitutional vote dilution challenge" either "under the Fourteenth or Fifteenth Amendment"). To the extent this Court questioned this proposition and deviated from the intent of the Framers in *Bossier II*,

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[6] *Gomillion* remains a core part of Fifteenth Amendment doctrine. Although some language in *Shaw v. Reno*, 509 U.S. 630, 645 (1993), suggests that *Gomillion* turned on the Equal Protection Clause of the Fourteenth Amendment, this Court's most recent extended discussion of the Fifteenth Amendment continues to treat *Gomillion* as grounded in the Fifteenth, and not the Fourteenth, Amendment. *See Rice*, 528 U.S. at 513, 522.

528 U.S. at 334 n.3, it did so in dicta in a footnote addressing an issue that was not part of the question presented. This Court's otherwise consistent treatment of vote dilution as a Fifteenth Amendment concern shows the extent to which *Bossier II* failed to fully consider the issue. As this Court noted in *Rice v. Cayetano*—a case decided *after Bossier II*—"state authority over the boundaries of political subdivisions, 'extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution.'" 528 U.S. 495, 522 (2000) (quoting *Gomillion*, 364 U.S. at 345).

In short, the last century of this Court's precedent, understanding the Fifteenth Amendment as protecting against vote dilution, accords with the intention of the Amendment's Framers, who sought to guarantee former slaves a truly effective voice in their democracy.

C. The Voting Rights Act Addresses the Same Concerns that Animated the Framers of the Fifteenth Amendment and is a Valid Exercise of Congress's Fifteenth Amendment Powers.

With the passage of the Voting Rights Act in 1965, Congress acted to fulfill the promise of the Fifteenth Amendment. "Passage of the Voting Rights Act was an important first step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett*, 556 U.S. at 10. Sections 4(b) and 5 of the Voting Rights Act (both as originally enacted and as reenacted) were designed to prevent renewed retrogression. These provisions address the same concerns that animated the Framers of the Fifteenth Amendment.

This Court has observed that "Section 5 was directed at preventing a particular set of invidious practices that had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.'" *Miller v. Johnson*, 515 U.S. 909, 925 (1995) (quoting H.R. Rep. No. 91-397, at 8 (1969)). "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Like the Fifteenth Amendment itself, Sections 4(b) and 5 focus not only on the current exercise of the right to vote, but also on ensuring that rights currently held are not eroded in the future.

It was not until after Congress enacted the Voting Rights Act of 1965 that the dream of equality at the core of the Fifteenth Amendment began to become a reality. This Court's decisions upholding Congress's renewed enforcement efforts have enabled Congress to make significant progress in reversing decades of discrimination and fulfilling the promise of racial equality. *See Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach*, 383 U.S. 301.

Relying on this Court's precedent, extensive hearings, and voluminous evidence, Congress has now once again concluded that discrimination against voters on the basis of race or color is far from eradicated and that the rights protected by the Fifteenth Amendment are still sufficiently fragile to require renewal of Sections 4(b) and 5 of the Voting Rights Act. The Fifteenth Amendment's history and this Court's decisions require that Congress's determination be given special deference and that Shelby County's challenge be rejected.

History shows that restricting Congress's Fifteenth Amendment power would pose significant risks, and that gains in voting rights are fragile and tenuous. The Framers of the Fifteenth Amendment "fully realized that enfranchisement required practical safeguards against evasions of the law and retrogression." Kousser, *The Voting Rights Act and the Two Reconstructions*, at 137. One of the central lessons of the Reconstruction Era is that "revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made." *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University). Declaring Sections 4(b) and 5 of the Voting Rights Act to be beyond Congress's Fifteenth Amendment enforcement powers would ignore the lessons of history and weaken the essential constitutional guarantee that Congress has sought to enforce.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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February 1, 2013

AMICUS
CURIAE
BRIEF

No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., in his official capacity
as Attorney General of the United States, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

◆

BRIEF OF PROFESSOR PATRICIA A. BROUSSARD, SABRINA COLLINS, STACY HANE, AKUNNA OLUMBA AND NAMED STUDENTS AND ORGANIZATIONS OF FLORIDA A & M UNIVERSITY COLLEGE OF LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

◆

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of Amici Curiae 1

Summary of the Argument 3

Argument 5

- I. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT IMPLEMENTS, RATHER THAN VIOLATES, THE CONSTITUTIONAL REQUIREMENTS OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 5
  - A. Section 5 was enacted to implement the Fourteenth Amendment's fundamental right of due process, the Fifteenth Amendment's right to vote, and to protect the political liberty of those who have been discriminated against and disenfranchised for centuries. Congress is within its granted powers to protect its citizens' rights and to ensure compliance with basic constitutional principles 5
  - B. In 2006, Congress relied upon an abundance of evidence which indicated that there was a continuing need for Section 5 preclearance protection. Relying upon this evidence, Congress reauthorized Section 5, as it had repeatedly done 12

TABLE OF CONTENTS – Continued

Page

II. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT MET THE CONSTITUTIONAL REQUIREMENTS OF BOTH THE TENTH AMENDMENT AND ARTICLE IV OF THE UNITED STATES CONSTITUTION 14

- A. The Section 5 preclearance requirement does not run counter to the Tenth Amendment because it does not deprive jurisdictions of the ability to make political decisions, but rather, ensures a balance of state sovereignty and constitutional accountability 14
- B. The Equal Protection Clause of the Fourteenth Amendment ("No state shall") renders an Article IV – Guarantee Clause violation moot. As such, this issue of Sections 5 and 4(b) is nonjusticiable and properly in the hands of the U.S. Congress 20

Conclusion 25

APPENDIX

List of Amici .... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Cipriano v. City of Houma, 395 U.S. 701 (1969) 7

City of Boerne v. Flores, 521 U.S. 507 (1997)....4, 7, 18, 19

City of Phoenix, Ariz. v. Kolodziejski, 399 U.S. 204 (1970) 7

Civil Rights Cases, 109 U.S. 3 (1883) 19

Crawford v. Marion County Elections Bd., 553 U.S. 181 (2008) 15

Dunn v. Blumstein, 405 U.S. 330 (1972)....................15

Ex Parte Virginia, 100 U.S. 339 (1880).....................25

Florida v. United States, No. 11-01428, 2012 U.S. Dist. LEXIS 115647 (D.C. Cir. Aug. 16, 2012) 13

Georgia v. Ashcroft, 539 U.S. 461 (2003) 15

Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959). 14

Gregory v. Ashcroft, 539 U.S. 452 (1991)...................16

Guinn v. United States, 238 U.S. 347 (1915).............15

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)..15

Hill v. Stone, 421 U.S. 289 (1975) 7

Lopez v. Monterey County, 525 U.S. 266 (1999) 15

Luther v. Borden, 48 U.S. 1 (1849)...........................24

Miller v. Johnson, 515 U.S. 900 (1995).....................15

Page

Northwest Austin Mun. Utility Dist. No. 1 v. Holder, 557 U.S. 193 (2009) 18, 20

Northwest Austin Mun. Utility Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. Sept. 4, 2008) 23

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 1, 9, 10, 11

Smith v. Allwright, 321 U.S. 649 (1944) 15

S.C. v. Katzenbach, 383 U.S. 301 (1966) 7, 15, 21, 23, 25

Texas v. Holder, No. 12-cv-128-RMC-DST-RLW (D.C. Cir. Aug. 30, 2012) 13

Texas v. United States, No. 11-1303, 2012 U.S. Dist. LEXIS 121685 (D.C. Cir. Aug. 28, 2012) 13

U.S. v. Town of Lake Park, Fla., No. 09-80507-CIV, 2009 WL 3667071 (S.D. Fla. Oct. 23, 2009) 17

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 9, 24, 25

UNITED STATES CONSTITUTION:

U.S. Const. pmbl. 7

U.S. Const. amend. X 4, 14, 20

U.S. Const. amend. XIII 3, 8

U.S. Const. amend. XIV .... *passim*

U.S. Const. amend. XV .... *passim*

U.S. Const. art. IV 14, 20, 24

Page

LEGISLATIVE SOURCES:

Pub. L. No. 89-110, 79 Stat. 437 (1965) 3

Pub. L. No. 91-285, 84 Stat. 314 (1970) 3

Pub. L. No. 94-73, 89 Stat. 400 (1975) 3

Pub. L. No. 97-205, 96 Stat. 131 (1982) 3

Pub. L. No. 109-246, 120 Stat. 577 (2006) 3, 12

H.R. Rep. No. 109-478 (May 22, 2006) 12, 16

OTHER SOURCES:

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Department of Justice, Voting Section Litigation, http://www.justice.gov/crt/about/vot/litigation/caselist.php (last visited 01/12/2013) 18

The Federalist Paper No. 45 (James Madison) 14

The History of Florida A & M College of Law, http://law.famu.edu/go.cfm/do/Page.View/pid/5/t/History 2

James Weldon Johnson, "Lift Every Voice and Sing," also known as "The Negro National Anthem" 6, 11

Page

Diana Kasdan, *State Restrictions on Voter Registration Drives*, Brennan Center for Justice at New York University School of Law, http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/ (last visited 01/12/2013) 16

Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* (2008) 7, 8, 9, 11

Martin Reed, *Debate Continues on Shelby County Voting Case Appeal*, AL.com (Nov. 16, 2012), http://blog.al.com/spotnews/2012/11/debate_continues_on_shelby_cou.html (last visited 01/12/2013) 22

Jon C. Rogowski & Cathy Cohen, *Turning Back the Clock on Voting Rights: The Impact of New Photo Identification Requirements on Young People of Color*, The African American Youth Project, http://research.AfricanAmericanyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf (last visited 01/12/2013)........17

Greg Stohr, *Voting Rights Act Challenge Gets U.S. High Court Hearing*, Bloomberg (Nov. 10, 2012), http://www.bloomberg.com/news/2012-11-09/voting-rights-act-challenge-gets-u-s-high-court-hearing.html (last visited 01/12/2013) 22

INTEREST OF AMICI CURIAE

Professor Patricia A. Broussard submits this amicus curiae brief in support of Respondents, including the Attorney General of the United States,[1] in the name of students and organizations at Florida A & M University College of Law (*see* Appendix), urging this Honorable Court to affirm the Court of Appeals for the District of Columbia Circuit's holding that,

> Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust Congress with ensuring that the right to vote – surely among the most important guarantees of political liberty in the Constitution – is not abridged on account of race. In this context, we owe much deference to the considered judgment of the People's elected representatives.

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

Florida A & M University College of Law is a Historically Black University (HBCU) which was reestablished by the Florida Legislature in 2000 for the primary purpose of ensuring that more minorities enter into the legal profession to the benefit of local minority communities in particular, and to the nation, generally.[2] Thus, as students of color, their interest is two-fold. First, many students are descendants of slaves and disenfranchised African Americans, and they believe it is vitally important that they advocate that the right to vote, the main source of political empowerment in this country, be preserved, protected, and closely guarded by this Court to protect against voter intimidation, dilution of the vote, or at worst abrogation of the right to vote. These students have an inter-generational stake in protecting the right to vote which was denied so many of their ancestors. This right is grounded in morality, but more importantly, this right is constitutionally guaranteed.

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[1] This brief is submitted with the consent of the parties Pursuant to Supreme Court Rule 37.6. Counsel represents that this brief was not authored or paid for in whole or in part by counsel for any party. Petitioners and Respondents have filed with the Clerk letters granting blanket consent to any party filing an amicus brief in support of either Petitioner or Respondents.

Second, the students of Florida A & M University College of Law have a vested interest in protecting the United States Constitution because, as stewards of the legal system, they are bound to honor and protect the Constitution. It is their duty to serve as amici curiae in this case because they are obliged to protect the rights of those who are silenced by intimidation, by lack of funds, by disenfranchisement, and by entities who would seek to suppress their vote. The students of Florida A & M University College of Law seek to leave a legacy of social activism and have a direct stake in the outcome of this case and respectfully ask that this Court hold that both Congress's legislative record and its broad and general powers under the Fourteenth and Fifteenth Amendments properly established the constitutionality of reauthorizing Sections 5 and 4(b) of the Voting Rights Act.

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[2] *See generally* The History of Florida A & M College of Law, http://law.famu.edu/go.cfm/do/Page.View/pid/5/t/History.

◆

SUMMARY OF THE ARGUMENT

The Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution grant Congress broad enforcement powers. These enforcement powers have been vetted through the Court for decades and generally found to meet Constitutional muster. The Voting Rights Act (VRA), and more specifically Section 5 of that Act, was enacted and consistently reauthorized within the scope of those powers to protect the voting rights and the political liberty of those who had been, and continue to be politically disenfranchised. Pub. L. No. 109-246, 120 Stat. 577 (2006).

Jurisdictions covered by Section 5 have proven themselves worthy of continued monitoring.[3] This monitoring does not infringe upon State sovereignty; rather, it enhances it by providing for a viable, engaged, and protected electorate.

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[3] *See generally* Pub. L. No. 89-110, 79 Stat. 437 (1965); Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 109-246, 120 Stat. 577 (2006), which are the several reauthorizations of the VRA which Congress has deemed necessary to prevent disenfranchisement (Sections 5 and 4(b) of the Voting Rights Act).

Moreover, Congress relied upon statistics, reports, and extensive data in reaching the conclusion that Section 5 needed reauthorization. This information provided the ballast the Court described in *City of Boerne v. Flores*, 521 U.S. 507 (1997). When applying rationality, congruence and proportionality, the Court should bend towards individual political liberties.

In addition, Section 5 does not run counter to the Tenth Amendment. The Fourteenth Amendment begins with the words, "No state shall. . . ." This prefatory language makes it abundantly clear that Congress may enact legislation which places parameters around States' behavior within the text of the Constitution without depriving jurisdictions of the ability to make reasonable political decisions.

When the Court balances the right to vote of those who have been, and continue to be, disenfranchised, against the asserted inconveniences of jurisdictions covered by Section 5, it should look at past behavior, current behavior, and the potential for future abuses. Congress, acting through the Federal District Court in DC and the Department of Justice, should have the authority to determine, prior to elections that the covered jurisdictions have not enacted laws, rules or procedures that are inconsistent with the requirements of the Act, and this can only be accomplished by Section 5 preclearance. The Court must determine which party has the incentive and is in the better position to determine compliance, those that have a history of attempting to game the political process at the expense of minorities, or who have been found guilty of disenfranchisement, or those seeking to protect the liberties of all Americans.

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ARGUMENT

I. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT IMPLEMENTS, RATHER THAN VIOLATES, THE CONSTITUTIONAL REQUIREMENTS OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Section 5 was enacted to implement the Fourteenth Amendment's fundamental right of due process, the Fifteenth Amendment's right to vote, and to protect the political liberty of those who have been discriminated against and disenfranchised for centuries. Congress is within its granted powers to protect its citizens' rights and to ensure compliance with basic constitutional principles.

Lift every voice and sing, till earth and Heaven ring,
Ring with the harmonies of liberty;
Let our rejoicing rise, high as the listening skies,
Let it resound loud as the rolling sea.
Sing a song full of the faith that the dark past has taught us,

Sing a song full of the hope that the present
has brought us;
Facing the rising sun of our new day begun,
Let us march on till victory is won.[4]

This song, commonly referred to as the Negro National Anthem, speaks of freedom and liberty. It is not the actual physical liberty from the bonds of slavery, because slavery had ended some thirty-five years before it was written, but rather, the liberty of full participation in America and all she represents and offers. Liberty as defined by political liberty, meaning among other things, the ability to participate in the process of deciding who should represent one's political interest. To this end, one of the most powerful rights that the Constitution bestows upon its citizens is the right to vote. Failure to protect that right to the fullest extent possible not only disproportionately disenfranchises African Americans and other minorities, but it also diminishes the nation as a whole.

The Due Process Clause of the Fourteenth Amendment dictates that all citizens be treated equally. The court has upheld this guarantee by prohibiting restrictions on voting based on literacy and property.[5] Additionally, Section 2 of that amendment imposes a steep price for States seeking to abridge that right by providing for a reduction in representation. U.S. Const. amend. XIV §§ 1, 2. These Sections drive home the point that the Framers intended Congress to enact legislation to implement the liberties it granted to minorities through the Reconstruction period. Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 3 (2008). The purpose of the Fourteenth Amendment is to ensure that the States treat their citizens equally, and the enactment of the VRA falls within Congress's expressed power granted to it by the Due Process Clause of the Fourteenth Amendment to that end.

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[4] "Lift Every Voice and Sing," also known as "The Negro National Anthem," written by James Weldon Johnson to commemorate President Abraham Lincoln's birthday on February 12, 1900.

Likewise, the right to vote is the linchpin in assuring that the Constitution has meaning. The preamble proclaims, "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility . . . to ourselves . . . do ordain and establish this Constitution." U.S. Const. pmbl. Those words are given meaning primarily through the electoral process. Voting is the primary way that we, as citizens of the United States, participate in forming that more perfect union, because it is the process in which representation is chosen.

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[5] Supreme Court cases finding that voting based on the ownership of property or the payment of taxes violates the equal protection clause of the Constitution. *See generally Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). Supreme Court cases setting aside literacy test as a basis for voting. *See generally S.C. v. Katzenbach*, 383 U.S. 301 (1966); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

The Fifteenth Amendment provides that the right to vote shall not be denied or abridged; this prohibition applies to both the Federal government and to the States. U.S. Const. amend. XV, § 1. Moreover, it is a well-established principle that the Thirteenth, Fourteenth, and Fifteenth Amendments bestow upon Congress the right, and arguably the duty, to enact legislation that would prevent the States from enacting legislation that would deny or abridge an individual's right to vote. Congress's "duty" arises from the fact that many States have a long history of disenfranchising its African American citizenry through either discriminatory tactics, polarizing the races, or by enacting legislation that would allow them to effectively disenfranchise voters by manipulating the electoral system. Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 11 (2008). Those "covered jurisdictions," which fall under the authority of Section 5 of the VRA, have demonstrated in the past, and continue to demonstrate, that they are unwilling or unable to ensure that all of its citizens' votes are treated the same, and therefore, should be subject to continued preclearance under Section 5.

It is the responsibility of Congress to redress the evils of racial discrimination, and to protect the fundamental right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). That responsibility does not wane, but the approach may change depending on the ill that needs to be addressed. The backward looking nature of a voting violation is such that a remedy could only be timely addressed through a provision such as Section 5. *Shelby County, Alabama*, 679 F.3d at 861. Section 5 preclearance is necessary because of the type of harm that the VRA seeks to prevent, because of the importance of the protected right, and because in this situation, money damages are not adequate. Most importantly, once the election has passed, adequate redress is impossible. Setting aside elections or shortening the terms of those elected is by its very nature inadequate because for a period of time, citizens will have been governed by officials that they did not choose.

The combination of potential harms requires a regulation that is forward looking, and Section 5 does so because it places the responsibility on the covered jurisdictions to prove that their proposed changes are not unreasonable manipulations of the electoral process. While Shelby County argues that the burden to them is too great, shifting the burden to the individual would create a cognizable harm, without an effective form of redress. This is a result that was not contemplated by the Framers of the Constitution. The Framers intended a government that would preserve an individual's liberties. Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 3

(2008). With this intent in mind, it is imperative that covered jurisdictions should shoulder the burden of proving that their actions are not manipulative of the electoral process, especially when these jurisdictions continue to attempt to enact election laws and rules and regulations that would have the purpose or effect of disenfranchising classes of voters protected by the VRA.

For those covered jurisdictions that have had a tradition of silencing or diluting the rights of its citizens, Section 5 is necessary, because history and data indicate that those jurisdictions would continue to enact laws and rules and regulations that would fail to ensure that every citizen has a right to vote. *See generally Shelby County, Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012). This would have the effect of denying minority citizens within that state the ability to participate in the political process; thus, dissuading candidates and elected officials from being responsive to their needs. It also denies them the ability to choose a representative who embraces their ideas, morals, and goals, and most importantly, disenfranchisement denies their ability to assist in forming a more perfect union.

While Shelby County argues that Section 5 is unnecessary, it does not propose any solution to the problem that Section 5 addresses, but instead, notwithstanding unrefuted evidence to the contrary, implies that the problem no longer exists. *Id.* Shelby County wants to be treated as a county that has not had widespread discriminatory actions, or voter intimidation tactics. *Id.* at 871. In fact, the State of Alabama was one of the States that used its Constitution to enact literacy tests to limit African Americans' voting rights to seriously detrimental effect.[6] While there has been a reduction in those specific types of intimidation tactics, Congress has found that through the use of the More Information Request process (MIR), VRA Section 2 suits, and continued registration and turnout disparities that federal oversight is still required. *Id.* at 872.

Through its continued unequal treatment of its citizens, Shelby County, and other similarly situated covered and noncovered jurisdictions, has demonstrated that Congress was correct in reauthorizing Section 5 of the VRA to ensure that all citizens achieve the promise found in the preamble of the U.S. Constitution and to fulfill the promise embodied in James Weldon Johnson's song.[7]

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[6] *See generally* Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 4 (2008) (181,481 African American males of voting age, only 3,000 registered to vote).

[7] *Supra* Note 4.

B. In 2006, Congress relied upon an abundance of evidence which indicated that there was a continuing need for Section 5 preclearance protection. Relying upon this evidence, Congress reauthorized Section 5, as it had repeatedly done.

The reauthorization of Section 5 in 2006 was not done blindly or arbitrarily; rather, this legislation went through a "Brandeis-like" review by members of Congress, which included reliance upon statistics, judicial findings, and first-hand accounts of discriminatory actions.[8] Such review by Congress is the sort of balancing approach that is necessary to effectuate the maintenance of a State's sovereignty and still ensure Constitutional accountability.

Fear of retrogression in the covered jurisdictions was not based on conjecture nor was it the result of backward thinking. In 2006, Congress found the need to extend Section 5 for another twenty-five years on the basis of an extensive legislative record that was over 15,000 pages in length. *See* Pub. L. No. 109-246, 120 Stat. 577 (2006). Additionally, post-enactment litigation from August 2012 provides evidence of the necessity of Sections 5 and 4(b) to ensure that retrogression does not occur at the hands of those whose political and personal aims are detrimental to the minority vote. In *Florida v. United States*, the three-judge Court of Appeals for the District of Columbia rejected Florida's petition for Section 5 preclearance for changes to existing early voting laws, finding that those proposed changes would result in retrogression within Florida's five covered jurisdictions. *Florida v. United States*, No. 11-01428, 2012 U.S. Dist. LEXIS 115647 (D.C. Cir. Aug. 16, 2012). In *Texas v. Holder*, the three-judge court denied Section 5 preclearance to the state of Texas' addition of certain limited forms of identification for voting, finding that the imposition of the identification requirement would have a disparate impact on poor, minority and elderly voters. *Texas v. Holder*, No. 12-cv-128-RMC-DST-RLW (D.C. Cir. Aug. 30, 2012).

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[8] *See generally* H.R. Rep. No. 109-478 (May 22, 2006) (The continued evidence of racially polarized block voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable. . . .).

Additionally, in *Texas v. United States*, the court found that a congressional redistricting plan had both a retrogressive effect and a discriminatory purpose. *Texas v. United States,* No. 11-1303, 2012 U.S. Dist. LEXIS 121685 (D.C. Cir. Aug. 28, 2012). Speaking specifically about the portion of the plan proposed by the state house, the court stated that "at a minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id.* at *131.

II. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT MET THE CONSTITUTIONAL REQUIREMENTS OF BOTH THE TENTH AMENDMENT AND ARTICLE IV OF THE UNITED STATES CONSTITUTION.

A. The Section 5 preclearance requirement does not run counter to the Tenth Amendment because it does not deprive jurisdictions of the ability to make political decisions, but rather, ensures a balance of state sovereignty and constitutional accountability.

From the beginning of this Constitutional republic it was established that, "the powers delegated . . . to the federal government are few and defined, while [t]hose which are to remain in the State governments are numerous and indefinite." The Federalist No. 45 (James Madison). However, it is axiomatic that in a federal system the laws of the individual States cannot be supreme. *Gomillion v. Lightfoot*, 270 F.2d 594, 602 (5th Cir. 1959) (Brown, J., dissenting). For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. *Id.*; *see also* U.S. Const. amend. X.

This tension between State sovereignty and Constitutional accountability generally surfaces, especially when concerning voting rights, during periods in our history where individual rights are subject to the discriminatory devices of those elected in local or State jurisdictions, rather than to rights guaranteed by our Federal system of governance.[9]

Initially, the Voting Rights Act of 1965 was challenged as an unconstitutional invasion of States' rights, however the Court held, "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *S.C. v. Katzenbach*, 383 U.S. 301, 324 (1966). The Court has continued to find that the VRA is not an invasion of rights held to the States, even though the Act may exact substantial federalism costs.[10] The Court has yet again been asked to address whether Section 5 of the VRA has reached its apex of rationality and is now in violation of States' rights. The answer is clearly a resounding no.

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[9] *See Guinn v. United States*, 238 U.S. 347 (1915) (finding State legislated grandfather clauses for voter registration unconstitutional); *Smith v. Allwright*, 321 U.S. 649 (1944) ("white primaries" in Texas a violation of Fifteenth Amendment); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (State poll tax requirements to vote found unconstitutional); and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (any State residency requirements over 30 days for voting found unconstitutional); *but see Crawford v. Marion County Elections Bd.*, 553 U.S. 181 (2008) (upholding Indiana State law requiring photo ID for voters casting a ballot in person).

[10] *See Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (the Act does not "dictate to States" methods for redistricting, it is still a flexible political function of the State); *Lopez v. Monterey County*, 525 U.S. 266, 267 (1999) ("This interpretation does not unconstitutionally tread on rights reserved to the States"); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("reapportionment is primarily the duty and responsibility of the State," but the Act ensures non-discriminatory basis for the reapportionment).

As the Court wrote, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 539 U.S. 452, 458 (1991). Section 5 of the VRA maintains this balance between the Federal and the State systems by requiring States to seek approval before changing any voting regulations or laws. Contrary to Shelby County's assertions, Section 5 does not deprive any jurisdiction of the ability to create new laws, that political power rests with the State or jurisdictional rule makers. As the House Report noted, "covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. Rep. No. 109-478, at 25 (May 22, 2006).

The political liberties truly at stake under Section 5 are those of the individual, more specifically, those of the minority voter. Between 2011 and 2012 alone, at least eight States – California, Florida, Illinois, Michigan, Mississippi, Nevada, North Carolina, and South Carolina – introduced legislation to restrict voter registration drives.[11] A September 2012 report estimated that photo ID laws could prevent nearly 700,000 minority voters from registering to cast their ballots.[12]

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[11] Diana Kasdan, *State Restrictions on Voter Registration Drives*, Brennan Center for Justice at New York University School of Law, http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/ (last visited 01/12/2013).

It is not just these subversive tactics of voter suppression that require the continuance of Section 5, for many of the evils that existed in 1965 continue still today. On March 31, 2009, the Department of Justice filed a complaint against the town of Lake Park in Palm Beach County, FL for violations of Section 2 of the VRA.[13] The complaint alleges that the Town's at-large system of electing its Commissioners denies African American voters an equal opportunity to elect representatives of their choice, and although African American voting age citizens compose 38% of Lake Park's total citizen voting age population, no African American candidate ever has been elected to office since the town's founding in 1923. The Department of Justice, on its website, lists twelve cases since 2006 alone that raise claims of Section 2 or

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[12] Jon C. Rogowski & Cathy Cohen, *Turning Back the Clock on Voting Rights: The Impact of New Photo Identification Requirements on Young People of Color*, The African American Youth Project, http://research.AfricanAmericanyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf (last visited 01/12/2013).

[13] Department of Justice, Cases Raising Claims Under Section 2 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php (last visited 01/12/2013). *See U.S. v. Town of Lake Park, Fla.*, No. 09-80507-CIV, 2009 WL 3667071 (S.D. Fla. Oct. 23, 2009) (On October 26, 2009, the Court entered a consent judgment and decree replacing the current at-large method of election with a limited voting plan providing for the election of four Commissioners with concurrent terms).

Section 5 violations under the VRA (alleging at-large, language, and redistricting violations), further evidencing the contemporaneous need for continuance of the preclearance measures employed by the VRA and perhaps expanding coverage.[14]

The Court has stated that, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Thus to maintain the balance of individual political liberties protected through Section 5 and that of a State's sovereignty to make and enact new laws the Court has, in addition to the rationality test, employed the congruence and proportionality test. *Id.* at 520. The congruence and proportionality test used by the Court in *Boerne*, while balancing Congressional Fourteenth Amendment powers, is applicable in cases where the underlying constitutional issue is drawn from the Fifteenth Amendment. *Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009) ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test").

The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. *Id.* at 205.

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[14] Department of Justice, Voting Section Litigation, http://www.justice.gov/crt/about/vot/litigation/caselist.php (last visited 01/12/2013).

In speaking of the Fourteenth Amendment's Enforcement Clause, of which this brief argues also applies to the Enforcement Clause of the Fifteenth Amendment, the Court in *Boerne* stated,

> "[it] does not authorize Congress to pass general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . . . ". *City of Boerne*, 521 U.S. at 525, citing *Civil Rights Cases*, 109 U.S. 3 (1883).

It is in the spirit of the Enforcement Clause that Section 5 legislation was written. The VRA's role has dual purpose: to correct the actions of States and jurisdictions which intentionally sought to exclude citizens from exercising their right to vote and to deter States from either deliberate attempts at future exclusion or deter legislative actions that, veiled as "fraud prevention" deny minorities their right to vote. Whether or not there exists the sort of blatant, racially motivated legislation of the early twentieth century, that the 1965 Act specifically targeted, the dilution of the minority vote still continues. To give proper effect to the VRA the actions of Congress must be given "wide latitude" to determine where the State or locality has unconstitutionally altered, or attempted to alter, laws that affect voting; Section 5 preclearance requirement does just that. *City of Boerne*, 521 U.S. at 520.

The political liberties of the State are not extinguished when a covered jurisdiction is required to seek preclearance under Section 5, for the power to legislate remains squarely in the hands of the jurisdiction. Section 5 merely uses the preclearance to prevent an individual's voice from being silenced through discriminatory election legislation. While, "the historic accomplishments of Section 5 of the VRA are undeniable," so too are the allegations of on-going discrimination and attempts at silencing minority citizens. *NW Austin*, 557 U.S. at 201. The Court is urged to continue its previous jurisprudence and hold that Section 5 is not usurping a State's sovereignty, and is not in violation of the Tenth Amendment.

B. The Equal Protection Clause of the Fourteenth Amendment ("No state shall") renders an Article IV – Guarantee Clause violation moot. As such, this issue of Sections 5 and 4(b) is non-justiciable and properly in the hands of the U.S. Congress.

As noted above, Section 5 of the VRA has served as a bastion of political liberty by ensuring one of our most revered fundamental rights, the right to vote. The preclearance requirement of Section 5 safeguards the right to vote and ensures that those who live in covered jurisdictions, those jurisdictions that have had the most egregious histories of discrimination and censorship, are afforded access to exercise the right. Contrary to the contentions of Shelby County, the repressive tactics that were aimed at diluting and discouraging the minority vote in the past continue today in "second-generation" abuses that are usually more subtle and sophisticated, but nonetheless effective and pernicious. The power of Section 5 is perhaps best characterized by Justice Warren in *Katzenbach* when he explained that it, "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim." *Katzenbach*, 383 U.S. at 328.

If Shelby County's challenge is successful, the discouragement and suppression of the individual political liberty that is embodied in the right to vote will be proliferated and unabated by those who forcibly and discriminatorily place their own political and personal gains above those of others, specifically minorities. The sentiment that we have arrived at a "post-racial" society, ignores contemporary realities that prove otherwise. In denying Shelby County's challenge to Section 5, the appeals court found that Congress's decision to extend the Section 5 preclearance requirement for another twenty-five years was rendered after "thoroughly scrutinizing the record" and finding "overt racial discrimination persists in covered jurisdictions notwithstanding decades of Section 5 preclearance." Brief for Intervenors-Appellees at 6, *Shelby County, Alabama v. Holder*, 679 F.3d 848, (D.C. Cir. 2012) (No. 11-5256).

Given that Shelby County is petitioning this Court to wholly invalidate Section 5, the most appropriate place to begin a consideration of the contemporary repression of minority voters is in that very jurisdiction.

While Shelby County claims that Section 5 is now unnecessary due to advancements in race relations, as recent as 2008, in a flagrant display of disregard for the Congressional mandate of Section 5, Calera, a city in Shelby County, redrew its district lines without seeking or obtaining federal preclearance.[15] This illegal change was retrogressive as it resulted in a drastic dilution of the African American vote in one particular district, reducing what had been a 70.9% African American majority to a mere 29.5%. This illegal change also resulted in the ouster of the only African American councilman, Ernest Montgomery, the second African American ever elected in Calera's history, which dates back to 1887. It is this sort of dilution and suppression that will run rampant if Shelby County's challenge is successful. Former African American Shelby County commissioner, Earl Cunningham, remembers when African Americans could not vote and expressed the need for the continuation of Section 5, "It's an insurance. We may not always have men and women of goodwill making the laws."[16] The insurance of access to the polls remains of vital importance and will be seriously undermined if Section 5, the very heart of the VRA, is repealed.

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[15] Greg Stohr, *Voting Rights Act Challenge Gets U.S. High Court Hearing*, Bloomberg (Nov. 10, 2012), http://www.bloomberg.com/news/2012-11-09/voting-rights-act-challenge-gets-u-s-high-court-hearing.html (last visited 01/12/2013).

[16] Martin Reed, *Debate Continues on Shelby County Voting Case Appeal*, AL.com (Nov. 16, 2012), http://blog.al.com/spotnews/2012/11/debate_continues_on_shelby_cou.html (last visited 01/12/2013).

As one of the Civil War Amendments, the Fourteenth Amendment was originally intended to protect newly freed African Americans from discrimination by the States. While its scope has been broadened to ensure that all people within a given jurisdiction are free from abuse by any State, *Northwest Austin* explained that "against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Northwest Austin Mun. Utility Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221, 245-246 (D.D.C. Sept. 4, 2008) (quoting *Katzenbach*, 383 U.S. at 324).

Shelby County has argued that Section 5 threatens the time honored principle of state sovereignty and that "[d]oing so selectively, absent compelling justification, unconstitutionally departs from the historic tradition that all the States enjoy equal sovereignty." This argument is not without merit; rather it rings quite true that there should be "compelling justification" to limit state sovereignty and to do so selectively. As discussed above, contemporary attempts at minority voter suppression and dilution are rampant, and many of the violations occur within the covered jurisdictions. Since 1982, the Justice Department has used Section 5 of the VRA to object to more than 2,400 state and local voting changes for various reasons, finding that those changes could result in retrogression.[17]

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[17] *Supra* Note 8.

While the Guarantee Clause of the United States Constitution provides to "every state in the union a republican form of government," it is silent as to the definition and/or parameters of "republican." U.S. Const. art. IV. However, it is quite possible that the silence is purposeful. The Founding Fathers, while seeking to grant powers to the States, would not have intended for those powers to be absolute and impenetrable. If so, there would be no check on the power of the States and the Fourteenth Amendment would then be null and void and no person would be safe from abuse at the hand of the respective States. This begs the question of the proper handling of challenges and assertions of States' powers. The Court has consistently held, beginning in 1849 with *Luther v. Borden,* that the power to assess the legitimacy of a state government and/or its republican nature lay with Congress. *Luther v. Borden*, 48 U.S. 1 (1849). In *Borden*, Justice Taney therefore labeled controversies arising under the Guarantee Clause as non-justiciable political questions which properly lie in the hands of Congress. *Id.* Accordingly, Congress should be granted deference in its continued support of Section 5. The fundamental right to vote, which is preservative of all other rights, lies at the foundation of our political liberty. *See Yick Wo*, 118 U.S. at 370.

However, as the Court has granted certiorari, the applicability of the Fourteenth Amendment and its charge that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws" necessitates a review that considers the rationality of Section 5. Here, the Court is asked to consider Congress's aim of eliminating racial discrimination in voting, one of the gravest evils that Congress can seek to redress. *See Yick Wo*. The Fourteenth Amendment, which protects that right for every person who is eligible to vote, is not restrained by the Guarantee Clause, nor is it limited by the Tenth Amendment. *See Ex Parte Virginia*, 100 U.S. 339, 346 (1880); *S.C. v. Katzenbach*, 383 U.S. 301 (1966).

◆

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court affirm the Court of Appeals and hold that Congress did not exceed its legislative authority in reauthorizing Section 5 and that Section 5 continues to be congruent and proportional to assuring the right to vote for all citizens, thereby ensuring individual political liberty.

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Shelby County, Alabama,
Petitioner,
v.
Eric H. Holder Jr., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Has the modern application of the Voting Rights Act resulted in an exercise of extra-constitutional authority by the federal government that conflicts with the Act's very purpose?

2. Can Voting Rights Act Sections 2 and 5 coexist? If not, which section is the more appropriate remedy for remedying voter disenfranchisement?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SECTION 5 NO LONGER SERVES ITS ORIGINAL PURPOSE 4

  A. The VRA, Once Justified by Jim Crow, Is Now "an Eye Glazing Mess" 4

    1. Successful at First 4

    2. Moving in the Wrong Direction................. 6

    3. The Justice Department's Complicity in Perverting Section 5 8

    4. Congress Exacerbates the Anachronism.. 10

  B. Section 5 Conflicts with Important Constitutional Principles 13

    1. Federalism Costs 13

    2. Unequal Protection 16

    3. Racially Disparate Purpose vs. Effect...... 17

II. SECTIONS 2 AND 5 ARE AT A "BLOODY CROSSROADS" 20

  A. The Conflict between Sections 2 and 5 Creates Bad Law 20

  B. Section 2 Is the Proper Remedy for the Problems Congress Identified 23

III. THIS CASE EXEMPLIFIES SECTION 5'S CONSTITUTIONAL DEFECTS 28

A. Lost in the Serbonian Bog 28

B. Caught (Again) at the Bloody Crossroads..... 31

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 17

Bartlett v. Strickland,
556 U.S. 1 (2009) 17, 20-21

Beer v. United States,
425 U.S. 130 (1976) 6, 9, 21

Branch v. Smith,
538 U.S. 254 (2003) 17

Chapman v. Meier,
420 U.S. 1 (1975) 31

Georgia v. Ashcroft,
539 U.S. 461 (2003) .... *passim*

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 7

Lopez v. Monterey County,
525 U.S. 266 (1999) 5

LULAC v. Perry,
548 U.S. 399 (2006) 17

Metts v. Murphy,
347 F.3d 346 (1st Cir. 2003) 21

Miller v. Johnson, 515 U.S. 900 (1995) .... *passim*

Nw. Austin Mun. Util. Dist. No. One v. Holder
("*NAMUDNO*"), 557 U.S. 193 (2009) .... *passim*

Perez v. Perry,
835 F. Supp. 2d 209 (W.D. Tex. 2011) 21

Perry v. Perez,
132 S. Ct. 934 (2012) 29, 31

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("*Bossier Parish I*"), 520 U.S. 471 (1997) 20, 22

Reno v. *Bossier Parish School Bd.*
("*Bossier Parish II*"), 528 U.S. 320 (2000) 15

Ricci v. DeStefano,
129 S. Ct. 2658 (2009) 19

Roe v. Wade, 410 U.S. 113 (1973) 3

Shaw v. Reno, 509 U.S. 630 (1993) 7

Shelby County v. Holder,
811 F. Supp. 2d 424 (D.D.C. 2011) 27

Shelby County v. Holder,
679 F.3d 848 (D.C. Cir. 2012) .... *passim*

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383 U.S. 301 (1966) .... *passim*

Thornburg v. Gingles,
478 U.S. 30 (1986) 22

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435 U.S. 110 (1978) 14

Uno v. Holyoke,
72 F.3d 973 (1st Cir. 1995) 28

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456 U.S. 37 (1982) 21

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U.S. Const. amend. XIV .... *passim*

U.S. Const. amend. XV .... *passim*

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Voting Rights Act of 1965,
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http://volokh.com/2009/08/21/looking-forward 29

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Hans von Spakovsky, *Crooked Justice*, National Review Online (December 4, 2012), http://www.nationalreviewonline.com/articles/334688/crooked-justice-hans-von-spakovsky 16

Ilya Shapiro, *The Court Should Reconsider the Constitutionality of the VRA's Outmoded and Unworkable Section 5*, ScotusBlog (Sept. 11, 2012), http://www.scotusblog.com/2012/09/online- vra-symposium-the-court-should-reconsider-the-constitutionality-of-the-vras-outmoded-and-unworkable-section-5/. 3

Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53 (2009) 19

Richard Pildes, *Introduction* to David Epstein, *The Future of the Voting Rights Act* (2006)............ 4

Roger Clegg, *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 Cato Sup. Ct. Rev. 35 (2009) 9, 13

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Thom File & Sarah Crissey, U.S. Census Bureau Population Reports: Voting and Registration in the Election of November 2008 4 (2010), available at http://www.census.gov/prod/2010pubs/p20-562.pdf 11

INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

Shelby County implicates a constitutional overreach too long suffered in jurisdictions where the federal government found, half a century ago, discrimination against African-American voters. The goal of preventing voter disenfranchisement is unquestionably just (and constitutional), but it is no longer served by Section 5 of the Voting Rights Act ("VRA"). This provision now only perpetuates the very race-based political decisions it was intended to stop. "Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory." *Nw. Austin Mun. Util. Dist. No. One v. Holder* ("*NAMUDNO*"), 557 U.S. 193, 226 (2009) (Thomas, J., concurring in part and dissenting in part).

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given timely notice of intent to file and written communications from Petitioners' and Respondents' counsel consenting to the filing of this brief has been submitted to the Clerk. Pursuant to Rule 37.6, *amicus* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

"The historic accomplishments of the Voting Rights Act are undeniable." *NAMUDNO*, 557 U.S. at 201. Its modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, the Fourteenth and Fifteenth Amendments, and with the orderly implementation of fair elections. Jurisdictions covered by Section 5 are constantly subject to utterly predictable litigation, the outcome of which is often dependent on judges' views of how to satisfy both Section 5's race-conscious mandates and the Constitution's command to treat people equally under the law. These tensions—constitutional, statutory, and practical—undermine the VRA's legacy of vindicating the voting rights of all citizens.

Moreover, Section 5's preclearance system is an anachronism. As this Court found four terms ago, "[t]he evil that section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 203. For example, the racial gap in voter registration and turnout is lower in the states originally covered by Section 5 than nationwide. *Id.* at 203-04 (citing Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* 3-6 (AEI, 2006)).

Indeed, the list of Section 5 jurisdictions is bizarre: six states of the Old South (and some counties in three others), plus Alaska, Arizona, and counties or townships in other states ranging from New Hampshire to South Dakota. As *amicus*'s counsel has noted in previous briefs and other writings, (only) three New York counties are covered, all boroughs in New York City. *See, e.g.*, Ilya Shapiro, *The Court Should Reconsider the Constitutionality of the VRA's Outmoded and Unworkable Section 5*, ScotusBlog (Sept. 11, 2012), http://www.scotusblog.com/2012/09/online-vra-symposium-the-court-should-reconsider-the-constitutionality-of-the-vras-outmoded-and-unworkable-section-5. Perhaps the four members of this Court who hail from that fair city know something that the rest of us don't.

All of this mess stems from the presumption that election laws in certain places are illegal until proven otherwise. But three generations of federal intrusion have been more than enough to kill Jim Crow.

The Voting Rights Act has exceeded expectations in making this nation "a more perfect union." Barack Obama, *A More Perfect Union*, Address at the National Constitution Center (Mar. 18, 2008) (transcript at http://www.americanrhetoric.com/speeches/barackobamaperfectunion.htm). While celebrating its achievements, we must recognize that this success has obviated its constitutional legitimacy. Moreover, the VRA's incongruities present the prototypical situation of legal problems that are capable of repetition, yet evading review. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) (internal citations omitted).

In *NAMUDNO*, this Court warned Congress of its "serious misgivings about the constitutionality of Section 5." 557 U.S. at 202 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Congress has done nothing to fix the apparent defects and so the Court cannot avoid addressing its doubts any longer. It is now time for the Court to declare Section 5 unconstitutional.

ARGUMENT

I. SECTION 5 NO LONGER SERVES ITS ORIGINAL PURPOSE

A. The VRA, Once Justified by Jim Crow, Is Now "an Eye Glazing Mess"[2]

1. Successful at First

The Voting Rights Act has become "one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions." Richard Pildes, *Introduction* to David Epstein, *The Future of the Voting Rights Act* xiv (2006).

Defining that appropriate balance, however, was not the VRA's original aim. Its original purpose was simply to enfranchise southern blacks who were still being denied their voting rights a century after the Civil War. "The statute has become such an eye glazing mess that it's easy to forget that in 1965 it was beautifully designed and absolutely essential." Abigail Thernstrom, *The Messy, Murky Voting Rights Act: A Primer*, Volokh Conspiracy (Aug. 17, 2009), http://volokh.com/2009/08/17/the-messy-murky-voting-rights-act-a-primer.

When Congress enacted the VRA, Jim Crow was not going quietly into the night. Enforcing the Fifteenth Amendment required an overwhelming exercise of federal power—radical legislation that involved an unprecedented intrusion of federal authority into state and local elections. *See Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (noting that Section 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs'" (quoting *Miller v. Johnson*, 515 U.S. at 926).

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[2] This section is based on the work of Abigail Thernstrom, legal historian and vice-chairman of the U.S. Commission on Civil Rights, particularly her book *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* (2009) and her August 2009 posts about the book at the Volokh Conspiracy blog.

The VRA effectively put southern states under federal electoral receivership. It suspended literacy tests, provided for the use of federal registrars, and demanded that suspect jurisdictions obtain preclearance of proposed electoral changes. A reverse-engineered statistical trigger identified these "covered" jurisdictions; the burden to prove that changes in voting procedure were free of racial animus—to prove a negative—lay on these Section 5 jurisdictions.

Justice Black worried that the provision compelled states to "beg federal authorities to approve their policies," so distorting our constitutional structure as to nearly eradicate the distinction between federal and state power. *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring in part and dissenting in part). His point was valid, but the VRA succeeded where all other attempts to secure voting rights failed: black voter registration skyrocketed.

The enforcement authority that would remedy a century of Fifteenth Amendment violations thus amounted to what might be called "federal wartime powers." As on other occasions when wartime powers were invoked, however, the consequence was a serious distortion of constitutional order. Such a temporary distortion was justified in 1965, but not today.

2. Moving in the Wrong Direction

Section 5 was an emergency provision with an expected life of five years that instead has been repeatedly renewed. Every renewal became an occasion for expanding the VRA; never did Congress consider whether the law's unprecedented reach should instead be reduced, commensurate with its success. Even as black political participation increased, federal power over local affairs grew.

In the 1970s, the government moved more places into Section 5's clutches. An arbitrary, careless change in the statistical trigger, for example, made those three New York boroughs subject to preclearance even though black New Yorkers had been freely voting since the Fifteenth Amendment's enactment in 1870, and had held municipal offices for decades. Hispanics, Asian Americans, American Indians, and Alaskan Natives became eligible for federal protection, even though their experience at the polls was not remotely comparable to that of southern blacks.

In 1982, Congress rewrote what had been an innocuous preamble, Section 2, morphing it into a powerful tool to attack election practices anywhere in the nation that had the "result" of denying the right to vote on account of race. Indeed, this Court had already read Section 5 to provide a remedy for vote dilution that squared with the VRA's structure and delegated to distant DOJ attorneys a limited task: stopping the institution of new electoral arrangements that undermined the 1965 Act. *Beer v. United States*, 425 U.S. 130, 141 (1976).

The VRA thus moved in an unanticipated direction. Its original vision was one all decent Americans share: equal access to the political process, with blacks free to form coalitions and choose candidates in the same manner as everyone else. But in certain places, equality could not be reached simply by giving blacks the vote. Ballot access was insufficient after centuries of slavery, another century of segregation, ongoing racism, and persistent resistance to black political power. More aggressive measures were needed.

Blacks thus came to be treated as politically different. The VRA was interpreted (and later amended) to mandate the drawing of legislative districts effectively reserved for black candidates. Federal officials' power to force jurisdictions to adopt "racially fair" maps conflicted starkly with the Constitution's federalism guarantees, while the entitlement of designated racial groups to legislative seats was discordant with traditional notions of democratic competition.

Even if race-conscious maps were once temporarily justified to overcome systemic racism, that experience does not justify today's racial gerrymanders. Serious costs have accompanied race-driven election regulation, costs that have increased as racism has waned. Nearly 20 years ago, this Court described race-driven electoral maps as "an effort to 'segregate . . . voters' on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (O'Connor, J.) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). Such maps threaten "to stigmatize individuals by reason of their membership in a racial group." *Id.* at 631.

That is, racial gerrymandering keeps "RACE, RACE, RACE," at the forefront of our minds. T. Alexander Aleinikoff & Samual Issarcharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich. L. Rev. 588, 610 (1993). Such racial sorting creates advantaged and disadvantaged groups; some that are privileged and some that are subordinate. The majority-minority districts which the DOJ demands in Section 5 cases become safe for minority candidates but have also turned white voters into what voting rights scholars call "filler people." *Id.* at 601.

In short, America has experienced an amazing transformation since 1965. The costs of race-conscious districting now far outweigh their benefits—and they represent an obstacle to political equality. Black political progress would likely be greater if race-conscious districting were viewed as a temporary remedy for unmistakably racist electoral practices (the lesser of various evils) rather than a tool for "racially proportionate" representation (which cannot be constitutionally justified).

3. The Justice Department's Complicity in Perverting Section 5

Regardless of Congress's intent, jurisdictions seeking Section 5 preclearance quickly began filing most requests with the Justice Department rather than the D.C. district court. DOJ was expected to function as a surrogate court, using legal standards from court opinions in a process akin to administrative decision-making. The reality has been quite different, as *Miller v. Johnson*, 515 U.S. 900, demonstrates.

Miller tells the remarkable story of a lawless Republican DOJ that forced Georgia to accept a districting plan drawn by the ACLU in its capacity as advocate for black state legislators. The ACLU's "max-black" plan served GOP interests by "bleaching" districts of black (and presumably Democratic) voters.

Georgia's redistricting committees increased the number of majority black congressional districts from one to two—even though the state had no obligation to give minorities more "safe" districts. After all, the point of preclearance was to prevent states from depriving blacks of the gains that basic enfranchisement promised, not to ensure a "fair" number of seats. *Beer*, 425 U.S. at 140. Georgia plainly met the law's demands, but DOJ still rejected its maps, informing the state that it had not adequately explained its failure to create a third majority-minority district. This "third district," however, would have connected neighborhoods in metropolitan Atlanta to black residents on the coast, 260 miles away and "worlds apart in culture." *Miller v. Johnson*, 515 U.S. at 908. "In short," this Court continued, "the social, political and economic makeup of the Eleventh District [told] a tale of disparity, not community." *Id.*

The preclearance process was not supposed to work as it did in Georgia and elsewhere during the Reagan-Bush years. By 1991, the vision of DOJ as a more "accessible" court had completely broken down. The Civil Rights Division's Voting Rights Section was operating as "a law office for minority plaintiffs, working as partners with civil rights advocacy groups." Abigail Thernstrom, *DOJ: A Law Office Working for Minority Plaintiffs*, The Volokh Conspiracy (Aug.19, 2009), http://volokh.com/2009/08/19/doj-a-law-office-working-for-minority-plaintiffs. *See also* Roger Clegg, *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 Cato Sup. Ct. Rev. 35, 50 (2009) ("[C]ollaboration between liberal federal bureaucrats and activist federal judges . . . has replaced a colorblind ideal with politically correct color consciousness.")

4. Congress Exacerbates the Anachronism

Section 5 is disconnected from the reality of modern American life. Blacks hold public office at all levels and have reached the pinnacles of every field of private endeavor. The extreme problems that once made the provision necessary no longer exist. Still, in 2006, Congress overwhelmingly renewed the VRA, including Section 5, for another 25 years. A campaign by so-called civil rights groups persuaded Congress that race relations remain frozen in the past, that America is still plagued by persistent disfranchisement, and that minority voters in covered jurisdictions (through a formula last updated in 1975) would remain unable to participate in political life without electoral set-asides—and that those jurisdictions should not run elections without federal oversight.

To justify Section 5's expansion of federal power as "appropriate" Fifteenth Amendment legislation, Congress identified second-generation barriers that it said still warranted federal intervention. "Discrimination [in voting] today is more subtle than the visible methods used in 1965. However, the effects and results are the same," the House Judiciary Committee reported. H.R. Rep. No. 109-478, at 6 (2006). "Vestiges of discrimination continue to exist . . . [preventing] minority voters from fully participating in the electoral process," the amended statute itself read. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 2(b)(1)(2), 120 Stat. 577 (2006).

Yet the reauthorization process failed to produce evidence to support continued federal intrusion; its reasoning was built on isolated incidents and speculation. The natural inference to draw is that Congress could not have established *Katzenbach*-compliant findings precisely because the VRA had worked!

By the 2008 election, a stunning 69.7 percent of the black population was registered to vote and turnout rates were similarly impressive. Thom File & Sarah Crissey, *U.S. Census Bureau Population Reports: Voting and Registration in the Election of November 2008* 4 (2010), available at http://www.census.gov/prod/2010pubs/p20-562.pdf. By 2008, there were 41 members of the Congressional Black Caucus; almost 600 African-Americans held seats in state legislatures, and another 8,800 were mayors, sheriffs, school board members, and the like. Forty-seven percent of these officials lived in Section 5 states, even though those states contained only 30 percent of the nation's black population. Abigail Thernstrom, *Voting Rights—and Wrongs* 203 (2009). The bottom line is indisputable: Section 5 states elect black candidates at higher rates than elsewhere.

Without the threat of federal interference, would state legislatures feel free to engage in mischief? It seems wildly improbable, even in the Deep South. As Justice Thomas put it in *NAMUDNO*,

> There is no evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting. Without such evidence, the charge can only be premised on outdated assumptions about racial attitudes in the covered jurisdictions.

557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part).

This Court recognized in *NAMUDNO*, that "things have changed in the South" and declared that "conditions . . . relied upon in upholding the statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved." 557 U.S. at 202. The skepticism of those who can't forget Jim Crow is understandable, but the South they remember is gone (and the discrimination that existed there never did in Alaska, Arizona, Manhattan, etc.). Widespread disfranchisement is ancient history, as unlikely to return as segregated water fountains. America is no longer a land where whites hold the levers of power and minority representation depends on extraordinary federal intervention, consistent with the Constitution only as an emergency measure. Today, southern states have some of the highest black voter-registration rates in the nation; over 900 blacks hold public office in Mississippi alone. Thernstrom, *Voting Rights—and Wrongs* 11. *See also NAMUDNO*, 557 U.S. at 227 (Thomas, J., concurring in part and dissenting in part) (surveying statistical evidence).

Indeed, a 2008 Clarksdale, Mississippi, newspaper editorial noted that "[t]here's probably less chance today of election discrimination against minorities occurring in Mississippi—given the high number of African-Americans in elected office, including as county election commissioners—than in many parts of the country not covered by the Voting Rights Act." Quoted in Abigail Thernstrom, *A Period Piece*, Volokh Conspiracy (Aug. 20, 2009), http://volokh.com/2009/08/20/a-period-piece. Yet Section 5 still "presumes that minorities are powerless to protect their own election interests in places where they actually have the most clout." *Id.*

Racial progress has rapidly outpaced the law, and the voting rights challenges of greatest concern today—hanging chads, electronic voting glitches, Black Panther intimidation, etc.—bear no relation to those that plagued us in 1965. Nevertheless, the VRA's most radical provisions survive, addressing yesterday's problems. The South has changed, America has changed, and it's time for this Court to change constitutional understandings regarding Section 5 as well.

B. Section 5 Conflicts with Important Constitutional Principles[3]

Congress's 2006 reauthorization of Section 5—and its antiquated coverage formula—was not only detached from America's new reality, it exacted substantial costs to federalism and distorted the principles of equal protection under the laws. Congress went far beyond enforcing voting rights and, perversely, encouraged racial gerrymandering.

1. Federalism Costs

Instead of removing what was supposed to be a temporary intrusion on federalism, Congress's 2006 VRA reauthorization heightened the tension between the states and federal government. That is, the Constitution protects the primary powers of the states to regulate elections. *Georgia v. Ashcroft*, 539 U.S. 461, 461-62 (2003). Absent a compelling justification or "exceptional conditions" (such as pervasive, invidious racial discrimination), election law falls within states' reserved powers and is an essential element of their sovereignty. *See NAMUDNO*, 557 U.S. at 216 (Thomas, J., concurring in part and dissenting in part) ("In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems." (citations omitted)); *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) ("[Preclearance is] a substantial departure . . . from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable.").

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[3] This section is based on the work of Roger Clegg, president of the Center for Equal Opportunity and former DOJ official, particularly *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 Cato Sup. Ct. Rev. 35 (2009).

In *NAMUDNO*, this Court cited many cases acknowledging Section 5's "intrusion into sensitive areas of state and local policymaking." 557 U.S. at 202 (quoting *Miller*, 515 U.S. at 926). Neither Congress nor this Court can avoid these glaring constitutional doubts any longer.

Section 5 violates the basic tenets of federalism in two principal ways. The first lies in the preclearance regime's mandate for anticipatory review. Mandatory preclearance acts as a prior restraint on election law, an area generally reserved to the states. Also, anticipatory review ensnares every state and local electoral rule proposed by a covered jurisdiction. To obtain preclearance a covered jurisdiction must prove not just the absence of "any discriminatory purpose" but that the proposed voting change will not detract from a minority group's "ability to elect" its preferred candidate. 42 U.S.C. § 1973c (2006). Under this regime, whether the proposal affects a voter's actual exercise of the right to vote is no longer the ultimate question. Covered jurisdictions cannot legislate based on perfectly valid—even compelling—interests if there is some incidental effect on racial balancing.

Similarly, the need for covered jurisdictions to "prove the absence of a discriminatory purpose" conjures up memories of DOJ's campaign of "maximizing majority-minority districts at any cost." *Shelby County v. Holder*, 679 F.3d 848, 888 (D.C. Cir. 2012) (Williams, J., dissenting). As Judge Williams commented below, this standard, "at worst restored the DOJ's 'implicit command that states engage in presumptively unconstitutional race-based districting'" *id.* at 885 (quoting *Miller*, 515 U.S. at 927), and "at best, 'exacerbated the substantial federalism costs that the preclearance procedure already exacts.'" *Id.* (quoting *Reno v. Bossier Parish School Bd.* ("*Bossier Parish II*"), 528 U.S. 320, 336 (2000)).

The second federalism violation is that the preclearance regime undermines the "fundamental principle of equal sovereignty" by "differentiating between the states" with a coverage formula that is now unsubstantiated and, therefore, completely arbitrary. *NAMUDNO*, 557 U.S. at 203 ("The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."). Moreover, "the greater the burdens imposed by Section 5, the more accurate the coverage scheme must be." *Shelby County*, 679 F.3d at 885 (Williams, J., dissenting). Congress did not even review the coverage formula when it reauthorized the VRA in 2006.

And not only does the outdated coverage formula itself strain our federalism, DOJ has not treated the states subject to Section 5 equally. For example, Shelby County and jurisdictions within it have submitted more than 680 preclearance filings since the VRA's inception. By contrast, New Hampshire's 10 covered jurisdictions have failed to make submissions for at least 20 voting changes (and perhaps as many as 90). While Shelby County was ruled ineligible for bailout for its failure to submit *one* voting change, DOJ fast-tracked New Hampshire's bailout requests! *See* Hans von Spakovsky, *Crooked Justice*, National Review Online (Dec. 4, 2012), http://www.nationalreview.com/articles/334688/crooked-justice-hans-von-spakovsky.

2. Unequal Protection

The Court again faces here the tension between Section 5 and the Constitution's non-discrimination mandate. As Justice Kennedy noted in *Ashcroft*, Section 5 imposes a serious dilemma when consideration of race would constitutionally condemn a proposed regulation just as preclearance demands it. 539 U.S. at 491 (Kennedy, J., concurring) ("There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive."). Judge Williams below echoed Justice Kennedy's concerns: Section 5 "not only mandates race-conscious decision-making, but a particular brand of it" that departs from "the Reconstruction Amendments' commitment to nondiscrimination." *Shelby County*, 679 F.3d at 887-888 (Williams, J., dissenting).

The VRA quite literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies others. For example, a minority group may be entitled to a racially gerrymandered district while other groups are not so entitled and indeed may lack protection against districting that hurts them. This is nothing if not treating people differently based on race. Under the Constitution, no racial group should be assured "safe" districts unless all other groups are given the same guarantee—an impossibility even if it were a good idea.

Despite having achieved so much success early on, continual efforts to invent new justifications for Section 5 sow the seeds for future conflict. The racial balkanization Section 5 fosters is so pernicious that this Court has repeatedly warned about its unconstitutionality. *See, e.g.*, *NAMUDNO*, 557 U.S. 193; *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Branch v. Smith*, 538 U.S. 254 (2003); *Abrams v. Johnson*, 521 U.S. 74 (1997). The segregated districts that racial gerrymandering creates have led to uncompetitive elections, increased polarization (racial and ideological), and the insulation of Republican candidates from minority voters—as well as the insulation of minority candidates and incumbents from white voters (contributing to these politicians' difficulties in running for statewide office). As Chief Justice Roberts wrote, it is "a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006).

3. Racially Disparate Purpose vs. Effect

To be sure, certain jurisdictions had played cat-and-mouse games with voting-rights enforcement—provoking Section 5's preclearance response. Fair enough, but it is problematic that later VRA amendments outlawed both actions with a racially disparate "purpose" and those with a racially disparate "effect"—so again that which the Constitution permits is illegal under a law meant to enforce the Constitution.

Whenever the government bans actions that merely have racially disparate *impacts*, two bad outcomes are encouraged that would not be if the government only policed actual racial discrimination.

First, actions that are perfectly legitimate are abandoned. Focusing obsessively on guaranteeing majority-minority districts detracts from experimentation with alternative methods of advancing minority power and may prevent the election of pragmatic candidates who can create "biracial coalitions which [could be] key to passing racially progressive policies." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting) (quoting David Epstein & Sharyn O'Hallaran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 Am. J. Pol. Sci. 367, 390-92 (1999)). For instance, in *Ashcroft*, Georgia "gave covered jurisdictions an opportunity to make trade-offs between concentrating minority voters in increasingly safe districts and spreading some of those voters out into additional districts; the latter choice, the Court pointed out, might increase the 'substantive representation' they enjoy and lessen the risks of 'isolating minority voters from the rest of the state' and of 'narrowing their political influence to only a fraction of political districts.'" *Id.* (quoting *Ashcroft*, 539 U.S. at 481).

Second, if the action is valuable enough, surreptitious racial quotas will be adopted so that the action no longer produces a racially disparate impact. In staffing, for example, an employer who requires employees to have high school diplomas and who does not want to be sued for the resulting racially disparate impact has two choices: abandon the requirement (and hire employees he believes to be less productive) or implement racial hiring quotas (engaging in the very discrimination that the statute supposedly bans). This tension between the anti-racism mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact was at the forefront of another civil rights case that this Court decided four terms ago. See Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53 (2009) (analyzing *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009)). Justice Scalia noted there that this tension is so strong that disparate impact statutes may violate the Constitution's equal protection guarantee. 129 S. Ct. at 2682 (Scalia, J., concurring).

We see the same phenomenon in the VRA context. Some legitimate voting practices—*e.g.*, ensuring that voters are citizens—will be challenged if they have a racially disparate impact. And jurisdictions are pressed to use racially segregated districting to ensure proportionate election results and thus engage in the very discrimination that the law forbids!

* * *

In *NAMUDNO*, the Court declared that "current burdens . . . must be justified by current needs," 557 U.S. at 203. Meanwhile, Section 5's coverage formula should be "sufficiently related to the problem that it targets" to warrant abrogation of the equal sovereignty of states. *Id.* Congress's 2006 findings were woefully inadequate to substantiate that "exceptional conditions" or "current needs" existed to justify the extraordinary burdens and enforcement powers they claimed. Since that time, not only has Congress not addressed the *NAMUDNO*'s concerns, but DOJ continues to interfere with benign electoral reforms.

Because the burdens imposed by Section 5 are not justified by "current needs," they fail to satisfy this Court's requirements for "appropriate" enforcement legislation as required by the Fourteenth and Fifteenth Amendments, and *Katzenbach*.

II. SECTIONS 2 AND 5 ARE AT A "BLOODY CROSSROADS"

A. The Conflict between Sections 2 and 5 Creates Bad Law

The VRA's outdated provisions no longer advance the Fifteenth Amendment's simple bar on race-based disenfranchisement. *See NAMUDNO*, 557 U.S. at 210. Worse yet, racial equality is hindered by the complex judicial web surrounding VRA implementation. Courts face significant challenges in trying to avoid racial discrimination while administering the inherently race-conscious VRA.

Shelby County again brings the tension between Sections 2 and 5 to the fore: Courts confront a "bloody crossroads" at the intersection of these provisions. While we know from *Reno v. Bossier Parish School Bd.* ("*Bossier Parish I*"), 520 U.S. 471 (1997), that each section requires a distinct inquiry, courts often face Section 2 claims while also having to draw electoral maps that comply with Section 5. While neither the DOJ nor the D.C. district court is supposed to deny Section 5 preclearance on Section 2 grounds, *Ashcroft*, 539 U.S. at 478, courts are effectively forced to wear both hats. Their apparent inability to do so is not surprising given the lack of applicable standards.

Many courts and legislatures in covered jurisdictions have labored to satisfy the VRA in the context of a cacophony of precedent—some that invokes only Section 5, some only Section 2, and some that references both sections. What's more, certain elements of the two inquiries overlap, even as this and other courts have consistently maintained that—at least in some measure—they are distinct. *See, e.g.*, *Bartlett v.*

Strickland, 556 U.S. 1; *Georgia v. Ashcroft*, 539 U.S. 461; *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003).

For example, in evaluating an election regulation under Section 5, a court conducts a "retrogression" analysis to ensure the proposed rule doesn't reduce the ability of minorities to elect their preferred candidates. 42 U.S.C. § 1973c (2006); *Beer v. United States*, 425 U.S. 130. But there is no justiciable definition of what constitutes the "ability to elect."

Ignoring for the moment that ambiguity, if a court concludes that retrogression would result under a proposal, "court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. This stricter standard applies, however, only to remedies required by the nature and scope of the violation." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (internal citations omitted). Okay, but in what respects these standards are "stricter," what constitutes "remedies," and which remedies are "required" (and under what circumstances) is far from clear.

If that weren't cryptic enough, Congress's 2006 prohibition on electoral regulations promulgated with "any discriminatory purpose," regardless of effect, further muddied the waters. Without legislative guidance as to what constitutes a "discriminatory purpose," lower courts are left only to "hope that . . . the Supreme Court will provide appropriate and immediate guidance." *Perez v. Perry*, 835 F. Supp. 2d 209, 227 (W.D. Tex. 2011) (Smith, J., dissenting).

But even if this Court's Section 5 guidance were easily applicable in a given case, that does not end the dispute. After a proposed rule has been precleared, Section 2 further complicates matters. Its language sounds similar to Section 5's—it invalidates laws that create inequality among races in electing their preferred representatives, 42 U.S.C. § 1973(b) (2006)—but don't be fooled, say the courts. This Court has "consistently understood" Section 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Ashcroft*, 539 U.S. at 477-78 (citing *Bossier Parish I*, 520 U.S. at 477). The distinction *Bossier Parish I* draws is merely that Section 5 "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Id.* at 478 (citing *Bossier Parish I*, 520 U.S. at 478). Is that a meaningful difference?

Indeed, even if it were clear that the analysis under the two sections is different, how those analyses differ remains ambiguous. "In contrast to Section 5's retrogression standard, the 'essence' of a Section 2 vote dilution claim is that 'a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Id.* at 478 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). This Section 2 process seems hardly different, however, from the very "retrogression" standard it distinguishes—a judicial assurance that a proposal "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006).

The result is untenable: Some states and counties are subject to Section 5's prolonged preclearance process while there has not yet been any judicial, legislative, or otherwise meaningful articulation of any substantive difference between that selectively applied Section 5 analysis and the Section 2 review all states must satisfy. Section 5's selective applicability precludes the establishment of nationwide districting standards, confounding lower courts and producing different, often contradictory, treatment of voting rights in different states—in large part because Sections 2 and 5 themselves conflict with each other.

This confusing precedent leaves little hope for the evenhanded administration of justice across the nation—and the turmoil is needless. Indeed, Sections 2 and 5 stem from the same constitutional provision, the Fifteenth Amendment. Section 2 meant to ensure that the Amendment was enforced nationwide, while Section 5 kept a closer eye on states that were most apt to violate it in the 1960s. But the contradictory precedent that has emerged creates a near-impossible task for courts. The lack of clarity regarding the interplay of Sections 2 and 5 also means that constitutionally permitted districting is prohibited (in some states) by a statute passed to enforce the same constitutional guarantees. Section 5's dubious constitutionality weighs heavily in favor of declaring victory and moving on, with Section 2 as the proper remedy for addressing the problems Congress has identified.

B. Section 2 Is the Proper Remedy for the Problems Congress Identified

Given Section 5's burdens, that bloody conflict should be resolved in favor of Section 2. In affording aggrieved litigants a private right of action, Section 2 provides the appropriate means for enforcing the Fifteenth Amendment and remedying any state practice which "results in a denial or abridgment of voting rights," 42 USC § 1973a. That private right of action is a more targeted remedy, empowering citizens to litigate specific discriminatory acts—in contrast to

Section 5's broad sweep, which ensnares every voting change, no matter how miniscule or banal.

Historically, case-by-case enforcement was designed to be the principal remedial mechanism for the enforcement of the VRA. In 1966, however, the *Katzenbach* Court ruled that Section 5's extraordinary federalism burdens were necessary, at least as an emergency measure, to effectively fight such "widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328. Yet in the absence of "exceptional conditions" and "unique circumstances"—*i.e.*, "intentional discrimination so pervasive that case-by-case enforcement of the VRA would be impossible," *id.* at 308—Section 5 would not have been an "appropriate" constitutional remedy. Today, "the extensive pattern of discrimination that led the Court to previously uphold Section 5 as [appropriate enforcement of] the Fifteenth Amendment no longer exists." *NAMUDNO*, 557 U.S. at 226 (Thomas concurring in part and dissenting in part). In *NAMUDNO*, this Court fired unmistakable warnings at Congress. Although it recognized the historic achievements of the VRA, the Court stated that "past success alone" is no longer "adequate justification to retain the preclearance requirements." *Id.* at 202.

Despite the VRA's extensive record in advancing racial equality in America, apparently the court below believes that the Jim Crow-era "exceptional conditions" and "unique circumstances" are still so pervasive that individualized enforcement under Section 2 is impossible—and that Section 2 cannot duplicate Section 5's purported "deterrent effect." The D.C. Circuit believes that Congress has produced sufficient evidence to conclude that discrimination remains so widespread and pervasive today that Section 2 is inadequate. Yet, Congress conceded, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." See H. R. Rep. No. 109-478, at 12 (2006). Congress thus had to offer a new justification to explain why Section 2 remains inadequate.

Section 5 was a generalized remedial mechanism once necessary for turning the tide against such "systematic resistance to the Fifteenth Amendment" and defeating "obstructionist tactics," *Katzenbach*, 383 U.S. at 328, but modern instances of discrimination are discrete rather than systemic. Facetious tests and sinister devices that eluded private rights of action are now permanently banned—while even Section 2 violations are exceedingly rare and not disproportionate to Section 5 jurisdictions.

Rather than rely on the evidentiary standard articulated by the *Katzenbach* Court, Congress reauthorized Section 5 by contriving a new rationale for this "uncommon exercise of congressional power"—the existence of "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 2(b)(2). Thus, the evidence that Congress produced was not "probative of the type of purposeful discrimination" that compelled Congress to enact Section 5. *NAMUDNO*, 557 U.S. at 228 (Thomas, J., concurring in part and dissenting in part). Other evidence it produced had no bearing on the original justifications for Section 5 and "is plainly insufficient to sustain such an extraordinary remedy." *Id.* "[E]vidence of 'second generation barriers' cannot compare to the prevalent and pervasive voting discrimination of the 1960's." *Id.*

The Court of Appeals scoured the congressional record, citing several examples of discriminatory voting practices as evidence that Section 5's comprehensive remedy is still necessary. Apart from the objections that some congressional findings are more speculative than fact-based, the reality is that

> Perfect compliance with the Fifteenth Amendment's substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

Id. at 229. All of the evidence of voter discrimination relied on by Congress and the Court of Appeals to conclude that Section 2 is inadequate is discrete and limited, not systemic and widespread. Congress failed to produce any evidence that discriminatory voting is so endemic in nationwide voting practices that it warrants the extraordinary remedy that *Katzenbach* warily approved as a temporary emergency measure nearly 50 years ago.

The Court of Appeals misleadingly concluded that that whether Section 2 is inadequate is Congress's decision, not the Court's. *Shelby County*, 679 F.3d at 873. It is emphatically the province of the judiciary, however, to say what the law is and whether Section 5's constitutional burden is "appropriate" given the alternative of Section 2 enforcement. In upholding Section 5, the *Katzenbach* Court refused to simply defer to Congress' assertion that such a radical measure was required to enforce the Fifteenth Amendment. Why should Congress deserve more deference now, half a century later? As in *Katzenbach*, this Court must conduct its own analysis to ascertain whether Section 5's extraordinary remedy is still appropriate. That is a constitutional question, not a political one, so deference to Congress would only reinforce the chaotic state of VRA jurisprudence and maintain the same battles in state legislatures and federal courts.

Another objection raised by the Court of Appeals involves the cost and expediency of VRA enforcement under Section 2. The lower court was concerned that plaintiffs with limited resources would be unable to litigate fact-intensive cases. The DOJ can essentially assume plaintiffs' costs for Section 2 suits, however, by either initiating the action itself or "intervening in support of the plaintiff as it often does." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting). Moreover, prevailing parties in a Section 2 suit are reimbursed attorney and expert fees. *Id.* Indeed, Section 2 was no constraint to a series of challenges in the 1980s to at-large voting districts in various Alabama counties. The Section 2 litigants were ultimately successful in obtaining consent decrees against most of the defendants, including Shelby County. *See Shelby County v. Holder*, 811 F. Supp.2d 424, 442-44 (D.D.C. 2011) (describing *Dillard* litigation, including the Section 2 decree that still applies to Shelby County).

As for the issue of expediency, when discriminatory practices are imminent and threaten injury before parties have had the opportunity to litigate, the courts may issue a preliminary injunction "to prevent irreparable harm caused by adjudicative delay." *Shelby* County, 679 F.3d at 888 (Williams, J., dissenting) (citing *Perry v. Perez*, 132 S. Ct. 934, 942 (2012)). Nothing in the legislative record of the 2006 VRA amendments suggests that Section 2 private rights of action would be an inadequate remedy.

In sum, Section 5's extraordinary measures are no longer constitutionally warranted because other legislation exists to fully enforce the Fifteenth Amendment's guarantees: Section 2.

III. THIS CASE EXEMPLIFIES SECTION 5'S CONSTITUTIONAL DEFECTS

A. Lost in the Serbonian Bog

At its inception, the VRA stood on firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic rights. A clear principle justified its original enactment: skin color should be irrelevant when states determine voting eligibility. Unfortunately, clarity has been lost. Nearly 50 years later, the law has become what Judge Bruce Selya described as a "Serbonian bog." *Uno v. Holyoke*, 72 F.3d 973, 977 (1st Cir. 1995). The legal landscape looks solid but is really a quagmire into which "plaintiffs and defendants, pundits and policymakers, judges and justices" have sunk. *Id.*

Ironically, the VRA has become an obstacle to racial integration. Race-based districts have kept most black legislators from the political mainstream—precisely the opposite of what the law's framers intended. Districts drawn to maximize the voting power of a racial group encourage voters to talk only to the similarly minded. One of Congress's "second generation barriers" that weighed heavily on the court below was the finding "that not one African

American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina" *Shelby County*, 679 F.3d at 862, but such conditions are products of Section 5! Black elected officials are disinclined to run and unprepared to win races in majority-white constituencies.

In safe seats, meanwhile, politicians are under no pressure to run as centrists. Their ideology, along with a reluctance to risk campaigns in unfamiliar settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office. As of 2006, for example, all Caucus members were more liberal than the average white Democrat. Abigail Thernstrom, *Looking Forward*, Volokh Conspiracy (Aug. 21, 2009), http://volokh.com/2009/08/21/looking-forward. Majority-minority districts reward politicians who make the racial appeals that are the staple of invidious identity politics. People across the political spectrum end up with more extreme views than they would otherwise hold when they talk only to those who are similarly minded. *See generally* Cass Sunstein, Republic.com (2001). Non-mainstream actors can play important roles in shaping legislation, of course, but when a historically excluded group subsequently chooses the political periphery, it risks perpetuating its outsider status. The marginalization that the VRA targets instead becomes entrenched.

Not all black politicians have been trapped in safe minority districts, of course. Barack Obama himself lost a congressional race but went on to win a statewide election. A decade earlier, Mike Coleman became the first black mayor of Columbus, Ohio, with the strategy: "Woo the white voters first . . . then come home to the base later." Gwen Ifill, *The Break-*

through: Politics and Race in the Age of Obama 227 (2009). Alas, such candidates remain the exception.

Take, for instance, the recent case of Congressman Artur Davis, who might have become the first black governor of Alabama. As the "Obama of Alabama," Davis gained prominence in a majority-minority district established pursuant to the VRA. In 2010, Davis ran in the gubernatorial primary for the Democratic Party, the same party that had elected George Wallace and devised many of the tactics which had necessitated Section 5. He notably avoided making racial appeals, courting white voters and attempting to reach out to a broader, more racially diverse constituency. He lost the black vote, however, and failed to achieve a landmark achievement for racial equality. The episode illustrates how race-conscious districting balkanizes the population and keeps black legislators from the political mainstream. Had Davis not been marginalized from white Democratic constituencies as a congressman, for example, his candidacy might have attracted the majority of white Democrats—let alone Republicans—who oppose the Affordable Care Act (against which he voted).

The VRA was meant to level the playing field but has been used to maximize black districts. The ugly implication is that black politicians need such help to win—but then their message is honed to appeal to limited constituencies. The marginalization that the VRA targets instead becomes entrenched.

As an alternative to this unfortunate pattern, this Court could excise Section 5 from the VRA, which would lift constraints on state policy experimentation. Those aggrieved by redistricting or other changes in election regulation could still enforce their Fifteenth Amendment rights through Section 2, while states would be free to devise innovative means to achieving greater racial integration.

B. Caught (Again) at the Bloody Crossroads

Once again this Court finds itself presented with yet another irreconcilable conflict between Sections 2 and 5 of the VRA. *Cf. Perry v. Perez*, 132 S. Ct. 934 (2012). That "bloody crossroads," *see supra*, lures covered jurisdictions like Shelby County into the inevitable trap of administering electoral schemes that do little to advance racial equality and often instead lead to racial balkanization. Shelby County is one of many jurisdictions required to maintain majority-minority districts under complex and conflicting standards. Avoiding racial discrimination under these circumstances, while subject to DOJ's administration of an inherently race-conscious VRA, is particularly difficult in such jurisdictions.

In *Perry*, this Court said, "redistricting is 'primarily the duty and responsibility of the State.'" 132 S. Ct. at 940 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). When it goes to fulfill this constitutional duty, however, Shelby County must submit to Section 5 preclearance, assuring the federal government that its changes will not result in "retrogression." Prohibiting retrogression requires drawing district lines that ensure minority voters are the majority in set districts—an inherently race-conscious mandate.

Meanwhile, Section 2 prohibits "any State or political subdivision" from imposing any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §1973(a). As noted above, the essence of a Section 2 vote dilution claim is that "'a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Georgia v. Ashcroft*, 539 U.S. at 478 (citing *Thornburg v. Gingles*, 478 U.S. at 47).

Section 2 thus requires race-based districting, even as Section 5 restricts that in theory but enables it (under what courts are told is a different standard) in practice. The Fourteenth and Fifteenth Amendments, meanwhile, call for race to be a non-factor in voting. Moreover, Section 5 arbitrarily prevents common national redistricting standards.

Like many jurisdictions trying to navigate between the VRA's Scylla and the Constitution's Charybdis, Shelby County finds itself stranded on judicial shoals. Meanwhile, Congress has never given Section 5 jurisdictions appropriate guidance on what constitutes a "discriminatory purpose." Consequently, Shelby County must contend with unraveling a complex web of overlapping Section 2 and 5 inquiries, with no applicable standards to guide its way. All of these factors amplify the unconstitutional character of Section 5 and restrict Shelby County from implementing "good government" principles. *Shelby County*, 679 F.3d at 886 (Williams, J., dissenting).

This Court should not allow DOJ to leverage Section 5 and further ensconce federal interference with state election administration. Section 2 is the more appropriate remedy—preserving the power of minorities to confront threats to the franchise while restoring the constitutional equilibrium.

CONCLUSION

The Voting Rights Act's Section 5 causes tremendous federalism and equal protection problems, all while enforcing arbitrary standards that conflict with the Fourteenth and Fifteenth Amendments. Recognizing that Section 5 is "no longer constitutionally justified," however, is not "a sign of defeat." *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part). Instead, a declaration that Section 5 is unconstitutional "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA." *Id.* at 229. The Court should declare victory and strike down Section 5.

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SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PRECLEARANCE WAS DESIGNED TO REMEDY FIRST-GENERATION VOTING BARRIERS, NOT SECOND-GENERATION BARRIERS 4

  A. First- Versus Second-Generation Voting Barriers 4

  B. Preclearance Was Designed To Prevent Jurisdictions From Adopting New Unconstitutional First-Generation Voting Barriers 5

II. THE EVIDENCE THAT CONGRESS CREDITED AS PROOF OF DISCRIMINATION IS CONSTITUTIONALLY INSUFFICIENT TO JUSTIFY PRECLEARANCE 9

  A. Racially Polarized Voting 10

  B. Section 5 Enforcement Statistics 16

  C. Section 2 Enforcement Actions 20

  D. Dispatching Elections Observers To Covered Jurisdictions 21

III. THE PRECLEARANCE COVERAGE FORMULA IS NOT TAILORED TO REMEDY SECOND-GENERATION BARRIERS 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **Page(s)**

Alden v. *Maine*,
527 U.S. 706 (1999) 24

Beer v. *United States*,
425 U.S. 130 (1976) 6, 17

Board of Trustees of Univ. of Alabama v. *Garrett*,
531 U.S. 356 (2001) 13

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 8

City of Mobile v. *Bolden*,
446 U.S. 55 (1980) 11, 12, 15

Georgia v. *Ashcroft*,
539 U.S. 461 (2003) 9, 17

James v. *Bowman*,
190 U.S. 127 (1903) 11

League of United Latin American Citizens v. *Perry*,
548 U.S. 399 (2006) 13

Lopez v. *Monterey Cnty.*,
525 U.S. 266 (1999) 7

Miller v. *Johnson*,
515 U.S. 900 (1995) 14, 18, 19

Nw. Austin Mun. Util. Dist. v. *Holder*,
557 U.S. 193 (2009) .... passim

Oregon v. *Mitchell*,
400 U.S. 112 (1970) 24

Reno v. *Bossier Parish Sch. Board*,
520 U.S. 471 (1997) ("*Bossier I*") 9, 20

Reno v. *Bossier Parish Sch. Board*,
528 U.S. 320 (2000) ("*Bossier II*") 9, 13

Shaw v. *Hunt*,
517 U.S. 899 (1996) 14

Shaw v. *Reno*,
509 U.S. 630 (1993) 12, 14, 15

Shelby County, Ala. v. *Holder*,
679 F.3d 848 (D.C. Cir. 2012) 8

Smith v. *Allwright*,
321 U.S. 649 (1944) 12

South Carolina v. *Katzenbach*,
383 U.S. 301 (1966) .... passim

Terry v. *Adams*,
345 U.S. 461 (1953) 11, 12

United States v. *Board of Commr's of Sheffield*,
435 U.S. 110 (1978) 16

United States v. Louisiana,
363 U.S. 1 (1960) 24

STATUTES

42 U.S.C. §1973(a) 5

42 U.S.C. §1973b(a) 5

42 U.S.C. §1973b(b) 23

42 U.S.C. §1973h 6

42 U.S.C. §1973i(a) 6

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) .... passim

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Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 29 (2005) (testimony of Roger Clegg) 17

INTEREST OF AMICUS CURIAE

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people.[1]

In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *National Federation of Independent Business* v. *Sebelius*, 132 S.Ct. 2566 (2012); *American Electric Power Co.* v. *Connecticut*, 131 S.Ct. 2527 (2011); *Bond* v. *United States*, 131 S.Ct. 2355 (2011); *Reisch* v. *Sisney*, No. 09-953, *cert. denied*, 130 S.Ct. 3323

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[1] No counsel for a party authored this brief in whole or in part. No monetary contributions were made with the intent to fund the preparation or submission of the brief. This brief is submitted pursuant to the blanket consents on file with the Court.

(2010); *Rapanos* v. *United States*, 547 U.S. 715 (2006); *GDF Realty Investments, Ltd.* v. *Norton*, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC* v. *Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Schaffer* v. *O'Neill*, No. 01-94, *cert. denied*, 534 U.S. 992 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

Congress exceeded its constitutional authority when it reauthorized Voting Rights Act (VRA) Section 5 preclearance based on "second-generation barriers" to voting.

Preclearance is an intrusive remedy with substantial federalism costs, and the Court only upheld this drastic measure after it was first adopted nearly fifty years ago due to extraordinary circumstances. Specifically, certain jurisdictions were cycling through first-generation voting barriers "for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). First-generation barriers are unconstitutional discriminatory devices that actually prevent citizens from voting, like literacy tests and grandfather clauses. See *id.*, at 311. With Section 5, Congress purported to target only Fifteenth Amendment violations. The Fifteenth Amendment applies only to state action, and it prohibits only intentional racial discrimination that prevents citizens from voting.

Section 5 achieved great success in "banish[ing] the blight of racial discrimination in voting" in the covered jurisdictions. *Id.*, at 308. When Congress reauthorized Section 5 in 2006, there was no contemporary evidence of the "exceptional conditions" that existed in the covered jurisdictions in 1965. *Id.*, at 334–335. Instead, Congress relied on some evidence of racially polarized voting in 2006 and the claim that this constituted a continuing vestige of discrimination, as opposed to the barriers that prevented citizens from voting in 1965.

These findings are insufficient to sustain Section 5. Racially polarized voting—cited as evidence of "discrimination"—does not prove any Fifteenth Amendment violation, because it is neither state action nor unconstitutional government discrimination. Nor do VRA Section 5 enforcement, VRA Section 2 enforcement, or the history of dispatching federal election observers provide sufficient evidence of the persistent and pervasive Fifteenth Amendment violations that would be necessary to justify Section 5's reauthorization.

Section 5 preclearance simply is not tailored to fix the alleged problems that Congress purported to target with the 2006 reauthorization. Congress readopted the old preclearance coverage formula that explicitly targets only those jurisdictions that used first-generation barriers decades ago. If Congress really intended to remedy racially polarized voting through Section 5 preclearance, then it would have adjusted the coverage formula. Instead, Congress left in place an arbitrary coverage formula that infringes on the sovereignty of States.

ARGUMENT

I. PRECLEARANCE WAS DESIGNED TO REMEDY FIRST-GENERATION VOTING BARRIERS, NOT SECOND-GENERATION BARRIERS.

A. First- Versus Second-Generation Voting Barriers.

Congress reauthorized Section 5 preclearance in 2006 based on so-called "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARAA), Pub. L. No. 109-246, §2(b)(2), 120 Stat. 577, 577 (2006). Congress cited evidence of racially polarized voting, *id.* §2(b)(3), 120 Stat. at 577; Section 5 preclearance enforcement, §2(b)(4), 120 Stat. at 577;

Section 2 lawsuits in covered jurisdictions, §2(b)(4)(C)-(D), 120 Stat. at 578; and dispatching of federal election observers, §2(b)(5), 120 Stat. at 578. Congress acknowledged that evidence of "second generation" barriers shows only "vestiges of discrimination in voting." *Id.* §2(b)(2), 120 Stat. at 577. Yet none of the findings evidences the type of "barrier" that actually prevents anyone from voting that Section 5 was originally crafted to remedy.

First-generation voting barriers, in contrast, are unconstitutional discriminatory devices that actually prevent citizens from voting. These devices include literacy tests, grandfather clauses, property qualifications, "good character" tests, and "understand[ing]" tests. See *Katzenbach*, 383 U.S., at 311.

B. Preclearance Was Designed To Prevent Jurisdictions From Adopting New Unconstitutional First-Generation Voting Barriers.

The Voting Rights Act was designed as a remedy to those first-generation barriers that were then widely used to intentionally deny minorities the ability to vote. See *id.*, at 311–312. Certain sections of the Voting Rights Act directly enforced the Fifteenth Amendment by prohibiting first-generation barriers. See, *e.g.*, 42 U.S.C. §1973(a) (private cause of action to enforce §1 of Fifteenth Amendment); §1973b(a) (banning discriminatory devices in covered jurisdictions); §1973h (banning poll taxes); §1973i(a) (banning voting prohibitions and refusals to count such votes).

Case-by-case enforcement, however, proved ineffective at eradicating these unconstitutional devices that prevented citizens from voting. When a court invalidated a jurisdiction's use of a particular unconstitutional device, that jurisdiction would "merely switch[] to discriminatory devices not covered by the federal decrees" or "enact[] difficult new tests designed to prolong the existing disparity between white and Negro registration." *Katzenbach*, 383 U.S., at 314.

Congress therefore enacted Section 5 preclearance to prevent jurisdictions from using these catch-me-if-you-can tactics to ignore the Constitution. See *Beer* v. *United States*, 425 U.S. 130, 140 (1976) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."). Preclearance was designed to prevent jurisdictions from circumventing direct prohibitions on first-generation voting barriers. By requiring covered jurisdictions to preclear all changes to their voting laws, Congress stopped these jurisdictions from cycling through unconstitutional discriminatory devices.

Preclearance, however, was an intrusive remedy devised to address extraordinary circumstances. Preclearance "authorizes federal intrusion into sensitive areas of state and local policymaking," which "imposes substantial 'federalism costs.'" *Nw. Austin Mun. Util. Dist.* v. *Holder*, 557 U.S. 193, 202 (2009) (quoting *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282 (1999)). Such a drastic remedy was permissible, this Court ruled, when necessary to combat "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S., at 335. The Court therefore explained that Congress had the authority to enact Section 5 preclearance initially, as it was "[u]nder the compulsion of these unique circumstances." *Ibid.*

This Court found preclearance constitutional on the basis that it would stop certain jurisdictions from cycling through unconstitutional first-generation voting barriers—that is, devices that actually prevented citizens from voting. And it worked; preclearance eradicated first-generation voting barriers by preventing jurisdictions from adopting new unconstitutional devices. See *Nw. Austin*, 557 U.S., at 202.

When Congress reauthorized Section 5 in 2006, however, Congress had before it no evidence that there still existed widespread and relentless efforts by state and local governments to prevent minorities from voting. Nor was there evidence that pervasive intentional discrimination would resume but for Section 5's continued application. Congress instead reauthorized Section 5 based on "second generation barriers"—interpreted by the Court of Appeals to mean "vote dilution techniques"[2]—and other evidence of "continued discrimination." VRARAA §2(b)(2), (b)(4), 120 Stat. at 577. These are nothing like the unconstitutional first-generation barriers that jurisdictions were using decades ago, and they cannot sustain Section 5.

Second-generation barriers, which implicate only the weight of a vote cast, do not establish the requisite nexus between Section 5's intrusive remedy and the Fifteenth Amendment violations that Section 5 was designed to cure. See *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) (congressional enforcement powers require "congruence and proportionality");

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[2] *Shelby County, Ala.* v. *Holder*, 679 F.3d 848, 878 (D.C. Cir. 2012). The Department of Justice and the lower courts have given greater import to "second-generation" barriers than Congress did in reauthorizing Section 5. Congress cited such barriers as evidence of "vestiges of discrimination," but never specifically identified any second-generation barrier that prevented citizens from voting. VRARAA §2(b)(2), 120 Stat. at 577.

Katzenbach, 383 U.S., at 328. Congress purported to target, through Section 5, only Fifteenth Amendment violations, and this Court has "never held that vote dilution violates the Fifteenth Amendment." *Reno* v. *Bossier Parish Sch. Board,* 528 U.S. 320, 334 n.3 (2000) ("*Bossier II*"). Indeed, Congress's record supporting Section 5's original authorization consisted of evidence of gamesmanship by covered jurisdictions denying minorities the right to vote—not evidence of practices affecting the weight of votes already cast. Vote dilution is within the province of Section 2, a separate and permanent component of the VRA implicating the Fourteenth Amendment. *Georgia* v. *Ashcroft,* 539 U.S. 461, 478 (2003). This Court has "consistently understood" Section 2 and Section 5 to "combat different evils and, accordingly, to impose very different duties upon the States." *Id.*, at 477–478 (quoting *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 477 (1997) ("*Bossier I*")). VRA Section 2 already provides a comprehensive remedy for addressing any potential problems posed by practices that affect the weight of the votes cast.

II. THE EVIDENCE THAT CONGRESS CREDITED AS PROOF OF DISCRIMINATION IS CONSTITUTIONALLY INSUFFICIENT TO JUSTIFY PRECLEARANCE.

To constitutionally justify Section 5's reauthorization, Congress in 2006 needed to compile a record of pervasive and "systematic resistance to the Fifteenth Amendment" in the covered jurisdictions that was not redressable by case-by-case litigation. *Katzenbach*, 383 U.S., at 328; see *Nw. Austin*, 557 U.S., at 224 (THOMAS J., concurring in the judgment in part and dissenting in part).

Congress did not do so. Much of the evidence Congress cited as proof of "vestiges of discrimination in voting" or simply as proof of "continued discrimination" is not probative of Fifteenth Amendment violations at all. VRARAA §2(b)(2), (b)(4), 120 Stat. at 577. And any evidence that is probative does not come close to approximating the "unremitting and ingenious" campaign of discrimination that justified "legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S., at 309, 334.

A. Racially Polarized Voting

Congress cited "racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965" as a basis for reauthorizing Section 5. VRARAA §2(b)(3), 120 Stat. 577. Congress touted this as the "clearest and strongest evidence" for the continued necessity of preclearance. H.R. Rep. No. 109-478, p. 34 (2006). But the existence of racially polarized voting is not evidence of intentional government discrimination in voting—the only type of discrimination that Congress is empowered to remedy under the

Fifteenth Amendment. See, *e.g.*, *Terry* v. *Adams*, 345 U.S. 461, 472–473 (1953) (Frankfurter, J.).

The Fifteenth Amendment prohibits only the "purposefully discriminatory denial or abridgment *by government* of the freedom to vote." *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (emphasis added). It authorizes Congress only to remedy "action 'by the United States or by any state,' and does not contemplate wrongful individual acts." *James* v. *Bowman*, 190 U.S. 127, 135 (1903). A Fifteenth Amendment violation thus requires a showing of government action and intent to discriminate, and no violation will be found when minorities are free to "register and vote without hindrance." *Bolden*, 446 U.S., at 65.

The evidence that Congress amassed of racially polarized voting cannot prove a single Fifteenth Amendment violation because it is neither government action nor discriminatory. Congress defined racially polarized voting as the pattern in which "voting blocs within the minority and white communities cast ballots along racial lines."[3] H.R. Rep. No. 109-478, p. 34

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[3] Racially polarized voting is generally portrayed as white voters refusing to support minority-preferred candidates. But polarization is equally dependent upon the reverse: minority voters refusing to support candidates preferred by white voters.

(2006). Of course, this is the result of private free choice and not state action. *Bolden*, 466 U.S., at 63–65; *Nw. Austin*, 557 U.S., at 228 (THOMAS, J., concurring in the judgment in part and dissenting in part)). This Court has held that such patterns are not evidence of unconstitutional discrimination, unless accompanied by evidence of discriminatory intent on the part of the government. See *Bolden*, 466 U.S., at 64–65 (citing *Smith* v. *Allwright*, 321 U.S. 649 (1944); see *Terry*, 345 U.S., at 473 ("To find a denial or abridgment of the guaranteed voting right to [a racial minority group], . . . one must find that the State has had a hand in it.").

Perhaps recognizing the error in casting polarization as evidence of a Fifteenth Amendment violation, the Attorney General has suggested that racially polarized voting is relevant as a predicate—albeit only one of many—to vote dilution.[4] This fall-back argument fails for many reasons.

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[4] Evidence of racially polarized voting is not the same as evidence of retrogressive vote dilution. Unconstitutional vote dilution occurs where changes in voting procedures "nullify" the ability of minority voters "to elect the candidate of their choice" and is unconstitutional. *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993) (citation and internal quotation marks omitted). But there is no constitutional right to the "electoral success [of] minority-preferred

First, there is no evidence that Congress intended to justify Section 5 based on the fact that racially polarized voting could be a predicate for vote dilution; the evidence supports only that Congress erroneously considered it to be evidence that Section 5 was still needed for minorities to be able to vote and run for office. See H.R. Rep. No. 109-478, p. 34 (2006) (describing polarization as evidence "of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process"). Had Congress "truly understood" polarization to be relevant because it is a predicate for unconstitutional vote dilution, "one would expect some mention of that conclusion in the Act's legislative findings." *Board of Trustees of Univ. of Ala.* v. *Garrett,* 531 U.S. 356, 371 (2001). There is none. *Ibid.*

Second, even if racially polarized voting can be a predicate for vote dilution, that cannot justify Section 5 preclearance. As explained in Part I.B., Section 5 was designed to remedy Fifteenth Amendment violations, but vote dilution does not violate the Fifteenth Amendment. *Bossier II*, 528 U.S., at 334 n.3.

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candidates." *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 428 (2006). As private action wholly separate from voting procedures, racial bloc voting cannot justify Section 5.

Moreover, preclearance is neither a logical nor a necessary tool to remedy instances of vote dilution. See *supra* Part I.B.

Finally, Congress's reliance on racially polarized voting as justification for Section 5 is particularly unwarranted, because if Section 5 affects racial polarization at all, it likely exacerbates it rather than diminishes it. The Department of Justice previously interpreted Section 5 to require gerrymandering that creates voting districts composed of primarily minority voters, in order to satisfy the burden of non-retrogression given changing populations.[5] This Court, however, has recognized that such gerrymanders "exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract," by reinforcing racial stereotypes making elected officials "more likely to believe that their primary obligation is to represent only the members of [a particular racial] group." *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993). By retaining Section 5 preclearance, the government would perpetuate the precise racially polarized voting tendencies that the government purports to condemn.[6]

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[5] For example, in North Carolina, the Department of Justice pursued a "policy of maximizing the number of majority-black districts." *Shaw* v. *Hunt*, 517 U.S. 899, 913 (1996). To comply with the Justice Department's aims, the North Carolina legislature was required to create a district resembling a "bug splattered on a windshield," and a "more unusually shaped" district "wind[ing] in snakelike fashion" for 160 miles. *Shaw* v. *Reno*, 509 U.S., at 635 (citation and internal quotation marks omitted). The Department pursued the same policy in Georgia. *Miller* v. *Johnson*, 515 U.S. 900, 925 (1995) ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.").

Far from being "strong evidence" for the continued justification of Section 5, racially polarized voting is never a Fifteenth Amendment violation, much less an "insidious and pervasive" pattern of "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S., at 309. Racially polarized voting therefore falls far short of justifying Section 5's "substantial departure from ordinary concepts of our federal system." *United States* v. *Board of Commr's of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (alteration and footnote omitted).

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[6] There is, at the very least, inconsistency in denouncing racially polarized voting while simultaneously lamenting failures to draw majority-minority districts to insulate African-American and white voters from each other, and presuming that a minority group has a single "candidate of choice" different from non-minority voters. See *Bolden*, 466 U.S., at 88 (Stevens, J., concurring) ("There is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.").

B. Section 5 Enforcement Statistics

Congress also considered as evidence of "discrimination" the "hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions . . . in covered jurisdictions since 1982." VRARAA §2(b)(4)(A), 120 Stat. at 577. Additionally, Congress compiled statistics of the "number of requests for declaratory judgments denied by the United States District Court for the District of Columbia" as support for reauthorization. *Id.* §2(b)(4)(B), 120 Stat. at 577. Modern preclearance statistics, however, are "poor proxies for intentionally discriminatory state action in voting, for a number of reasons." Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L. J. 177, 190 (2005).

The Department of Justice objections cannot be considered evidence of purposefully discriminatory state action, because Section 5 is a prophylactic remedy that prohibits conduct beyond what is forbidden by the Constitution. Prior to 2006, the question whether a voting change was entitled to preclearance under Section 5 depended on whether the change "would lead to a retrogression in the position of racial minorities," not whether the change was motivated by discrimination. See *Ashcroft,* 539 U.S., at 480 (citation and internal quotation marks omitted). Indeed, in the nearly three decades between *Beer* (1976) and *Ashcroft* (2003), the preclearance analysis did not even consider the existence of discriminatory intent. Pitts, Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine), 32 Pepp. L. Rev. 265, 273 (2005). It is no surprise then that an objection is not tantamount to an instance of intentional discrimination.[7]

Congress likewise failed to discount illegitimate objections. For example, in the 1990s, the Department of Justice adopted a

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[7] Even those objections based on discriminatory purpose do not prove that a voting practice change was motivated by discrimination. An objection is merely "one side's opinion" about the purpose because there has been no trial or formal hearing to resolve the question. Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 29-30 (2005) (testimony of Roger Clegg).

"policy of objecting to certain State actions that were perfectly constitutional, a policy the Supreme Court later rejected." An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 9 (2006) (statement of Richard L. Hansen); see *Miller*, 515 U.S., at 917–919 (rejecting as intentionally discriminatory the Department's policy of denying preclearance to plans that failed to maximize majority-minority districts intentionally). These illegitimate objections, too, are included within the tally of those used to justify Section 5's reauthorization. H.R. Rep. No. 109-478, pp. 21–24, 36–40 (2006).

Even taking Congress's objection statistics at face value, those statistics cannot demonstrate persisting discrimination on any significant scale in the covered jurisdictions. The evidence relied upon by Congress proved that objections are steadily declining. S. Rep. No. 109-295, p. 13 (2006). Between 1982 and 2004, only 0.74% of preclearance submissions resulted in an objection (752 of 101,440 submissions). See *ibid.*; see also H.R. Rep. No. 109-478, p. 22 (2006). Though the early 1990s witnessed an increase, the Department was then using the invalid policy that it would object to any proposed change that did not maximize the number of majority-minority districts. See *Miller*, 515 U.S., at 921. Not surprisingly, once that invalid policy was discredited, the number of objections declined precipitously. S. Rep. No. 109-295, p. 13 (2006) (noting 61 objection letters issued in 1994, and only seven issued in 1996, the year after the *Miller* decision issued). The Department objected to only three out of 5,211 submissions in 2004, and to just a single submission out of 4,734 in 2005. *Ibid.*

The fact that the Department submitted "more information requests" to covered jurisdictions seeking preclearance is even less probative of intentional discrimination than the objections. H.R. Rep. No. 109-478, p. 40 (2006). Congress noted that "since 1982, over 205 voting changes have been withdrawn" as a result of these requests. *Id.*, p. 41. But these statistics prove only that the Department lacked sufficient evidence to make a preclearance determination—not that the Department had determined the proposed change to be illegal. *Id.*, p. 40.

Further, the decision by state and local governments to withdraw submitted changes in the face of such inquiries may suggest efforts to comply with the Constitution—the very opposite of overt defiance. They could also indicate that bureaucratic hurdles have deterred covered jurisdictions from making voting changes at all, regardless of whether those changes could be upheld as constitutional. In either event, they are not evidence of persistent voting discrimination in the covered jurisdictions.

C. Section 2 Enforcement Actions

Congress's reauthorization of Section 5 was also predicated upon evidence of "the continued filing of section 2 cases that originated in covered jurisdictions." VRARAA, §2(b)(4)(C)-(D), 120 Stat. at 578. This evidence fails to justify Section 5's remedy for multiple reasons.

Section 2 litigation is not evidence of intentional discrimination prohibited by the Fifteenth Amendment. For one thing, the mere filing of a lawsuit does not prove a Section 2 violation. Moreover, Section 2 does not have an intent component, which is necessary to show a Fifteenth Amendment violation. *Bossier I,* 520 U.S. 471, 482 (1997). In fact, out of all of the Section 2 cases filed since 1982, Congress identified only twelve reported decisions finding unconstitutional discrimination in covered jurisdictions. S. Rep. No. 109-295, p. 13 (2006) & App. 1. Half of these involved discrimination against white voters. *Ibid.*

Given the dearth of cases finding intentional discrimination against minorities, the Attorney General has attempted to infuse relevance into the remaining Section 2 actions by arguing that this Court should also credit unpublished decisions and favorable settlements. But the study that the Attorney

General relied upon—the Report of the National Commission on the Voting Rights Act—revealed only 11 findings of intentional discrimination in covered jurisdictions since 1982. See The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong. 10 (2006) (testimony of Richard H. Pildes); S. Rep. No. 109-295, p. 102 (2006). And those cases described as "favorable settlements" are no evidence whatsoever of intentional discrimination that prevents citizens from voting.

D. Dispatching Elections Observers To Covered Jurisdictions

Congress also sought to justify Section 5 based on its finding that "tens of thousands of Federal observers . . . have been dispatched to observe elections in covered jurisdictions." VRARAA §2(b)(5), 120 Stat. at 578. These dispatches do not support a continuing need for Section 5 because they are in no way dependent upon the existence of actual discrimination in voting.

The dispatch of federal elections observers is not evidence of actual discrimination because, as Congress expressly acknowledged, dispatches trigger upon Congress's "reasonable belief that minority citizens [were] at risk of being disenfranchised." H.R. Rep. No. 109-478, p. 44 (2006). Actual evidence of intentional discrimination is not required.

Ultimately, like so many of the other alleged indicators of "second-generation barriers," the dispatch of elections observers to covered jurisdiction evidences only a continued *suspicion* that discrimination, of some sort, continues in covered jurisdictions. This does not measure actual existence of ongoing discrimination. Congress's mere suspicion cannot possibly justify the reauthorization of Section 5 preclearance. *Katzenbach* demanded much more before upholding Section 5's intrusive remedy, and suspicion alone will never demonstrate a congruent and proportional remedy, much less one that justifies Section 5's significant federalism costs.

III. THE PRECLEARANCE COVERAGE FORMULA IS NOT TAILORED TO REMEDY SECOND-GENERATION BARRIERS.

The preclearance coverage formula is not calibrated to target jurisdictions with second-generation barriers and evidence of continued discrimination. Section 5's coverage formula as reauthorized in 2006 fails *Katzenbach*'s requirement that preclearance be "rational in both practice and theory." 383 U.S., at 330.

The coverage formula explicitly targets only those jurisdictions that used first-generation barriers decades ago. The formula examines whether jurisdictions had prohibited first-generation barriers in 1964, 1968, or 1972, and whether those jurisdictions had low voter registration or turnout in those election cycles. 42 U.S.C. §1973b(b). The preclearance coverage formula in Section 4(b) has remained unchanged since 1975. See *Nw. Austin*, 557 U.S., at 203.

If Congress really intended Section 5 to remedy the specific problems it identified when reauthorizing preclearance in 2006, then it would have adjusted the coverage formula to cover jurisdictions that actually had such problems. For example, racially polarized voting is hardly limited to jurisdictions targeted by the existing coverage formula. Likewise, Section 2 litigation arises across the country. If Congress was actually trying to remedy such occurrences, then it should have attempted to do just that. Instead, Congress's reauthorization of Section 5 continued to single out certain jurisdictions based on data from two generations ago. This is especially striking because African-American voter turnout in 2008 appeared higher in covered states than in non-covered states.[8]

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[8] The Census Bureau provides African-American turnout data for eight of the nine covered states, and shows an average African-American turnout among those states of 65.9%. See Seaman, An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System, 30 St. Louis U. Pub. L. Rev. 9, 64 (2010). This is higher than the 64.7% national average. See United States Census Bureau, Voting and Registration in the Election of

"[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S., at 203; see *ibid.* (recognizing "our historic tradition that all the States enjoy 'equal sovereignty'" (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960))). Congress, though, did not even attempt to tailor the 2006 preclearance reauthorization to cover jurisdictions with second-generation barriers that reduce the effectiveness of certain votes. Congress did not try to identify any "local evils" that could possibly justify the disparate treatments of States. *Katzenbach*, 383 U.S., at 328-329.

Congress therefore violated "the sovereign status of the States," which retain "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden* v. *Maine*, 527 U.S. 706, 714 (1999). A State's election process is at the heart of its sovereignty. See *Oregon* v. *Mitchell*, 400 U.S. 112, 125 (1970) ("No function is more essential to the separate and independent existence of the States and their governments than the power to

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November 2008 – Detailed Tables, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.

determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filing local public offices."). Yet Congress continues to interfere with the sovereignty of covered States by exercising a prior restraint over their election laws, regardless whether sufficient second-generation voting barriers exist within that State. Conversely, Congress has decreed that non-covered States are not subject to such a prior restraint, even if significant vote dilution occurs in the State. That arbitrary distinction demeans the dignity of the States, and it is not a valid use of Congress's Fifteenth Amendment enforcement power.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF GABRIEL CHIN, ATIBA ELLIS, CHRISTOPHER S. ELMENDORF, JANAI S. NELSON, BERTRALL ROSS, DANIEL TOKAJI, AND FRANITA TOLSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE*.......................... 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT.. 9

I. SECTION 5 OF THE VOTING RIGHTS ACT IS VALID AS AN EXERCISE OF CONGRESS' AUTHORITY UNDER THE ELECTIONS CLAUSE. 9

  A. Congress Has Comprehensive Power Over Federal Elections. 9

  B. Congress Enacted Section 5 Of The Voting Rights Act Pursuant To Its Broad Elections Clause Power. 13

  C. Principles Of State Sovereignty Provide No Limit On Congress' Elections Clause Authority. 16

  D. The Elections Clause Power Need Not Be Exercised Uniformly, And, In Any Event, Section 5 Is Uniform Across The Nation. 20

II. CONGRESS' ELECTIONS CLAUSE POWER DEFEATS PETITIONER'S FACIAL CHALLENGE. 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

Ass'n of Cmty. Orgs. for Reform Now v. *Edgar*, 56 F.3d 791 (7th Cir. 1995)........... 11

Ass'n of Cmty. Orgs. for Reform Now v. *Miller*, 129 F.3d 833 (6th Cir. 1997)........ 11

Ayotte v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006) 25

Blanchette v. *Conn. Gen. Ins. Corps.*, 419 U.S. 102 (1974)... 22

Cook v. *Gralike*, 531 U.S. 510 (2001)...... 5, 18

Edye v. *Robertson*, 112 U.S. 580 (1884)....... 22

Fernandez v. *Wiener*, 326 U.S. 340 (1945) .. 22

Florida v. *Mellon*, 273 U.S. 12 (1927).......... 7, 22

Foster v. *Love*, 522 U.S. 67 (1997) 9, 10, 18, 20

Gonzalez v. *Arizona*, 677 F.3d 383 (9th Cir. 2012) *cert granted sub nom.* 133 S. Ct. 476 (2012) 5, 19

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 26

M'Culloch v. *Maryland*, 17 U.S. 316 (1819) 5, 13

Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566 (2012)..................................... 15

Nw. Austin Mun. Util. Dist. No. One v. *Holder*, 557 U.S. 193 (2009)....................... 8, 26

Parker v. *Levy*, 417 U.S. 733 (1974) 8

Ex parte Siebold, 100 U.S. 371 (1879).................................... 4, 5, 9, 13, 14, 16

Smiley v. *Holm*, 285 U.S. 355 (1932).......... 12, 13

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966).. 15

Stellwagen v. *Clum*, 245 U.S. 605 (1918).... 22

Tennessee v. *Lane*, 541 U.S. 509 (2004)....... 26

United States v. *Classic*, 313 U.S. 299 (1941)... 5, 12, 13

United States v. *Salerno*, 481 U.S. 739 (1987)... 25

United States v. *Stevens*, 130 S. Ct. 1577 (2010) 7, 25

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 5, 9, 16, 18

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 12

Voting Rights Coal. v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995) 11

Wash. State Grange v. *Wash. State Republican Party*, 552 U.S. 442 (2008) 7, 24

Ex parte Yarbrough, 110 U.S. 651 (1884) 9, 10, 11, 26

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 4 .... 4, 6, 12, 17, 21

U.S. Const. art. I, § 8 .... 5, 6, 20, 21

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 14

42 U.S.C. § 1973 .... 7, 11, 23

RULES

Supreme Court Rule 37.6 1

Supreme Court Rule 37.3 1

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Gabriel J. Chin, U.C. Davis Legal Studies Research Paper No. 313, *Section 5 of the Voting Rights Act and the 'Aggregate Powers' of Congress over Elections* 13 (2012), http://ssrn.com/abstract=2132158 .... 4, 6, 19

The Continuing Need for Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary, 109th Congress 5 (2006) (testimony of Professor Pamela Karlan) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG109shrg28753.pdf 14

The Federalist No. 59 .... 9, 18, 19, 23

Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 Ala. L. Rev. 349 (2006–07) 11

Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195 (2012) 16, 18

H.R. REP. NO. 89-439 (1965) 14

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* certifies that counsel of record for both petitioners and respondents have consented to this filing in letters on file with the Clerk's office.

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Sovereignty?: Federalism as a Constraint on the Voting Rights Act, 65 Vand. L. Rev. 1195 (2012), which examines the extent of Congress' authority under the Elections Clause.

SUMMARY OF THE ARGUMENT

The Fourteenth and Fifteenth Amendments are not and have never been the *sole* source of Congress' authority for Section 5.[2] Section 5 concerns elections not only for state officials, but also for federal officials. The Elections Clause, U.S. Const. art I, § 4, cl. 1, provides distinct, clear authority for Congress to enact Section 5's pre-clearance procedures for state laws concerning federal elections.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

Id. Congress' Elections Clause power is broad and plenary. *Ex parte Siebold*, 100 U.S. 371, 388 (1879). Congress enjoys "general supervisory power over the whole subject" of federal elections. *Id.* at 387. Like all other powers directly granted to Congress, Congress' legislative authority over federal elections is enhanced by the Necessary and Proper Clause, which applies to "all . . . powers vested by [the] Constitution in the government of the United States." U.S. Const. art. I, § 8, cl. 18. In combination with the Necessary and Proper Clause, Congress has the discretion to effect "all means which are appropriate," *M'Culloch* v. *Maryland*, 17 U.S. 316, 421 (1819), to meet the legitimate goal of "protection of the integrity of elections." *United States* v. *Classic*, 313 U.S. 299, 319 (1941) (internal quotation marks omitted). Section 5 is a legitimate exercise of Congress' authority to protect the integrity of federal elections. This Court should not disturb it.

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[2] Professor Gabriel J. Chin explains that Congress relied upon the Fourteenth and Fifteenth Amendments and the Elections Clause as its sources of power in enacting the VRA. *See* Gabriel J. Chin, U.C. Davis Legal Studies Research Paper No. 313, *Section 5 of the Voting Rights Act and the 'Aggregate Powers' of Congress over Elections* 13 (2012), http://ssrn.com/abstract=2132158.

Congress' power under the Elections Clause is not qualified by the principle of state sovereignty. The Elections Clause provides a procedural role for the states in federal elections, *Cook* v. *Gralike*, 531 U.S. 510, 514 (2001), but the acknowledgement of that role is neither a recognition nor a grant of sovereign authority to the states over federal elections. In *U.S. Term Limits, Inc.* v. *Thornton*, this Court declared that concerns about federalism do not apply to the regulation of federal elections because that power is expressly delegated to Congress and not reserved to the states by the Tenth Amendment. *See* 514 U.S. 779, 804-05 (1995). The principle of dual sovereignty adopted by the Framers, which rejected the model of the Articles of Confederation, demands as much. The federal government must have the sovereign authority over the manner by which its legislators are selected if it is to have truly independent authority, as the Framers intended. Congress thus may displace state regulation over federal elections entirely, allowing states no input. *Ex parte Siebold*, 100 U.S. at 383; *Gonzalez* v. *Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) (en banc) (Congress has the power to completely negate state regulation of federal elections), *cert granted sub nom.* 133 S. Ct. 476 (2012). Likewise, a more limited assertion of Congress' authority, like requiring states to pre-clear changes to laws concerning federal elections, is no intrusion on state sovereign authority. *See* Chin, *supra*, note 1, at 15–16.

Just as principles of state sovereignty present no obstacle to Congress' authority under the Elections Clause, neither do principles of uniformity. The fact that the VRA imposes pre-clearance requirements on some jurisdictions, but not on others, does not mean Congress has acted beyond its Constitutional power under the Elections Clause. The Elections Clause gives Congress authority to enact national solutions to regional voting problems. The Elections Clause does not require that Congress' regulations apply with complete uniformity to all jurisdictions. Article I specifies certain Congressional powers that must be exercised uniformly, such as its powers over taxation, U.S. Const. art. I, § 8, cl. 1, naturalization, and bankruptcy, *id.* § 8, cl. 4. The Elections Clause contains no such uniformity requirement, and such a restriction would be ill-suited to the purpose of the clause. The Elections Clause contemplates variation in state laws because "each State" will adopt its own set of regulations governing federal elections. *See id.* § 4, cl. 1. Exercises of Congress' authority under the Elections Clause need not apply uniformly.

In any event, Section 5 presents a uniform, national solution to the problem of racial discrimination in voting. Its procedures apply to all jurisdictions with a history or practice of racial discrimination in voting. Furthermore, the list of covered jurisdictions is not static.[3] It is hardly surprising that federal law concerning federal elections would have varying impact in light of the widely varying electoral history and regulations of the several states. This does not mean that the federal law is not uniform. Congress may enact uniform laws that operate differently in different states because of local laws or conditions. *See Florida* v. *Mellon*, 273 U.S. 12, 17 (1927). Even if uniformity were required, Congress designed the VRA as a uniform rule.

In the context of this case, the Elections Clause is no mere detail. Petitioner has brought a facial challenge to Section 5. *See* Compl. 1. Such a challenge asks this Court to rule that "no set of circumstances exists under which [the VRA] would be valid," *see United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks omitted) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)), and that "the law is unconstitutional in all of its applications." *See Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008). No such ruling is possible in light of the Elections Clause's broad grant of authority to Congress. Amici acknowledge that the Elections Clause does not provide Congress with the authority to reach changes to election laws that affect purely state or local elections. However, Shelby County has brought a facial challenge against Section 5, and the Elections Clause provides ample authority for the applications of Section 5 to changes that affect federal elections. As a result, petitioner's facial challenge must fail.

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[3] The statute's "bail-in" and "bail-out" provisions focus the act's application on discriminatory laws, wherever enacted, rather than on a fixed list of jurisdictions. *See* 42 U.S.C. § 1973b(a).

Indeed, this case exemplifies the wisdom of this Court's traditional reluctance to strike down federal statutes on their face. *Parker* v. *Levy*, 417 U.S. 733, 760 (1974) ("This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied."). A focus on Congress' authority under the Fourteenth and Fifteenth Amendments is understandable, but too narrow. Amici are confident that the Fourteenth and Fifteenth Amendments provide ample authority to support Section 5. However, even if they did not, this Court could not overlook Congress' separate and independent authority under the Elections Clause to adopt Section 5 for federal elections. To the contrary, because a facial challenge must fail if there is any set of circumstances under which the challenged act of Congress is valid, this Court can and should begin and end its analysis with that source of Congressional power. The Elections Clause provides a narrow and clear basis for rejecting petitioner's facial challenge that renders any further consideration of Congress' authority under the Fourteenth and Fifteenth Amendments unnecessary. *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009) (recognizing the well-established practice of this Court avoiding constitutional questions unnecessary to decide the case).

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT IS VALID AS AN EXERCISE OF CONGRESS' AUTHORITY UNDER THE ELECTIONS CLAUSE.

A. Congress Has Comprehensive Power Over Federal Elections.

The federal government's existence depends on fair federal elections. *Ex parte Yarbrough*, 110 U.S. 651 (1884). It is hardly surprising, then, that "the power of Congress over the subject [of federal elections] is paramount. It may be exercised "as and when Congress sees fit to exercise it." *Ex parte Siebold*, 100 U.S. at 384. "The Clause gives Congress 'comprehensive' authority to regulate the details of elections." *Foster* v. *Love*, 522 U.S. 67, 68-70, 71 n.2 (1997).

The Framers' principal purpose in adopting the Elections Clause was to empower the federal government to prevent efforts to undermine or corrupt the elections process for federal officials. *See The Federalist No. 59* (Alexander Hamilton) (Clinton Rossiter ed., 1961). As Alexander Hamilton put it, "[the Clause's] propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation." *Id.* at 362 (Alexander Hamilton). *See also U.S. Term Limits*, 514 U.S. at 808-09 (quoting *2 Records Of The Federal Convention Of 1787*, at 240 (M. Farrand ed.1911) (noting Madison's concern that "[i]t was impossible to foresee all the abuses that might be made of the [states'] discretionary power [under the Elections Clause]" and noting that because the Framers feared that "the diverse interests of the States would undermine the National Legislature," they "adopted provisions intended to minimize the possibility of state interference with federal elections")). Examples from recent years as well as the post-civil war period confirm both the breadth of Congress' authority under the Elections Clause and the paramount role of Congress in determining *when* federal intervention in elections procedures is necessary.

In *Foster* v. *Love*, the Court validated Congress' authority to preempt a Louisiana open primary statutory scheme that effectively changed the day on which candidates for federal office were elected. 522 U.S. at 69. The Court recognized that Congress, in selecting a single election day, was concerned about the potential "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States." *Id.* at 73. The Court invalidated the Louisiana law in light of what it called Congress' "comprehensive" authority to implement "safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.* at 71 n.2 (internal quotation marks and citation omitted).

In *Ex parte Yarbrough* ("The Ku Klux Cases"), the Court upheld an act of Congress criminalizing voter intimidation and violence. 110 U.S. at 667. The act served as the basis for prosecuting a group of eight men in Georgia for threatening, intimidating, and beating Berry Saunders because Saunders, an African American, had voted in a federal election. The Court upheld the law as a valid exercise of Congress' power under the Elections Clause, finding additional support in the Fifteenth Amendment. *Id.* at 664. The Court pointed to Congress' earlier abolishment of at-large House elections because such elections "worked injustice to other states which did not adopt that system, and gave an undue preponderance of power to the political party which ha[s] a majority of votes in the state, however small." *Id.* at 660-61.

The Court further explained that Congress must have the power to prevent corruption in its own elections. "Will it be denied that it is in the power of [Congress] to provide laws for the proper conduct of those elections? . . . Can it be doubted that [C]ongress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud?" *Id.* at 661. If the federal government "has not this power," the Court reasoned, "it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." *Id.* at 658.

Congress relied on the Elections Clause to enact the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg. *See* Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 Ala. L. Rev. 349, 366 (2006–07). The NVRA is an act "designed to make it easier to register to vote in federal elections" which "intrudes deeply into the operation of state government." *Ass'n of Cmty. Orgs. for Reform Now* v. *Edgar*, 56 F.3d 791, 792-93 (7th Cir. 1995); *see also Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *Voting Rights Coal.* v. *Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995). Congress felt it prudent to require states to expand the ways that eligible persons could register to vote. 42 U.S.C. § 1973gg-2. The NVRA was seen as a means "to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements." *Ass'n of Cmty. Orgs. for Reform Now*, 129 F.3d at 835. All appeals courts that have considered the NVRA (the Sixth, Seventh and Ninth Circuits, cited above) have upheld it as a matter appropriate for Congress' judgment.

The fundamental purpose advanced by the Elections Clause—protection of the integrity of federal elections—has led this Court to give its text a broad construction. This Court has interpreted the Elections Clause to give Congress authority to regulate state laws affecting even those steps in the election of federal offices not explicitly mentioned in the text of the clause. For example, this Court has recognized that Congress' authority under the Elections Clause includes the drawing of district boundaries. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 275 (2004) (Scalia, J., plurality) ("Article 1, §4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished."). This Court also has held that "the authority of Congress, given by § 4, includes the authority to regulate primary elections when . . . they are a step in the exercise by the people of their choice of representatives in Congress." *Classic*, 313 U.S. at 317. This Court has interpreted the scope of the phrase "times, places, and manner of holding elections" to include a broad range of activities, including "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns," *Smiley* v. *Holm*, 285 U.S. 355, 366-67 (1932). Congress may "enact . . . numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.* Congress' power under the Elections Clause is broad indeed.

Further, Congress' Elections Clause power enjoys the added force of the Necessary and Proper Clause. That "provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution." *Classic*, 313 U.S. at 320. Accordingly, Congress has available to it "all means which are appropriate," *M'Culloch*, 17 U.S. at 421, to meet the legitimate end of "insur[ing] the freedom and integrity of choice" that elections are fundamentally about, *Classic*, 313 U.S. at 319-20. "All means" includes the imposition of criminal penalties to preserve "the purity [of elections] . . . and the rights of citizens to vote . . . peaceably and without molestation." *Ex parte Siebold*, 100 U.S. at 382 (upholding statutes criminalizing an election officer's neglect or failure to perform her duties).

In sum, the breadth of Congress' authority over election law is commensurate with the stakes. The integrity of the federal government itself depends in no small measure on the integrity of the elections of those who serve as its legislators. This Court has long acknowledged the importance of Congress' Elections Clause power, and consequently provided Congress broad leeway to exercise it. It is up to Congress, finally, to determine when state laws concerning federal elections should be modified.

B. Congress Enacted Section 5 Of The Voting Rights Act Pursuant To Its Broad Elections Clause Power.

The Voting Rights Act is an exercise of Congressional judgment about when state election laws concerning federal elections should be modified. From its inception, Section 5 of the VRA has been considered by Congress to have been enacted pursuant to its Elections Clause power. Tokaji, *supra*, at 365. To be sure, Congress was conscious of its authority under the Fourteenth and Fifteenth Amendments, but, as the House Report indicates, "[t]he bill... is also designed to enforce... article 1, section 4" of the Constitution. *See* H.R. REP. NO. 89-439 (1965); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 ("To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes."); *see also The Continuing Need for Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Congress 5 (2006) (testimony of Professor Pamela Karlan), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf (Elections Clause gives Congress "absolutely plenary power over any election in which Federal officials are selected," meaning that "there is no federalism concern") (citing *Vieth* v. *Jubelirer* for the proposition that "there are cases where there is a 14th Amendment violation that the courts cannot alone deal with because there is not a manageable judicial standard... [and the Elections Clause empowers Congress to deal with such issues]").

The pre-clearance requirement for state regulation of federal elections is comfortably within the scope of the "general supervisory power over the whole subject" of elections that Congress enjoys under the Elections Clause. *Ex parte Siebold*, 100 U.S. at 387. Congress cannot be denied the authority to prevent states from manipulating or otherwise corrupting the electoral process, to safeguard against racial discrimination, improve voter access, and set the boundaries of electoral districts. The pre-clearance requirement found in Section 5 of the VRA is one of those safeguards Congress has the authority to put in place.

Among other mechanisms, the Voting Rights Act requires federal review of electoral districts to ensure that minority voting power is protected. The Voting Rights Act, like the NVRA, seeks to prevent the implementation of local laws and practices that impede the ability of citizens to register for and participate in federal elections. This Court and the courts of appeals have recognized that the Elections Clause gives Congress authority to draw electoral districts, to protect voter access, to combat racial discrimination and intimidation in voting, and to override attempts by state and local legislators and other actors to manipulate or corrupt elections. *See supra* p. 9-11. Section 5 of the Voting Rights Act invokes each of these recognized powers and falls well within Congress' authority under the Elections Clause.

The indisputable purpose of the Voting Rights Act is to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). The broad authority of the Elections Clause gives Congress the power to adopt the means it deems appropriate to address the problems it perceives.[4] Having perceived a problem of racial discrimination in voting, Congress acted as it deemed appropriate. There is no time limit on that action; the validity of legislation adopted pursuant to the Elections Clause does not expire. It is for Congress to decide when the election law requirements it has adopted pursuant to the Elections Clause are no longer needed, just as it is for Congress to decide when those requirements were necessary in the first place. *Ex parte Siebold*, 100 U.S. at 384 (Congress' may exercise its Elections Clause power "as and when Congress sees fit to exercise it.")

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[4] Of course the power that Congress exercises under the Elections Clause must comport with other constitutional requirements, such as the Equal Protection Clause. *See e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2598 (2012) ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.").

C. Principles Of State Sovereignty Provide No Limit On Congress' Elections Clause Authority.

Our Constitution "split the atom of sovereignty." *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring). Both the federal and state governments possess spheres of ultimate sovereign authority. History is full of difficult cases and heated, even bloody, disputes over where to draw the line between federal and state sovereign authority. But when it comes to the authority over the regulations and means for electing federal legislators, there is and has never been any doubt: Congress is sovereign.[5] When it acts pursuant to its Elections Clause authority, Congress is not intruding on state sovereign authority, even when it replaces or alters laws that the states, in the first instance, had the authority (in fact, obligation) to adopt. State sovereignty provides no limit on the authority of Congress to act pursuant to the Elections Clause.

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[5] *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195, 1207-32 (2012) (explaining that modern judicial conceptions of federalism are inapposite to the Elections Clause and that the historical background and judicial treatment of the Elections Clause demonstrate an absence of state sovereignty in the area of elections).

The text of the Elections Clause acknowledges that the states have the authority to legislate the "times, places, and manner of holding elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. But the authority to enact legislation regarding federal elections is not *sovereign* authority over the matter. This is clear from the text for a variety of reasons.

First, the text of the Elections Clause imposes an obligation on the states—"shall be prescribed"—rather than acknowledging a power that the states have discretion to exercise. Second, the Elections Clause requires this obligation to be fulfilled in a particular way. The rules concerning federal elections must be prescribed "by the legislature" of each state; the legislature may not delegate the authority to the state executive. Third, and most important, "Congress may at any time by Law make or alter such Regulations." *Id.* Unlike a sovereign, the states' authority in this area is subject to a higher authority that is free to act "at any time," with no textual limit on the reason why that higher authority—Congress—may choose to act. Indeed, even the sole exception to Congress' authority set forth in the Elections Clause—the *place* of choosing Senators—reflects the view that the States are not sovereign in this area. When the Constitution was adopted, the state legislatures elected Senators. So this qualification on Congress' sovereign authority merely reflects that Congress' authority was not intended to displace the states' sovereign authority over where their legislatures may meet.

What the text strongly suggests, this Court's decisions confirm. As this Court has observed, the power to regulate federal elections is expressly provided to Congress and is not reserved to the States under the Tenth Amendment. *U.S. Term Limits*, 514 U.S. at 804-05; *see Foster*, 522 U.S. at 72 (holding that Congress has the final say over federal elections). Furthermore, this Court has interpreted the states' power under the Elections Clause to be confined to procedural regulations, *Cook*, 531 U.S. at 514 (invalidating a Missouri constitutional amendment which attempted to induce members of the Missouri congressional delegation to vote for congressional term limits), but has not similarly limited Congress' powers derived from the Elections Clause. Indeed, "[t]he Elections Clause . . . delegates but limited power over federal elections to the States." *Id.* at 527 (Kennedy, J., concurring) (citing *U.S. Term Limits*, 514 U.S. at 804). Likewise, the Framers understood that the Elections Clause reflected Congress' supreme authority over the regulations governing federal elections because that was essential to ensure the survival and the independence of the federal government. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195 (2012).

Alexander Hamilton, writing in Federalist 59, characterized the Elections Clause as lodging the power over federal elections "primarily in the [states] and ultimately in [the federal government]." *The Federalist No. 59*, at 362 (Alexander Hamilton). He also observed that the propriety of lodging ultimate authority over federal elections in the federal government "rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.*" *Id.* (emphasis in original). Federal sovereignty over federal elections was understood to be essential to the effectiveness of the federal government itself.

Accordingly, in this area of constitutional law states are autonomous; however, they are not sovereign. *See* Tolson, *supra*, at 1247 ("[T]he Elections Clause gives the states strong autonomy power over elections and leaves sovereignty with Congress."). It may be prudent for the federal government to respect the states' familiarity with local conditions. *See The Federalist No. 59*, at 363 (Alexander Hamilton). But there is no obligation to do so. *Gonzalez*, 677 F.3d at 392 ("Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns."); Chin, *supra*, note 1, at 15–16.

Thus, section 5's federal pre-clearance requirements—which were intended to ensure that state changes in election procedures do not undermine the integrity of federal elections by weakening voting power on the basis of race—do not offend any state's sovereignty. To the extent a state law impacts federal elections, it is not an exercise of the state's sovereignty. It is, rather, an exercise of the state's autonomous responsibility to facilitate federal elections. But it is the sovereign authority of the federal government to consider whether it believes such laws should be replaced or altered. That is how Section 5 of the VRA works. And that is what the Elections Clause, and the theory and practice of the federal government's sovereignty over the regulations for elections of its officials, requires.

D. The Elections Clause Power Need Not Be Exercised Uniformly, And, In Any Event, Section 5 Is Uniform Across The Nation.

Petitioner objects to Section 5's "unequal treatment" of the jurisdictions that require preclearance. *See* Pet. Br. 40. But when viewed as a matter of Congress' Elections Clause power, that objection has no force. The Constitution does not require Congress to adopt laws pursuant to the Elections Clause power that are uniform in effect, and it would make no sense to do so. Moreover, to the extent some concept of uniformity could be imposed on the Elections Clause power, the procedures created by Section 5 satisfy it. Those procedures apply to every jurisdiction in the United States meeting the requirements of its coverage provision. That coverage provision is not fixed, but considers recent circumstances in determining whether to add or subtract jurisdictions from the preclearance requirements. Section 5 thus creates a "uniform rule[] for federal elections, binding on the States." *See Foster*, 522 U.S. at 69 (citing *U.S. Term Limits*, 514 U.S. at 832–33). Like the principle of state sovereignty, the principle of uniformity in federal enactments is no barrier to the continued efficacy of Section 5 as an exercise of Congress' Elections Clause power.

Article I specifies certain Congressional actions that must apply uniformly. For example, "Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .; but all Duties, Imposts and Excises shall be *uniform* throughout the United States." U.S. Const. art. I, § 8, cl. 1 (emphasis added). Likewise, Congress' power over naturalization and on the subject of bankruptcy are expressly required to be "uniform." *Id.* § 8, cl. 4. But not all Congressional power is required to be exercised uniformly throughout the states. Indeed, it would make no sense to have required Congress to "uniformly" adopt post roads and post offices, *id.* § 8, cl. 7, or to uniformly "constitute inferior tribunals to" this Court, *id.* § 8, cl. 9. Local circumstances must be considered in determining whether to build post roads and post offices, or to constitute lower courts. The Framers did not require Congress to legislate blind to those circumstances.

Congress' Elections Clause power also allows Congress to consider local circumstances. It contains no express uniformity requirement. To the contrary, the text acknowledges that uniformity is not required because it makes no sense given the combination of state autonomy to enact regulations in the first instance and Congress' supervisory sovereign power. The Elections Clause gives Congress the power not only to "make" federal election law. The states have the obligation to make their own laws in the first instance, and Congress is empowered to "alter such regulations" "at any time by law." U.S. Const. art. I, § 4. That is, the Elections Clause contemplates that Congress might choose to adopt a federal law targeting a specific law in a specific state. That is one way Congress can "alter" the "regulations" of a state that Congress has concluded undermine the integrity of elections. Imposing a uniformity requirement on Congress' actions under the Elections Clause would place an ill-suited constraint on the broad supervisory authority Congress was given.

Given the nature of Congress' sovereign, supervisory authority in this area, Section 5 is "uniform" in the only way that makes sense. Even where uniformity is expressly required by the

Constitution, Congress may enact uniform laws that operate differently in different states because of local laws or conditions. "Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states, nor control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same [law.] All that the Constitution . . . requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States." *Mellon*, 273 U.S. at 17 (upholding a federal tax law); *see also Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918) (federal bankruptcy law may recognize specific state laws, although "such recognition may lead to different results in different states. . . [although] the operation of the Act is not alike in all the states.") (citing *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 188, 189, 190 (1902)). Of particular note, "the uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Blanchette* v. *Conn. Gen. Ins. Corps.*, 419 U.S. 102, 159 (1974); *Edye* v. *Robertson*, 112 U.S. 580 (1884) ("Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. . . . Here there is substantial uniformity within the meaning and purpose of the constitution."). Put simply, no operable concept of uniformity prohibits Congress from regulating conduct that is known to occur only in certain jurisdictions. A textually rooted concept of uniformity requires only that Congress regulate conduct uniformly "in every state *where it is found*." *Fernandez* v. *Wiener*, 326 U.S. 340, 361 (1945) (emphasis added).

The Elections Clause clearly contemplates a patchwork of regulations governing federal elections that varies from state to state. It obligates "each state" to enact laws governing the elections of federal officials. And as Hamilton observed, the Constitution expects that "each State" will take its local conditions and circumstances into account in adopting its regulations. *The Federalist No. 59* (Alexander Hamilton). Under this regime, Congress' power to "alter" the regulations adopted by the varying states will obviously have different effects on different state election law regimes. Even when Congress prescribes nationally applicable rules, the various state election laws will conflict to varying degrees with those national rules. The differential effects are not a failure of uniformity, but rather the inevitable consequence of the variation in the background against which Congress acts.

Section 5's coverage provision permissibly addresses the national problem of voter discrimination, wherever it may be found. Section 5's requirements apply to all states with a history or practice of voter discrimination. *See* 42 U.S.C. § 1973b. And the list of jurisdictions is not static. If voter discrimination is found in any "State or political subdivision," the offending jurisdiction can be subjected to Section 5's pre-clearance requirements under the "bail-in" provision. *Id.* § 1973a(c). Furthermore, jurisdictions may "bail-out" of the pre-clearance provision by establishing that they have had a clean voting rights record for ten years. *See id.* § 1973b.[6] These rules apply to every jurisdiction in the United States. Petitioner's objections regarding "unequal treatment" stem from the unequal history that Congress plainly has the authority to address. Nothing in an operable concept of "uniformity" requires Congress to pretend that history did not exist, or that present circumstances do not justify continued coverage. Nor is there any authority in the text or theory behind the Elections Clause for this Court to place a time limit on Congress' judgment regarding the best way to deal with that history.

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[6] In Virginia alone, for instance, thirty one jurisdictions have already bailed-out successfully. *See* U.S. Dep't of Justice, *Section 4 of the Voting Rights Act*,

II. CONGRESS' ELECTIONS CLAUSE POWER DEFEATS PETITIONER'S FACIAL CHALLENGE.

Petitioner chose to bring a facial challenge to Section 5. Compl. 1 ("This is an action for a declaratory judgment that Section 4(b) . . . and Section 5 . . . of the Voting Rights Act ("VRA") . . . are *facially* unconstitutional."). That choice means that the Elections Clause power can and should play a dispositive role in this case. To affirm the judgment below, this Court need conclude no more than that Section 5 of the VRA is a valid exercise of Congress' Elections Clause power.

Facial challenges are categorically "disfavored" by this Court. *See Wash. State Grange*, 552 U.S. at 450. Among other reasons, facial challenges are disfavored because they "run contrary to the fundamental principle of judicial restraint that courts should... [not] 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 450 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting in turn *Liverpool, N.Y. & Phila. S.S. Co.* v.

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http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited Jan. 22, 2013).

Comm'rs of Emigration, 113 U. S. 33, 39 (1885))). Reluctance to strike down laws on their face reflects a healthy judicial respect for the will of the people. *See id.*; *see also Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (rejecting facial challenge, in part, because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.") (internal quotation marks omitted). This Court nullifies the will of the people *only* when the Constitution so requires.

Facial challenges are difficult to sustain precisely because of the risks they pose. Federal statutes can have broad applications and draw their authority from a variety of sources. Accordingly, this Court has required a broad showing to sustain a facial challenge. Shelby County's facial challenge means that petitioner cannot prevail merely by demonstrating (even if it could) that Section 5 is unconstitutional when applied to a specific redistricting scheme or to some other "conceivable set of circumstances." *See Salerno,* 481 U.S. at 745. Neither is it sufficient for Shelby County to argue that some provisions of the Act might violate the Constitution. *See id.* at 745 n.3. Shelby County must demonstrate that the VRA is void of all "plainly legitimate sweep." *Stevens*, 130 S. Ct. at 1587 (internal quotation marks omitted) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments)). For this reason, a facial challenge is "the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745.

The Elections Clause power of Congress, by itself, defeats petitioner's facial challenge. Applications of Section 5 to the mechanisms and processes of federal elections are constitutional under the Elections Clause.[7] For example, changes in district lines for federal elections or changes in voter registration rules clearly fall within the limits of Congress' power to ensure the integrity of federal elections. In general, as described in Part I above, this Court has affirmed Congress' authority under the Elections Clause to regulate the type of misconduct Section 5 is meant to address. *See Ex parte Yarbrough*, 110 U.S. at 661 (upholding an act of Congress prohibiting voter intimidation and violence).

Petitioner's facial challenge means this case does not require this Court to consider whether Congress has authority under the Fourteenth and Fifteenth Amendments to require pre-clearance for changes in state election laws that concern only state or local elections. Whatever the answer to that question, petitioner's facial challenge fails in light of the Elections Clause power. *See e.g. Katzenbach* v. *Morgan*, 384 U.S. 641, 646 n.5 (1966) (upholding part of the VRA on Fourteenth Amendment grounds, making it "unnecessary... to consider whether § 4(e) could be sustained as an exercise of power under [other clauses of the Constitution]"). This Court traditionally does not reach out to decide issues of Congress' power beyond that which is necessary to decide the case before it. *See Nw. Austin*, 557 U.S. at 205. Petitioner's facial challenge provides this Court an opportunity to reaffirm the broad power of Congress over the rules affecting federal elections.

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[7] This Court has previously evaluated exercises of congressional power on an as-applied basis. *See, e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) ("Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.").

This Court should take that opportunity, and only that opportunity, as no more is necessary to decide this case.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

[illegible]

FEB 1 - 2013

OFFICE OF [illegible]

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., in his official capacity
as Attorney General of the United States, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR *AMICI CURIAE*, THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, IN HIS CAPACITY AS MAYOR OF THE CITY OF NEW YORK, AND CHRISTINE C. QUINN, IN HER OFFICIAL CAPACITY AS THE SPEAKER OF THE CITY COUNCIL OF THE CITY OF NEW YORK, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. THE ADMINISTRATIVE REQUIREMENTS IMPOSED BY SECTION 5 OF THE VOTING RIGHTS ACT ARE NOMINAL AND NON-OBTRUSIVE 3

a. The Process Of Generating and Transmitting A Submission For Preclearance Does Not Require Significant Additional Time or Cost 3

b. Section 5 Preclearance Requirements Do Not Impede or Interfere With Lawful Local Decision Making 6

II. THE RELATIVE COSTS IMPOSED BY SECTION 5 PRECLEARANCE ARE FAR OUTWEIGHED BY THE BENEFITS GENERATED FOR CITIZENS AND COUNTRY OVERALL 8

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Page

CASES

Baker v. Carr,
369 U.S. 186 (1962) 4

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489 U.S. 688 (1989) 7

N.Y. State on behalf of N.Y., Bronx & Kings Co. v. U.S.,
65 F.R.D. 10 (D.D.C. 1974) 1

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS

U.S. Const. amend. XV 10

U.S. Const. amend. XV, art. IV 2

Voting Rights Act of 1965
42 U.S.C. § 1973a. . . . . *passim*
42 U.S.C. § 1973b. . . . . *passim*

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28 C.F.R. § 51.28 (2011). 4

36 Fed. Reg. 5809 (Mar. 27, 1971) .1

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Page

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Page

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Letter from John R. Dunne, Asst. Att'y Gen., Civil Rights Div., Dep't of Justice, to Judith Reed, N.Y.C. Districting Comm'n, regarding Submission No. 91-1902 (July 19, 1991) (on file with author) 8

Letter from Wm. Bradford Reynolds, Asst. Att'y Gen., Civil Rights Div., Dep't of Justice, to Fabia Palomino, N.Y.C. Districting Comm'n, regarding Submission No. 81-1981 (Oct. 27, 1981) (on file with author) 7

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Page

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Robert Pear, *New York's Plan Wins U.S. Backing,* N.Y. Times, Jul. 27, 1991, *available at* http://www.nytimes.com/1991/07/27/nyregion/new-york-s-plan-wins-us-backing.html 8

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Page

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INTEREST OF *AMICI CURIAE*

Amici are the City of New York, the Council of the City of New York, Michael R. Bloomberg, in his official capacity as Mayor of the City of New York, and Christine C. Quinn, in her official capacity as Speaker of the Council of the City of New York (hereinafter collectively referred to as "the City"). Three of the City's five counties are covered jurisdictions under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b. Bronx, Kings, and New York counties were declared covered jurisdictions under Section 5 in 1971 and have remained covered since.[1] 36 Fed. Reg. 5809 (Mar. 27, 1971).

New York City's five counties are home to over 8.2 million residents. U.S. CENSUS BUREAU. STATE AND COUNTY QUICKFACTS. Updated Jan. 10, 2013, *available at* http://quickfacts.census.gov/qfd/states/36/3651000.html. The City's residents come from all fifty states and from countries around the world. They are diverse in a myriad of ways, including race, color, creed, age, national origin, gender, sexual orientation, disability, and marital status. The City embraces this diversity with strong anti-discrimination laws and policies promoting the equal rights of its residents. *See, e.g.,* N.Y.C. Admin. Code § 8-101 (2012).

In the intervening 41 years since the City became a covered jurisdiction, the City has pre-cleared over two thousand voting changes with the Justice Department. *See* 2 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1840 (2006) (Appendix to the statement of Wade Henderson, report of RenewTheVRA.Org, "Voting Rights in New York, 1982–2006"); Juan Cartagena, *Report: Voting Rights in New York City: 1982-2006*, 17 S. Cal. Rev. L. & Social Justice 501, 505. Changes have ranged from altering the location of polling places to the inclusion of additional languages, like Bengali, on election materials for language minority groups. In the course of the City's long history with Section 5 procedures, New York City officials have regularly engaged with Justice Department officials, who serve as valuable resources for local election officials in developing voting-related plans. The Justice Department's feedback both before and after preclearance assists the City in perfecting its electoral processes.

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[1] Kings and Bronx counties are also covered under Section 4(f)(4), which relates to language minority voters. 42 U.S.C. § 1973b(f); 40 Fed. Reg. 43746 (Sept. 23, 1975). Section 5 preclearance for the three covered counties started in 1974 following litigation that temporarily exempted the City from coverage, and then reopened the City to Section 5 review. *See N.Y. State on behalf of N.Y., Bronx & Kings Co. v. U.S.*, 65 F.R.D. 10 (D.D.C. 1974).

SUMMARY OF THE ARGUMENT

The Section 5 preclearance requirements do not impose an undue burden on or interfere with governmental function in covered jurisdictions like New York City. In fact, preclearance has, and continues to, provide substantial benefits to New York City and the nation in eliminating voting discrimination.

ARGUMENT

We agree with the Justice Department and Intervenors-Respondents that Congress's 2006 reauthorization of the Voting Rights Act and Section 5 was a Constitutional exercise of legislative power granted under Article IV and the Fifteenth Amendment. Congress's judgment is due substantial deference. This brief does not repeat the arguments of the parties in explaining why Section 5 satisfies Constitutional requirements. Instead, this brief relates the experience of the City as a covered jurisdiction, demonstrating that Section 5 imposes no undue burden on covered jurisdictions and that it provides substantial benefits to the nation in eliminating voting discrimination.

I. THE ADMINISTRATIVE REQUIREMENTS IMPOSED BY SECTION 5 OF THE VOTING RIGHTS ACT ARE NOMINAL AND NON-OBTRUSIVE

a. The Process Of Generating and Transmitting A Submission For Preclearance Does Not Require Significant Additional Time or Cost.

The procedures for submitting voting changes are clear, unambiguous, and effectively routine. *See, e.g., Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. On Constitution, Civil Rights and Property Rights of the S. Comm. on the* Judiciary, 109th Cong. 13 (2006) (testimony of Donald Wright). Indeed, the Justice Department has gone to great lengths to ease and streamline the preclearance process. Regular guidance as to the standards of review and essential components for submission is published in the Federal Register. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011); Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239 (Apr. 15, 2011). Officials are also available to field questions in advance of submissions. Moreover, technological advancements have enabled online submission, in many cases, saving time and money in printing and mailing costs. *See* How to File An Electronic Submission, http://www.justice.gov/crt /voting/sec_5/evs (last visited Jan. 17, 2013). Currently, submitting routine voting changes need not consume significant additional administrative time than documenting and implementing the voting change itself.

Any burden in developing a submission for preclearance is *de minimis* relative to the work already required for any voting change under New York State and local law. Irrespective of Section 5's requirements, the type of government action subject to preclearance will always involve substantiation. N.Y. ELEC. LAW §§ 1-102 & 3-200 *et seq.* (2012). For example, under State law, a change in polling place must be reflected in an official record, implemented according to law, and supported by a articulable rationale -- even if that reason is merely a political judgment. N.Y. ELEC. LAW § 3-212 (2012). As Section 5 requires just such straightforward information, this record serves as the basis for the submission. 28 C.F.R. § 51.27 (2011). Preclearance requires that all changes with an effect on voting be supported by basic descriptive factual information about the proposed change and affected jurisdiction. *Id.* If the action only has a negligible impact on voting rights, the submission will be brief. If the action is more significant, such as redistricting, maps and census data are also required.[2] 28 C.F.R. § 51.28 (2011). But, as noted, much of the necessary submission material will already have been generated during the redistricting process, in which maps are drawn, census data is analyzed, and past election results are documented. N.Y.C. Charter § 51 (2009).

Under local law, the City redraws its City Council districts every ten years, utilizing the most recent decennial-Census data -- a process that takes several months to conduct. N.Y.C. Charter ch. 2-A (2009). With or without the Section 5 requirements, the City would be obligated by law to undertake the same redistricting process in a manner consistent with the goals of the Voting Rights Act. As evidenced by the language of the Charter, compliance with the whole of the Voting Rights Act is paramount, both because of preclearance and the value of good electoral processes. *See Id.* The City Charter mandates that the appointed Districting Commission draw new Council districts with careful attention to Constitutional parameters. Specifically,

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[2] This type of record is generated in all states and their political subdivisions at least every 10 years when they must redraw districts. *Baker v. Carr*, 369 U.S. 186 (1962).

> a. The difference in population between the least populous and the most populous districts shall not exceed ten percentum (10%) of the average population for all districts, according to figures available from the most recent decennial census. Any such differences in population must be justified by the other criteria set forth in this section.
>
> b. Such districting plan shall be established in a manner that ensures the fair and effective representation of the racial and language minority groups in New York city which are protected by the United States voting rights act of nineteen hundred sixty-five, as amended.
>
> c. District lines shall keep intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious or other.

Id. at § 52.

Redrawing lines is a comprehensive and measured process, wherein the Districting Commission holds open meetings and hearings. *Id.* at § 51. A variety of stakeholders, including citizens, minority interest groups, political groups, and academics attend hearings, provide testimony, and engage with the Districting Commission. *See, e.g.*, N.Y.C. Districting Comm'n, *The Final Districting Plan For The Council Of The City Of New York* (Mar. 31, 2003) (Submission No. 2003-1147), 10-16. The new district lines drawn by the Districting Commission are then subject to public comment and review, and possible revision if necessary. N.Y.C. Charter § 51. The resultant record of this process must be maintained as a part of City records. N.Y.C. Charter §§ 1133 & 3003 (2009). It is no hardship to submit those same materials to the Justice Department for preclearance review.

b. Section 5 Preclearance Requirements Do Not Impede or Interfere With Lawful Local Decision Making.

Nowhere does the Voting Rights Act prohibit lawful local governance. Moreover, the preclearance process does not remove local authority to make decisions, as others have argued. Br. for Arizona et al. as *Amici Curiae* Supporting Pet'r, Shelby County, AL v. Holder et al., 25, No. 12-96 (Jan. 2, 2013). Preclearance only provides a review of decisions to ensure they comply with the Constitution when they potentially affect voting rights.

New York City has not been meaningfully limited in its governance decisions as a result of preclearance. The Districting Commission and City officials may make all necessary legal changes for effective New York City elections. N.Y. ELEC. LAW § 1-102 (2012); N.Y.C. Charter § 51 (2009). On the rare occasions the Justice Department has raised objections to City voting changes, the City was able to fix the identified problems in ways that did not interfere with the concept of self-governance.[3] *See, e.g.*, Letter from Wm. Bradford Reynolds, Asst. Att'y Gen., Civil Rights Div., Dep't of Justice, to Fabian Palomino, N.Y.C. Districting Comm'n, regarding Submission No. 81-1981 (Oct. 27, 1981) (on file with author) (objecting to possible retrogressive effects in new redistricting plans). Rather, these objections simply sharpened the City's focus on potential voting rights issues.

In the past, when the Justice Department has objected, the City has benefited from its review and consideration. In 1981, the Justice Department rejected the City's redrawn Council districts because of the retrogressive effects of certain district lines. *Id.* In 1991, the Justice Department again objected to the City's redistricting plans. However, these plans were the first submitted for preclearance since this Court had ruled that the City's Board of Estimate violated the "one person, one vote" requirements in 1989. *Board of Estimate v. Morris*, 489 U.S. 688 (1989). The City was then confronted with the formidable task of expanding its 35 City Council districts to 51. N.Y.C. Charter Revision Comm'n, Final Report of the New York City Charter Revision: Jan. 1989–Nov. 1989 (1990), 9-11. The Justice Department objected to the City's initial plans, noting potential problems with new districts in Brooklyn and the Bronx, and the difficulties the City faced with such dramatic district changes. Letter from John R. Dunne, Asst. Att'y Gen., Civil Rights Div., Dep't of Justice, to Judith Reed, N.Y.C. Districting Comm'n, regarding Submission No. 91-1902 (July 19, 1991) (on file with author) ("[It is] a job of staggering proportions, namely to divide a city of over 7 million people into 51 new council districts while addressing the historical inability of the many minority communities in the city to elect candidates of their choice"). The letter went on to clarify Justice Department policies with regard to incumbents and offered further assistance if needed. *Id.* Following the suggestions set forth in the Justice Department letter, the City was able to swiftly redraw district lines so all citizens had the opportunity to elect the candidates of their choice. Robert Pear, *New York's Plan Wins U.S. Backing*, N.Y. TIMES, Jul. 27, 1991, *available at* http://www.nytimes.com/1991/07/27/nyregion/new-york-s-plan-wins-us-backing.html. The next redistricting plan was submitted by the City in 2003, and was accepted by the Justice Department without objection. The City is currently preparing new Council district lines for the 2013 elections, and will be soon be submitting those changes to the Justice Department.

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[3] Only nine objections have been raised in response to the City's submissions, the last of which was in 1999. *See* Section 5 Objection Determinations: New York, http://www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last visited Jan. 24, 2013).

II. THE RELATIVE COSTS IMPOSED BY SECTION 5 PRECLEARANCE ARE FAR OUTWEIGHED BY THE BENEFITS GENERATED FOR CITIZENS AND COUNTRY OVERALL

As a covered jurisdiction, the City supports affirmation of the Circuit Court's decision upholding the constitutionality of the Voting Rights Act. As discussed above, the actual "burden" imposed by Section 5 is minor.

Further, any such burden pales in comparison to the broad benefits of Section 5.

Voting rights are an important and vital issue, especially in a period where national demographics are dramatically shifting. Both the City's and country's populations are more diverse than ever. U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS, C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, 3 (Mar. 2011); N.Y.C. Department of City Planning, *Total Population by Mutually Exclusive Race and Hispanic Origin: New York City and Boroughs, 1990 to 2010*, Table PL-P2A NYC (May 2011) (hereinafter, *"City Planning Table: N.Y.C. 1990-2010"*). Continued vigilance is needed to protect the most fundamental right in a representative democracy -- the right to vote -- for all citizens. Since 1965, Section 5 has played a critical role in advancing the Constitutional voting rights of minorities across the United States. Data show increased participation by minority-citizens nationwide. DOUGLAS R. HESS, PROJECT VOTE, REPRESENTATIONAL BIAS IN THE 2008 ELECTORATE 12, tbl. 5 (2009), *available at* http://www.projectvote.org/reports-on-the-electorate-/440.html. Despite these laudable gains, voting discrimination still exists and pernicious problems remain. *Id.* at 21; Cartagena, *supra*, at 537-39. There is still room for improvement.

During its time as a covered jurisdiction, the City has achieved increased participation by racial and language minorities. For example, voting-related materials have been translated into Spanish, Chinese, Korean, Bengali and Russian. N.Y.C. Board of Elections, For Voters, http://vote.nyc.ny.us/html/voters/voters.shtml (last visited Jan.

18, 2013). Elections in the City are more inclusive because more citizens can meaningfully engage in the electoral process. Further, 53% of the New York City Council seats are now held by members of racial minorities, compared to 45% ten years ago. Frank Lombardi, *White City Council Members the Minority for First Time Ever After Tuesday Elections*, N.Y. DAILY NEWS, Nov. 3, 2009. The representation of racial minorities on the Council is now approaching parity with the demographic makeup of the City, where the population is 67% minority or non-white. *City Planning Table: N.Y.C. 1990-2010.*

The City continually strives to ensure that the Fifteenth Amendment rights of all its citizens are protected. Its voting-rights record improves year after year, and preclearance aids in this process by providing an additional external check on the process. The City engages in transparent redistricting and elections processes that are varied and complex. It is with the help of Section 5 that state and local governments with imperfect histories on voting issues have improved, and continue to improve, their electoral processes.

CONCLUSION

For all the above reasons, and those stated in the Justice Department and Intervenors-Respondent's briefs, Section 5 of the Voting Rights Act should be upheld. This is especially important in ensuring fundamental rights are protected and in advancing democracy in this country. Congress did not exceed its enumerated powers in reauthorizing the Voting Rights Act in 2006. Accordingly, the City of New York urges affirmance of the D.C. Circuit Court's judgment.

Respectfully submitted,

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AMICUS
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BRIEF

No. 12-96

In The
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit

BRIEF *AMICI CURIAE* OF CONSTITUTIONAL LAW SCHOLARS AND CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Plain Language and Original Meaning of the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments Give Congress Broad Power to Enact Measures to Protect Individual Rights and Prevent State-Sponsored Discrimination 5

II. The Debates over the Thirteenth, Fourteenth, and Fifteenth Amendments and Contemporaneous Enforcement Legislation Reflect the Broad Legislative Powers that the Framers Sought to Confer on Congress to Protect Personal, Individual Rights and Prevent State-Sponsored Discrimination. 14

   A. The Thirteenth Amendment Was Written to Give Congress the Power to Enforce the Thirteenth Amendment's Promise of Freedom 15

TABLE OF CONTENTS (cont'd)

Page

B. The Fourteenth Amendment Was Written to Give Congress the Power to Protect Personal, Individual Rights and Prevent State-Sponsored Racial Discrimination.................. 19

C. The Fifteenth Amendment Was Written to Give Congress the Power to Ensure Enjoyment of the Right to Vote Free From Racial Discrimination.. 23

III. The History of the Fifteenth Amendment Demonstrates that "Appropriate" Enforcement Legislation Includes Broad, Prophylactic Regulation to Protect the Right to Vote 26

IV. This Court's Precedents Establish that the Constitution Gives Congress Broad Power to Prevent and Deter Racial Discrimination in Voting. 29

A. The Court Has Consistently Held that McCulloch's Broad Construction of Congressional Power Applies to Legislation Enforcing the Fifteenth Amendment.............29

B. The Court Has Consistently Held that the Fifteenth Amendment Permits Congress to Single Out Jurisdictions With Proven Histories of Racial Discrimination in Voting for Prophylactic Regulation..........................34

CONCLUSION 38

TABLE OF AUTHORITIES

Page

Cases

Ableman v. Booth,
62 U.S. (21 How.) 506 (1859)................................12

City of Boerne v. Flores,
521 U.S. 507 (1997) 6, 32, 33, 34, 36

City of Rome v. United States,
446 U.S. 156 (1980) 29, 31

Civil Rights Cases,
109 U.S. 3 (1886) 31, 36

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 33

Coyle v. Smith,
221 U.S. 559 (1911) 35

Dickerson v. United States,
530 U.S. 428 (2000) 38

Dred Scott v. Sandford,
60 U.S. (19 How.) 393 (1857)..................................3

Ex Parte Virginia,
100 U.S. 339 (1880) 8, 19, 20

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 33

TABLE OF AUTHORITIES (cont'd)

Page

Georgia v. United States,
411 U.S. 526 (1973) 31

Hepburn v. Griswold,
75 U.S. (8 Wall.) 603 (1870) 9

Hunter v. Underwood,
471 U.S. 222 (1985) 6

James Everard's Breweries v. Day,
265 U.S. 545 (1924) 31

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 17, 30

Legal Tender Cases,
79 U.S. 457 (1870) 13

Lopez v. Monterrey County,
525 U.S. 266 (1999) 31, 33

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 7, 9, 10

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 16, 19, 22

Northwest Austin Mun. Util. Dist. No. 1 v. Holder,
557 U.S. 193 (2009) 34, 35, 37

Oregon v. Mitchell,
400 U.S. 112 (1970) 32

TABLE OF AUTHORITIES (cont'd)

Page

Prigg v. Pennsylvania,
41 U.S. (16 Pet.) 539 (1842) 11, 12

Rice v. Cayetano,
528 U.S. 495 (2000) 5, 23

Rogers v. Lodge,
458 U.S. 613 (1982) 6

Shaw v. Reno,
509 U.S. 630 (1993) 6, 27

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 30, 32, 34, 35, 37

Tennessee v. Lane,
541 U.S. 509 (2004) 32

Texas v. White,
74 U.S. 700 (1869) 13

United States v. Chavez,
290 U.S. 357 (1933) 35

United States v. Morrison,
529 U.S. 598 (2000) 36

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 6

TABLE OF AUTHORITIES (cont'd)

Page

Constitutional Provisions and Legislative Materials

U.S. CONST.:
  art. IV, § 2, cl. 3 11
  amend XIII, §1 5
  amend XIII, §2 .... 5, 6
  amend XIV, §1 5
  amend XIV, §5 .... 5, 6
  amend XV, §1 5
  amend XV, §2 .... 5, 6

Cong. Globe:

  38th Cong., 1st Sess. (1864) .... *passim*

  38th Cong., 2nd Sess. (1865) .... *passim*

  39th Cong., 1st Sess. (1866) .... *passim*

  40th Cong., 3rd Sess. (1869) .... *passim*

  41st Cong., 2nd Sess. (1870) .... *passim*

  42nd Cong., 1st Sess. (1871) .... *passim*

  42nd Cong., 2nd Sess. (1872) .... *passim*

  43rd Cong., 1st Sess. (1874) .... *passim*

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TABLE OF AUTHORITIES (cont'd)

Page

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AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) 22

Akhil Reed Amar, *Foreward; The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) 16

Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) 7, 17

Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010) 7, 9

JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997) 22

Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431 (2009) 6, 34

Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001) 7

TABLE OF AUTHORITIES (cont'd)

Page

Steven A. Engel, *Note, The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding*, 109 YALE L.J. 115 (1999) 7

ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988) 27

Robert J. Kaczorowski, *The Supreme Court and Congress' Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 11

JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826) 14

Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997)............... 7, 8, 9

JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) 7

Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J. L. & PUB. POL'Y 991 (2008).. 7, 8

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)........ 13

TABLE OF AUTHORITIES (cont'd)

Page

MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001)............................ 16

INTEREST OF *AMICI CURIAE*

The following scholars are experts in the field of constitutional law, each of whom has published a book or law review article on the Fourteenth Amendment or Fifteenth Amendments. *Amici* law professors teach courses in constitutional law and have devoted significant attention to studying the Reconstruction Amendments:

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School.

Guy-Uriel Charles is the Charles S. Rhyne Professor of Law at Duke Law School and Founding Director of the Duke Law Center on Race, Law & Politics.

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Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the

Fourteenth and Fifteenth Amendments. CAC has filed *amicus curiae* briefs in the U.S. Supreme Court in cases raising significant issues regarding the text and history of the Reconstruction Amendments, including *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012); and *Fisher v. University of Texas at Austin*, No. 11-345.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Shelby County's constitutional attack on the preclearance requirement of the Voting Rights Act—one of the Act's most successful provisions in preventing and deterring voting discrimination—depends on a cramped understanding of Congress's express power to "enforce" by "appropriate legislation" the guarantees of the Fifteenth Amendment. In Shelby County's view, courts have an obligation to strictly scrutinize the legislative remedies Congress deems "appropriate" to enforce the constitutional right to vote free from racial discrimination. This deeply flawed vision has no basis in the text, history, and original meaning of the Fifteenth Amendment, which, along with the Thirteenth and Fourteenth Amendments, significantly expanded the powers of Congress.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

The Reconstruction Amendments fit together like an interlocking puzzle with pieces that both stand alone and build off each other. In Section One, we show that these Amendments and their nearly identically worded Enforcement Clauses collectively reflect the lessons of the antebellum period and the Civil War and significantly change the balance of power between the federal government and the states. Against the backdrop of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the framers chose language—"appropriate legislation"—intended to give Congress broad discretion to select the means to "enforce" the Constitution's new guarantees of personal, individual rights. In Section Two, we discuss the ratification of each of the Amendments separately, illustrating how each subsequent Amendment built off the experience of Congress in trying to enforce the Constitution in the face of continuing discrimination by recalcitrant southern states. Culminating this historical progression, the Fifteenth Amendment's plain language and history demonstrates that Congress, not the courts and certainly not the states, was being given sweeping powers to stamp out every conceivable attempt by the states to deny the franchise on account of race. With the Fifteenth Amendment's simple and focused mandate and the clear textual and historical evidence of the intended role of Congress, the

Court's deference to Congress should be at its apex in reviewing legislation duly enacted under Section 2 of the Fifteenth Amendment.

In resisting the force of the Reconstruction Amendments' grants of enforcement authority, Shelby County's argument that the Voting Rights Act offends state sovereignty echoes the same rejected arguments opponents of the Amendments made in challenging their adoption in Congress and their ratification by the states. The County ignores the historical reality that the Amendments ratified at the end of the Civil War were "the result of [a] great constitutional revolution" that "ended with the vindication of individual rights by the national power." Cong. Globe, 41st Cong., 2nd Sess. 3608 (1870). History shows that the Reconstruction Amendments gave Congress broad power—no less sweeping than Congress's Article I powers—to ensure the rights guaranteed by those Amendments, including the right to vote free from racial discrimination.

The text and history of the Fifteenth Amendment support the constitutionality of Congress's near-unanimous 2006 reauthorization of the Voting Rights Act, demonstrating that when Congress acts to prevent racial discrimination in voting, its authority is broad and entitled to great deference. Congress had ample basis for maintaining Section 5 as a bulwark against current and ongoing state-sponsored racial discrimination in voting concentrated in the covered jurisdictions. Accordingly, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. The Plain Language and Original Meaning of the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments Give Congress Broad Power to Enact Measures to Protect Individual Rights and Prevent State-Sponsored Discrimination.

The Thirteenth, Fourteenth, and Fifteenth Amendments fundamentally altered our Constitution, establishing broad guarantees of freedom, equality under the law, and the right to vote free from racial discrimination and empowering Congress to protect these personal, individual rights. The Thirteenth Amendment outlaws "slavery" and "involuntary servitude . . . within the United States," U.S. Const. amend XIII, §1; the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," "deprive any person of life, liberty and property, without due process of law," or deny "to any persons within its jurisdiction the equal protection of the law." U.S. Const. XIV, § 1. Finally, in language "as simple in command as it was comprehensive in reach," *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S.

Const. amend. XV, § 1. To make these guarantees a reality, each of the Amendments provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amends. XIII, § 2; XIV, § 5, XV § 2.

In writing the Enforcement Clauses, the framers of the Reconstruction Amendments did not simply add to the list of express congressional powers enumerated in Article I and elsewhere in the Constitution. Instead, they explicitly invested Congress with a central role in enforcing the constitutional rights protected by our fundamental charter, including the right to vote, a right this Court has long described as "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).[2] Where, as here, Congress acts to enforce the right to vote free from racial discrimination expressly granted in the Fifteenth Amendment and protected as well by this Court's cases construing the Fourteenth Amendment's guarantee of equal protection, see *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Shaw v. Reno*, 509 U.S. 630 (1993), Congress may "make stronger the rights" guaranteed by these Amendments, including by "legislat[ing] prophylactically against new evils that it anticipates may soon arise." Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1439, 1442 (2009).

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[2] As this Court has recognized, the framers of the Fourteenth Amendment considered and rejected proposals that would have granted Congress a plenary power to enact laws to secure various individual rights, preferring instead constitutional language taken from the Thirteenth Amendment that gave Congress the power to "enforce" constitutional guarantees by "appropriate legislation." *See City of Boerne v. Flores*, 521 U.S. 507, 520-23 (1997).

The language that the framers used to define the scope of Congress's authority under the Thirteenth, Fourteenth and Fifteenth Amendments—"appropriate legislation"—reflects a decision to give Congress wide discretion to enact whatever measures it deemed "appropriate" for achieving the purpose of the Amendment. In giving Congress the power to enact "appropriate legislation," the framers granted Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a seminal case well known to the Framers of those Amendments. *See, e.g.*, JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 28-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810-15 (2010); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J. L. & PUB. POL'Y 991, 1002-03 (2008); Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 188 (1997); Steven A. Engel, *Note, The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding*, 109 YALE L.J. 115, 131-34 (1999). When Congress acts to enforce the

Reconstruction Amendments, including the Fifteenth Amendment, its authority is broad and entitled to great deference.

Both the plain language of the text and the context against which the framers acted confirm that the "Amendments' enforcement clauses are most naturally read as new, sweeping 'necessary and proper' clauses." Paulsen, 31 HARV. J. L. & PUB. POL'Y at 1002. The framers of the Reconstruction Amendments, including the Fifteenth Amendment, chose language conferring on Congress the power to "enforce" by all "appropriate legislation"—language taken from Chief Justice Marshall's foundational opinion in *McCulloch* sustaining the broad federal powers of Congress under Article I—because they were reluctant to leave the judiciary with sole responsibility for protecting against racial discrimination in voting and other constitutional violations.

With Southern states acting to strip African Americans of precious rights less than a decade after *Dred Scott v. Sandford*, the framers were determined to give Congress a leading role in securing the constitutional guarantees of the three Reconstruction Amendments. "[T]he remedy for the violation" of the Fifteenth Amendment, like the remedies for violation of the Thirteenth and Fourteenth Amendments, "was expressly not left to the courts. The remedy was legislative, because . . . the amendment itself provided that it shall be enforced by legislation on the part of Congress." Cong. Globe, 42nd Cong., 2nd Sess. 525 (1872). The Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Ex Parte Virginia,* 100 U.S. 339, 345 (1880). "Born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power," McConnell, 111 HARV. L. REV. at 182, the text of the Reconstruction Amendments incorporated the language of *McCulloch*, establishing a broad federal legislative power to protect constitutional rights with corresponding deference from the courts to respect this new authority.

In *McCulloch*, Chief Justice Marshall laid down the fundamental principle determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421 (emphasis added); *see also Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1870) (quoting this passage in full and declaring that "[i]t must be taken then as finally settled . . . that the words" of the Necessary and Proper Clause are "equivalent" to the word "appropriate"); McConnell, 111 HARV. L. REV. at 178 n.153 ("In *McCulloch v. Maryland*, the terms 'appropriate and 'necessary and proper' were used interchangeably."). Indeed, in *McCulloch*, Chief Justice Marshall used the word "appropriate" to describe the scope of congressional power no fewer than six times. *McCulloch*, 17 U.S. at 408, 410, 415, 421, 422, 423. Thus, by giving Congress power to enforce the constitutional prohibition on racial discrimination in voting by "appropriate legislation," the framers "actually *embedded in the text*" the "language of *McCulloch*." Balkin, 85 N.Y.U. L. REV. at 1815 (emphasis in original).

McCulloch's broad construction of congressional power requires great deference by the courts in reviewing legislation enacted by Congress pursuant to an affirmative grant of power, such as the Enforcement Clause of the Fourteenth and Fifteenth Amendments. *McCulloch*, 17 U.S. at 421 (explaining that "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution"). For the courts to substitute their own judgment regarding the necessity of measures enacted by Congress pursuant to its express powers would be to violate the separation of powers between the courts and Congress, "to pass the line which circumscribes the judicial department and to tread on legislative ground." *Id.* at 423.

Throughout Reconstruction, the framers repeatedly stressed that *McCulloch* was the measure of congressional power under the Enforcement Clauses of the three Reconstruction Amendments, entrusting to the discretion of Congress a broad power to enforce constitutional rights. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1124 (1866) ("When Congress was clothed with power to enforce . . . by appropriate legislation, it meant . . . that Congress should be the judge of what is necessary for the purpose of securing to [the freemen] those rights."); Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870)

("Congress, then, is clothed with so much power as is necessary and proper to enforce the two amendments to the Constitution, and is to judge from the exigencies of the case what is necessary and what is proper."); Cong. Rec., 43rd Cong., 1st Sess. 414 (1874) ("The power to secure equal civil rights by 'appropriate legislation' is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ. This has been settled in *McCulloch vs. Maryland.*"). Indeed, even opponents of the Reconstruction Amendments conceded that congressional enforcement power under the Amendments was equivalent to congressional power under Article I's Necessary and Proper Clause. *See, e.g., id.* at 4084-85 ("[W]hence comes these words 'appropriate legislation'? They come from the language of Marshall in deciding the case *McCulloch vs. The State of Maryland.*").

In drafting the Enforcement Clauses of the Reconstruction Amendments, the framers were also acutely aware of pre-Civil War Supreme Court decisions that gave a broad construction to Congress's power to enforce what the Court viewed as a constitutional "right" to the return of slaves, as recognized by the Fugitive Slave Clause, U.S. Const. art. IV, § 2, cl. 3—one of the few provisions of the antebellum Constitution that limited state action. *See* Robert J. Kaczorowski, *The Supreme Court and Congress' Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 221-30 (2004). In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Court upheld the constitutionality of the Fugitive Slave Act of 1793, concluding that it was justified as "appropriate" legislation to enforce the Fugitive Slave Clause. *Id.* at 615. Relying on *McCulloch*, Justice Story expressed this conclusion using language that the framers of the Reconstruction Amendments would later adopt: "the natural inference" from the existence of the right of recapture was that Congress was "clothed with the *appropriate* authority and functions to *enforce* it." *Id.* at 615 (emphasis added). *See also Ableman v. Booth*, 62 U.S. (21 How.) 506, 517, 526 (1859) (stating that Congress had power to "protect and guard the rights of all by *appropriate* laws" and upholding the Fugitive Slave Act of 1850) (emphasis added). Under *Prigg*, Congress had the same broad discretion to choose "appropriate" means for enforcing rights as it did when it acted to "carry into execution" its Article I powers, even when the Constitution provided no explicit textual authority for an enforcement power.

The framers of the Reconstruction Amendments, though they abhorred the "right" the Court had upheld in *Prigg*, made sure to incorporate the *Prigg* Court's understanding of congressional power, and enlisted it in support of racial equality. Throughout Reconstruction, the framers invoked *Prigg* "as fixing the interpretation of the Constitution" as "authorizing affirmative legislation in protection of the rights of citizenship under Federal law . . . ." Cong. Globe, 42nd Cong., 1st Sess. app. 70 (1871); Cong. Globe, 41st Cong., 2nd Sess. 3680 (1870) (invoking *Prigg* in support of legislation to "secure[] the right of the man to cast his ballot"). Under the Enforcement Clauses in the Reconstruction Amendments, they argued, "[s]urely we have the authority to enact a law as efficient in the interests of freedom . . . as we had in the interests of slavery." Cong. Globe, 39th Cong. 1st Sess. at 475.

Like *McCulloch* and *Prigg*, Supreme Court cases of the era interpreting the scope of Congress's express powers used "appropriate" interchangeably with "necessary and proper" and emphasized Congress' broad discretion to enact laws pursuant to its express constitutional powers. *See Legal Tender Cases*, 79 U.S. 457, 542 (1870) ("Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate . . . ? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution."); *Texas v. White*, 74 U.S. 700, 729 (1869) (explaining that "in the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed").

Finally, the influential treatise-writers of the age also read *McCulloch* as embracing congressional power to take "appropriate" measures to implement its powers, a point not lost on the framers of the Reconstruction Amendments. The accounts of congressional power authored by Justice Story and Chancellor Kent, for example, were cited repeatedly during the debates over the Amendments. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (quoting Story); *id.* at 1118 (quoting Kent); *id.* at 1292 (quoting Kent); *id.* at 1294 (quoting Story). Story used the word "appropriate" to emphasize that

Congress "must have wide discretion as to the choice of means." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 417 (1833) ("[T]he only limitation upon the discretion would seem to be, that the means are *appropriate* to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable, as to strike the eye of every observer.") (emphasis added). Chancellor Kent likewise invoked *McCulloch* when stressing the importance of Congress's power to adopt any means "which might be *appropriate* and conducive" to a permissible end. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 238 (1826) (emphasis added).

By using the phrase "by appropriate legislation," the framers wrote *McCulloch*'s broad construction of congressional power into the Enforcement Clause of the Reconstruction Amendments. From their perspective, with respect to the Fifteenth Amendment, Congress had broad authority to choose how to remedy violations of the Fifteenth Amendment's prohibition on racial discrimination in voting by the states.

II. The Debates over the Thirteenth, Fourteenth, and Fifteenth Amendments and Contemporaneous Enforcement Legislation Reflect the Broad Legislative Powers that the Framers Sought to Confer on Congress to Protect Personal, Individual Rights and Prevent State-Sponsored Discrimination.

The debates over the Thirteenth, Fourteenth, and Fifteenth Amendments, both before Congress and in the states, and enforcement legislation enacted contemporaneously with the Amendments confirm what the text and original meaning of the Enforcement Clauses provide: the Constitution gives Congress broad enforcement power to "secure to citizens the actual enjoyment of the rights and privileges guaranteed." Cong. Globe, 42nd Cong., 1st Sess. 375 (1871). As the debates reflect, the text was intended and understood to give Congress the same broad legislative powers recognized in foundational Supreme Court precedents, such as *McCulloch* and *Prigg*.

A. The Thirteenth Amendment Was Written to Give Congress the Power to Enforce the Thirteenth Amendment's Promise of Freedom.

The Thirteenth Amendment eliminated slavery and, for the first time in the Constitution's history, explicitly gave Congress the power to enforce the Constitution's promise of freedom. Introducing the Thirteenth Amendment on behalf of the Senate Judiciary Committee, Senator Lyman Trumbull likened the Amendment's Enforcement Clause to Article I's Necessary and Proper Clause, explaining that the Thirteenth Amendment would "authorize the Congress of the United States to pass such laws as may be necessary to carry this provision into effect." Cong. Globe, 38th Cong., 1st Sess. 1313 (1864); *see also* Cong. Globe, 38th Cong., 2nd Sess. 214 (1865) (describing the Enforcement Clause as "conferring upon Congress plenary power to pass all necessary enactments to enforce this provision of the Constitution.").

As Senator Trumbull's comments reflect, the framers understood that the grant of enforcement power was critical to secure true freedom to the enslaved. Because of the grant of power to Congress, the Amendment would not merely end slavery, but would "obliterate the last lingering vestiges of the slave system [and] its chattelizing, degrading, and bloody codes," Cong. Globe, 38th Cong., 1st Sess. 1324 (1864), and ensure that "the rights of mankind, without regard to color or race, are respected and protected." *Id.* at 2989. Indeed, opponents of the Thirteenth Amendment, both in Congress and in the states, understood that the Enforcement Clause would grant Congress broad powers and objected that the Enforcement Clause "confers on the Congress the power to invade any State to enforce the freedom of the African in war or peace" and "strikes down the corner-stone of the Republic, the local sovereignty of the States," *id.* at 2962, providing Congress with a "dangerous grant of power." MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 230 (2001) (quoting Mississippi's objection to Thirteenth Amendment).

This new congressional enforcement power was put into effect almost immediately. As the 39th Congress met in late 1865, Southern states were trying to wipe out the promise of freedom. States across the South passed Black Codes, harsh and discriminatory laws aimed at making African Americans second-class citizens. *See* Akhil Reed

Amar, *Foreward; The Document and the Doctrine*, 114 HARV. L. REV. 26, 64-65 (2000); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038-40 (2010) (describing provisions of Black Codes that denied the freed slaves the right to bear arms). In order "to destroy all these discriminations and to carry into effect the constitutional amendment," Cong. Globe, 39th Cong., 1st Sess. 474 (1866), the 39th Congress enacted the Civil Rights Act of 1866. The Act, which prohibited denial or abridgment, on the basis of race, of the rights to make or enforce contracts, sue in courts, give evidence, own real and personal property, as well as to keep and bear arms, extended far beyond the self-executing provisions of the Thirteenth Amendment; in today's terms, they were prophylactic enforcement measures. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968) ("[T]he majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act."); Amar, *Intratextualism*, 112 HARV. L. REV. at 823 (explaining that the 1866 Act, which "swept far beyond merely prohibiting slavery and involuntary servitude" illustrates the 39th Congress's "broad view" of the enforcement power).

The legislators who had just framed the Thirteenth Amendment pointed to *McCulloch*'s and *Prigg*'s expansive construction of congressional power in defending the Act's constitutionality. Republicans drew on "the celebrated case of *McCulloch v. The State of Maryland*" to demonstrate why Congress had power to enact the 1866 Act. Cong. Globe, 39th Cong., 1st Sess. 1118 (1866). Under *McCulloch*, Congress was the "sole judge" of the necessity of a measure that was indisputably directed at a legitimate end—"the maintenance of the freedom to the citizen," a federal power "defined by the Constitution itself." *Id.* The framers in the 39th Congress argued that *Prigg*'s broad understanding of the congressional enforcement power, previously a weapon against liberty, could now be applied in equality's service: "We will turn the artillery of slavery upon itself." *Id.*; *see also id.* at 1294 ("[W]e are not without light as to the power of Congress in relation to the protection of these rights. In the case of *Prigg vs. Commonwealth of Pennsylvania*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case.").

The overwhelming consensus among those who had framed the Thirteenth Amendment was that "Congress shall have the power to secure the rights of freemen to those men who had been slaves" and that "Congress must judge as to what legislation is appropriate and necessary to secure these men the rights of free men . . . ." *Id.* at 1124. As Senator Trumbull observed, the Enforcement Clause was an express grant of power "to secure freedom to all people in the United States" that "vests Congress with the discretion of selecting that 'appropriate' legislation, which it is believed will best accomplish the end." *Id.* at 475.

B. The Fourteenth Amendment Was Written to Give Congress the Power to Protect Personal, Individual Rights and Prevent State-Sponsored Racial Discrimination.

The 39th Congress demonstrated its broad understanding of the enforcement power conferred by the Thirteenth Amendment by passing the Civil Rights Act of 1866 over President Johnson's veto, but this fight crystallized the need for more constitutional change. Two months after the Act's passage, Congress approved the Fourteenth Amendment to secure fundamental rights and equality against the hostile acts of state governments, once again arming Congress with broad enforcement power. This new grant of power ended any doubt about the constitutionality of the Civil Rights Act of 1866. *See McDonald*, 130 S. Ct. at 3041 (explaining that "the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866").

The debates over the Fourteenth Amendment, unsurprisingly, stressed the importance of a broad legislative power to protect constitutional rights. The leading proponents of the Amendment, Senator Jacob Howard and Representative John Bingham, delivered important speeches explaining that Congress would have wide latitude to enact "appropriate" measures for protecting constitutional rights. In their view, "whatever legislation is appropriate, that is . . . whatever tends to enforce submission to the prohibitions [of the Fourteenth Amendment], and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws . . . is brought within the domain of congressional power." *Ex Parte Virginia*, 100 U.S. at 346.

Introducing the Amendment in May 1866, Senator Howard emphasized the Enforcement Clause's relation to the Necessary and Proper Clause interpreted in *McCulloch*, explaining that the Amendment brought the power to enforce the Constitution's guarantees "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. at 2765-66. "Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id.*

Senator Howard's speech refutes a narrow reading of Congress's power to "enforce" the Fourteenth Amendment by "appropriate legislation." The enforcement provision, Howard said, conferred "authority to pass laws which are appropriate to the *attainment of the great object* of the amendment." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property." *Id.* at 2768. For Senator Howard, the enforcement provision was "indispensable" because it "imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.*

In the House debates, Representative Bingham argued that Section 5 corrected "a want . . . in the Constitution of our country" by expressly giving the people the power "by congressional enactment" to protect "the inborn rights of every person . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). This new grant of power would enable Congress to prevent "state injustice and oppression" *id.*, and to "correct the unjust legislation of the states." *Id.* at 2459; *see also id.* at 2498 ("We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one."); *id.* at app. 257 (explaining that the fifth section of the Amendment was "necessary in order to carry the proposed article into practical effect").

The Fourteenth Amendment's opponents also understood Section 5 to confer a broad discretion on Congress to enforce the Amendment's provisions—and, in fact, this broad power was one of the reasons for their opposition to the Amendment. *See id.* at 2500 (arguing that that the Fourteenth Amendment would "strike down . . . State rights and invest all power in the General Government"); *id.* at 2940 (calling the enforcement clause "most dangerous"). Accordingly, while supporters and opponents of the Fourteenth Amendment parted ways on the merit of the Amendment's broad enforcement power, both sides agreed that the Amendment would provide Congress significant authority to enforce its provisions.

Likewise, during ratification, opponents of the Fourteenth Amendment expressed the fear that the authority to pass "appropriate legislation" would give Congress extensive power to define the obligations of states with respect to their citizens. *See* JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 254-55 (1997). One Texas Senator summed up these concerns: "What is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., 422 (1866). Likewise, Governor Jenkins of Georgia worried that Congress is "the proper judge[] of what constitutes appropriate legislation. If therefore, the amendment be adopted, and a fractional Congress . . . be empowered 'to enforce it by appropriate legislation,'what vestige of hope remains to the people of those States?" BOND, NO EASY WALK TO FREEDOM at 238.

In 1867, President Johnson tried to strip Section 5 out of the Fourteenth Amendment, urging adoption of an alternative proposal that "eliminated Congress' power to enforce the Amendment." *McDonald*, 130 S. Ct. at 3078 (Thomas, J., concurring). That proposal failed, and "the American people ratified the Fourteenth Amendment . . . [k]nowing full well that . . . th[e] language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality." AKHIL REED

AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 363 (2005).

C. The Fifteenth Amendment Was Written to Give Congress the Power to Ensure Enjoyment of the Right to Vote Free From Racial Discrimination.

The culmination of the Amendments to the Constitution designed to guarantee personal rights and outlaw state-sponsored racial discrimination was the Fifteenth Amendment. In writing into the Constitution the "fundamental principle" that state and federal governments "may not deny or abridge the right to vote on account of race," *Rice*, 528 U.S. at 512, the framers explained that the Fifteenth Amendment would be "the capstone in the great temple of American freedom," Cong. Globe, 40th Cong., 3rd Sess. 724 (1869), that would "make every citizen equal in rights and privileges." *Id.* at 672. Once again, a broad congressional power to ensure that the right to vote was actually enjoyed was critical to the Amendment.

During the debates on the Fifteenth Amendment, leading framers, such as John Bingham, made clear that the Amendment's Enforcement Clause, like that of the Thirteenth and Fourteenth Amendments, gave Congress a broad "affirmative power" to secure the right to vote. *Id.* at 727; *id.* at 1625 ("Congress . . . under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this."). Without a broad enforcement power, the framers feared that the constitutional guarantee would not be fully realized. "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States. Clearly, no power but that of the central government is or can be competent for their adjustment . . . ." *Id.* at 984.

In 1870, the year the Fifteenth Amendment was ratified, Congress invoked the Amendment's Enforcement Clause in support of voting rights legislation, reflecting the framers' judgment that the Fifteenth Amendment is "ample and full and clothes Congress with all the power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2nd Sess. 3563 (1870). The Enforcement Clause, Senator Oliver Morton explained, "intended to give Congress the power of conferring upon the colored man the full enjoyment of his right. We so understood it when we passed it. . . . [T]he second section was put there . . . for the purpose of enabling Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." *Id.* at 3670; *id.* at 3655 (explaining that the "intention and purpose" of the Fifteenth Amendment's Enforcement Clause was to "secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there"); *id.* at 3663 ("Congress has a right by appropriate legislation to prevent any state from discriminating against a voter on account of his race . . . ."); *id.* at app. 392 (explaining that "some stringent law is necessary to neutralize the deep-rooted prejudice of the white race there against the negro"). *See also* Cong. Rec., 43rd Cong., 1st Sess.

4085 (1874) (observing that the Enforcement Clause of the Fifteenth Amendment was added to allow Congress "to act affirmatively" and ensure that "the right to vote should be enjoyed").

Both supporters and opponents alike recognized that the Fifteenth Amendment's Enforcement Clause significantly altered the balance of power between the federal government and the states, giving Congress broad authority to secure the right to vote to African Americans and to eradicate racial discrimination in the electoral process. Congressional opponents of the Fifteenth Amendment objected that "when the Constitution of the United States takes away from the State the control over the subject of suffrage it takes away from the State the control of her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon." Cong. Globe, 40th Cong., 3rd Sess. at 989. Opponents of the Fifteenth Amendment, both in Congress and in the states, worried that Congress would use its enforcement power to "send their satraps into every election district in this country," 41st Cong., 2nd Sess. 255 (1869), and put into effect "registry laws and laws regulating elections at our doors, enacted by a power we cannot reach or control," 2 *Journal of the State of Michigan House of Rep.* 1101 (Mar. 5, 1869). In their view, "nothing could be more loose and objectionable than the clause which authorizes Congress to enforce the restraint upon the States by 'appropriate legislation' . . . Under this phraseology, Congress is made the exclusive judge . . . ." *Journal of the Senate, State of California,* 18th Sess. 150 (1869-70).

These concerns over state sovereignty were flatly rejected by the framers of the Fifteenth Amendment and the American people, who explicitly conferred on Congress the power to secure the right to vote free from racial discrimination. In giving Congress the power to remedy voting discrimination by the states, the Fifteenth Amendment specifically limited state sovereignty. As Senator Carl Schurz explained during debates over Congress's first attempt to enforce the Fifteenth Amendment:

> [T]he Constitution of the United States has been changed in some most essential points; that change does amount to a great revolution . . . . The revolution found the rights of the individual at the mercy of the States; it rescued them from their arbitrary discretion, and placed them under the shield of national protection. It made the liberty and rights of every citizen in every State a matter of national concern.

Cong. Globe, 41st Cong., 2nd Sess. at 3607-08.

III. The History of the Fifteenth Amendment Demonstrates that "Appropriate" Enforcement Legislation Includes Broad, Prophylactic Regulation to Protect the Right to Vote.

Most relevant here, the history of the Fifteenth Amendment demonstrates that Congress's broad legislative power was particularly important to secure the right to vote free from racial discrimination. Because states extensively regulate elections, including by regulating voter qualifications and drawing district lines, states hostile to the

Fifteenth Amendment could easily use their power over the election system to deny or abridge the right to vote free from discrimination, as they often did. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 590-91 (1988) (discussing efforts to defy the Fifteenth Amendment through racial gerrymandering and adoption of discriminatory voting laws); *Shaw*, 509 U.S. at 640 (discussing racial gerrymandering enacted in the 1870s to dilute the right of African Americans to vote).

Accordingly, the framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both heavy-handed and subtle—was critical to ensuring "the colored man the full enjoyment of his right," Cong. Globe, 41st Cong., 2nd Sess. 3670 (1870), and "prevent[ing] any state from discriminating against a voter on account of his race . . . ." *Id.* at 3663. As the debates over the Fifteenth Amendment and contemporaneous congressional enforcement legislation show, the framers were well aware that Congress needed broad authority to enact prophylactic legislation to root out all forms of racial discrimination in voting.

For example, during the debates on the Fifteenth Amendment, the framers observed that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," emphasizing that "[w]hat we desire to reach" is "to insure by constitutional enactment . . . the right of suffrage" of citizens without regard to race. Cong. Globe, 40th Cong., 3rd Sess. 725 (1869). In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African Americans on account of their race. Highlighting the importance of providing "proper machinery . . . for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting . . . . The States can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). "There may be a hundred prerequisites invented by the States," *id.*, "a hundred modes whereby [the colored man] can be deprived of his vote." *Id.* at 3657; *see also id.* at 3568 (noting "it is our imperative duty . . . to pass suitable laws to enforce the fifteenth amendment" because, without them, "the fifteenth amendment will be practically disregarded in every community where there is a strong prejudice against negro voting"). The only means to ensure minority voting rights, the framers recognized, "are to be found in national legislation. This security cannot be obtained through State legislation," where "the laws are made by an oppressing race . . . ." *Id.* at app. 392.

The framers recognized that the right to vote would actually be enjoyed by the newly freed slaves only if Congress had the authority to stamp out and deter the full range of racial discrimination in voting, including by enacting prophylactic regulation to ensure the right to vote was actually enjoyed. As

Senator Schurz commented, under the Fifteenth Amendment, "[a] State shall have full power to do that which is right in its own way; but it is prohibited from doing that which is wrong in any way." *Id.* at 3608.

IV. This Court's Precedents Establish that the Constitution Gives Congress Broad Power to Prevent and Deter Racial Discrimination in Voting.

A. The Court Has Consistently Held that McCulloch's Broad Construction of Congressional Power Applies to Legislation Enforcing the Fifteenth Amendment.

Consistent with the text and history discussed above, this Court has consistently held that *McCulloch*'s broad interpretation of Congress's power under the Necessary and Proper Clause applies equally to legislation enforcing the right to vote free from discrimination secured by the text of the Fifteenth Amendment. "Congress' authority under § 2 of the Fifteenth Amendment . . . [is] no less broad than its authority under the Necessary and Proper Clause." *City of Rome v. United States*, 446 U.S. 156, 174-75 (1980). Under these cases, broad *McCulloch*-style deference applies to the means Congress adopts to enforce the constitutional right to vote free from racial discrimination. The preclearance requirement contained in Section 5 of the Voting Rights Act seeks to enforce the core purpose of the Fifteenth Amendment, and the nearly unanimous, bipartisan decision of Congress to re-authorize it falls squarely within Congress's broad power to enforce the Fifteenth Amendment.

In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court applied *McCulloch* deference in holding that the preclearance and coverage provisions of the Voting Rights Act—the same provisions Shelby County attacks here—were "appropriate legislation" within Congress's Fifteenth Amendment enforcement power. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324. As the *Katzenbach* Court explained, "[b]y adding th[e] authorization [for congressional enforcement in Section 2], the framers indicated that Congress was to be chiefly responsible for implementing the rights created. . . . Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* at 325-26.

Based on this text and history, the Court held that the "basic test" set forth by Chief Justice Marshall in *McCulloch* "concerning the express powers of Congress" applied, and rejected "South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms. . . . Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment." *Id.* at 326, 327; *cf. Jones*, 392 U.S. at 439 (explaining that the Enforcement Clause of the Thirteenth Amendment "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'") (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1886)); *James Everard's Breweries v. Day*, 265 U.S. 545, 558-559 (1924) (applying *McCulloch* to analyze constitutionality of congressional action under the Enforcement Clause of the Eighteenth Amendment).

Shelby County contends that *Katzenbach* is a relic of the 1960s that must be confined to its facts, but this Court's cases have refused to impose such artificial limits on the power of Congress to enforce the Fifteenth Amendment's promise of voting equality. Despite considerable progress in the towards fulfilling the command of the Fifteenth Amendment, this Court has reaffirmed *Katzenbach*'s reasoning three separate times, upholding Congress's renewal of the preclearance requirement in 1970, 1975, and 1982. As these cases hold, "Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions," *Lopez v. Monterrey County*, 525 U.S. 266, 283 (1999), because "the Act's ban on electoral changes that are discriminatory . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment." *City of Rome*, 446 U.S. at 177. *Accord Georgia v. United States*, 411 U.S. 526, 535 (1973).

The text, of course, gives Congress the authority to select the means of enforcing constitutional rights; it does not eliminate the requirement that Congress act to "enforce" rights protected by the Constitution. In order to ensure that Congress is actually enforcing, not inventing, new constitutional rights, this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), refined the *McCulloch* standard, applying a congruence and proportionality test to smoke out congressional efforts to establish new rights in the guise of enforcement. But these concerns do not have the same force when it comes to the Fifteenth Amendment's focused and express prohibition on racial discrimination in voting. In the text of the Constitution itself, the Fifteenth Amendment protects against governmental efforts to deny or abridge the right to vote on account of race.

Consistent with the text's plain language, Supreme Court precedent dictates that Congress has broad leeway to design remedies to protect against discrimination based on race—the most constitutionally suspect form of discrimination—in order to protect the right to vote, which has always been recognized as a fundamental right of the highest order. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. As Justice Scalia has recognized, "[g]iving [Congress] . . . more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctly violative of the principal purpose of the [Civil War] Amendment[s] . . . ." *Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting); *see also Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intentions of the framers of the Thirteenth, Fourteenth, and Fifteenth

Amendments."). *See* Br. of Fed. Respondent at 17-19; Br. of Cunningham Resp-Intervenors at 5.

Boerne itself recognized that when Congress enforces recognized, fundamental constitutional rights—such as the right to vote expressly enumerated in the Fifteenth Amendment and protected as well by this Court's equal protection precedents—"[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). As history shows, the Fifteenth Amendment was designed to radically alter constitutional principles of federalism, giving to Congress a broad sweeping power to ensure that the right to vote free from racial discrimination was actually enjoyed by all Americans. While "the Voting Rights Act, by its nature, intrudes on state sovereignty," "[t]he Fifteenth Amendment permits this intrusion." *Lopez*, 525 U.S. at 284-85.

Indeed, *Boerne* is best understood as a refinement of long established fundamental principles giving Congress broad authority to choose the means of remedying violations of constitutional guarantees, designed to ensure that the "object of valid [enforcement] legislation [is] the ... remediation or prevention of constitutional violations." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999). Since the function of *Boerne*'s congruence and proportionality test is to distinguish "measures that remedy or prevent unconstitutional actions" and "measures that make a substantive change in the governing law," *Boerne*, 521 U.S. at 519, when Congress enforces an expressly enumerated constitutional right, such as the Fifteenth Amendment's prohibition on racial discrimination in voting, "Congress ought to have wide latitude in choosing among enforcement remedies." Calabresi & Stabile, 11 U. PA. J. CONST. L. at 1436. As the Constitution's text reflects, "[t]he Fifteenth Amendment empowers Congress, not the Court, to determine . . . what legislation is needed to enforce it." *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009).

B. The Court Has Consistently Held that the Fifteenth Amendment Permits Congress to Single Out Jurisdictions With Proven Histories of Racial Discrimination in Voting for Prophylactic Regulation.

Consistent with the text and history of the Fifteenth Amendment, this Court has also held that prophylactic legislation that targets states with a long history of racial discrimination in voting for special, more stringent remedies is "appropriate legislation" within the scope of the Fifteenth Amendment's Enforcement Clause. In *South Carolina v. Katzenbach*, this Court upheld the preclearance requirement of the Voting Rights Act, explaining that "[i]n acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach*, 383 U.S. at 328. Having found that "substantial voting discrimination presently occurs in certain sections of the country and knowing "no way of accurately forecasting where the evil might spread in the future," Congress's decision to focus on "a small number of States and political subdivisions which in most instances were familiar to Congress by name" was a "permissible method of dealing with the problem." *Id.*

This Court in *Katzenbach* recognized that the Constitution does not require Congress to treat the States all alike, or ignore a history of racial discrimination in voting in certain States, when it enforces the Fifteenth Amendment's command of voting equality. "[T]he doctrine of the equality of states . . . does not bar th[e] [VRA's] approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." *Id.* at 328-29; *see also Northwest Austin*, 557 U.S. at 203. Since the doctrine of equality of states is not a textual limit on the enumerated legislative powers of Congress, but rather is rooted in the fact that, since the Constitution's founding, new states have been admitted to the nation on an equal footing with the original states, see *Coyle v. Smith*, 221 U.S. 559, 566-67 (1911), "the principle of equality is not disturbed by a legitimate exertion of the United States of its constitutional power . . . ." *United States v. Chavez*, 290 U.S. 357, 365 (1933); *see also Coyle*, 221 U.S. at 568 (distinguishing invalid conditions on admission of new states from "affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject").

Indeed, this Court has always recognized that the preclearance provision of the Voting Rights Act is the quintessential example of "appropriate legislation" enforcing the Fifteenth Amendment's command of voting equality because it only applies to jurisdictions with longstanding, proven histories of racial discrimination in voting. Rather than applying the preclearance requirement "equally to cases arising in states which have the justest laws respecting the personal rights of citizens . . . as to those which arise in states that may have violated the prohibitions of the amendment," *Civil Rights Cases*, 109 U.S. at 14, Congress "confined [preclearance] to those regions of the country where voting discrimination had been most flagrant" and "limited [it] to those cases in which constitutional violations were most likely." *Boerne*, 521 U.S. at 532-33. As this Court has affirmed on many occasions, by providing a remedy "directed only to those States in which Congress found that there had been discrimination," *United States v. Morrison*, 529 U.S. 598, 627 (2000), Congress appropriately tailored the Voting Rights Act "to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *Boerne*, 521 U.S. at 526.

* * * * * * *

Whether this Court applies the *McCulloch* standard reflected in the text of Section 2 of the Fifteenth Amendment or *Boerne*'s refinement of it, the result is the same: Congress's 2006 reauthorization of the Act's preclearance requirement is "appropriate legislation" enforcing the Fifteenth Amendment.

In extending the preclearance requirement of the Voting Rights Act in 2006, Congress acted to protect against racial discrimination in voting—the single core purpose of the Fifteenth Amendment. Acting within its wide discretion to select appropriate means, Congress conducted an extensive inquiry into the current state of racial discrimination in voting and permissibly determined that prophylactic measures were "current[ly] need[ed]," *Northwest Austin,* 557 U.S. at 203, to protect against unconstitutional racial discrimination in the administration of elections persisting in the covered jurisdictions.

As it had in 1965, when the Act was first passed, and in 1970, 1975, and 1982, when preclearance was renewed, Congress found that "substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting where the evil might spread elsewhere in the future." *Katzenbach*, 383 U.S. at 328. Choosing to limit its attention to the geographic areas where federal remedies were most pressing, Congress continued in effect the preclearance requirement and its associated coverage formula—one of the American law's most successful civil rights provisions—in order to prevent and deter state-sponsored racial discrimination in voting. In so doing, Congress found that the Act's burdens—while by no means insignificant—had been lessened by decades of familiarity with the preclearance process and the availability of bailout, and were, in any event, fully justified by the need to ensure continued progress toward the promise of voting equality commanded by the Fifteenth Amendment. *Cf. Dickerson v. United States*, 530 U.S. 428 (2000).

By an overwhelming margin—98-0 in the Senate and 390-33 in the House—bipartisan majorities agreed that the preclearance provision of the historic Voting Rights Act continued to serve the critical purpose of preventing and deterring racial discrimination in voting that persist in the covered jurisdictions. As the comprehensive opinions below demonstrate, these findings are amply supported by the massive record Congress assembled of voting discrimination in all phases of the electoral process. Pursuant to the original understanding of the Fifteenth Amendment's Enforcement Clause—that Congress would have broad power to determine what is appropriate to protect the right to vote free from racial discrimination—the Court should defer to Congress's near-unanimous judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR PROFESSORS RICHARD L. ENGSTROM, THEODORE S. ARRINGTON, AND DAVID T. CANON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

- I. CONGRESS PROPERLY CONSIDERED EVIDENCE OF RACIALLY POLARIZED VOTING IN REAUTHORIZING SECTION 5. 5
  - A. That Racially Polarized Voting Occurs Is A Fact. 6
  - B. There Is A Link Between Racially Polarized Voting And Government Discrimination Against Minority Voters. 10
- II. THE CONGRESSIONAL RECORD INCLUDES AMPLE EVIDENCE OF RACIALLY POLARIZED VOTING, AND IN ANY EVENT ANY ALLEGED SHORTCOMING IN THE LEGISLATIVE RECORD DOES NOT HELP PETITIONER 13
- III. IN REAUTHORIZING SECTION 5, CONGRESS HAS ATTEMPTED TO ADDRESS DISCRIMINATORY VOTE DILUTION, NOT TO PROHIBIT RACIALLY POLARIZED VOTING. 24
  - A. Racially Polarized Voting Can Create An Environment Conducive to Minority Vote Dilution. 24

TABLE OF CONTENTS—Continued

Page

B. Racially Polarized Voting Is A Necessary Precondition For Vote Dilution To Occur. 26

C. Redistricting Can Be Used to Effect Vote Dilution.... 27

IV. VOTE DILUTION DOES JUSTIFY PRE-CLEARANCE. 29

A. Vote Dilution Can Be Used As Evidence To Sustain The Reauthorization Of Section 5. 29

B. The Right To Vote Involves More Than Mere Access To Casting A Ballot, And Includes The Right To A Meaningful Vote. 31

CONCLUSION 34

TABLE OF AUTHORITIES

CASES Page

Allen v. State Board of Elections, 393 U.S. 544 (1969) 24, 31

Bartlett v. Strickland, 556 U.S. 1 (2009) 23, 24

Benavidez v. City of Irving, 638 F. Supp. 2d 709 (N.D. Tex. 2009) 2, 21

Blodgett v. Holden, 275 U.S. 142 (1927) 33

Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976 (D.S.D. 2004) 8

Cane v. Worcester County, 840 F. Supp. 1081 (D. Md. 1994) 3

City of Rome v. United States, 446 U.S. 156 (1980) 30

Clark v. Calhoun County, 88 F.3d 1393 (5th Cir. 1996) 2, 8

Clark v. Roemer, 777 F. Supp. 445 (M.D. La. 1990) 9

Cofield v. City of LaGrange, 969 F. Supp. 749 (N.D. Ga. 1997) 9

Colleton County Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002) 8, 21

DeGrandy v. Wetherell, 794 F. Supp. 1078 (N.D. Fla. 1992), *aff'd in part and rev'd in part on other grounds sub nom. Johnson v. DeGrandy*, 512 U.S. 997 (1994) 9

Dillard v. Baldwin County Commission, 222 F. Supp. 2d 1283 (M.D. Ala. 2002) 8

Ewing v. Monroe County, 740 F. Supp. 417 (N.D. Miss. 1990) 9

Page

Fabela v. City of Farmers, No. 10-1425, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012) 21

Fairley v. Hattiesburg, No. 2:06cv167-KS-MTP, 2008 WL 32872000 (S.D. Miss. Aug. 7, 2008) 20

Fullilove v. Klutznick, 448 U.S. 448 (1980) 14

Georgia v. Ashcroft, 539 U.S. 461 (2003) 4, 33

Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) 21

Growe v. Emison, 507 U.S. 25 (1993) 7

Hines v. Mayor and Town Council of Ahoskie, 998 F.2d 1266 (4th Cir. 1993) 3

Houston v. LaFayette County, 20 F. Supp. 2d 996 (N.D. Miss. 1998) 9

Jamison v. Tupelo, 471 F. Supp. 2d 706 (N.D. Miss. 2007) 20

Katzenbach v. Morgan, 384 U.S. 641 (1966) ... 14

LaRoque v. Holder, 831 F. Supp. 2d 183 (D.D.C. 2011), *vacated on other grounds*, 679 F.3d 905 (D.C. Cir. 2012) 7, 12

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 8, 27

Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) 9

Mansell v. Mansell, 490 U.S. 581 (1989) 14

Miller v. Johnson, 515 U.S. 900 (1995) 24

Page

Mobile v. Bolden, 446 U.S. 55 (1980) 24

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012)............... 33, 34

Northwest Austin Municipal Utility District Number One v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008), *rev'd and remanded on other grounds*, 557 U.S. 193 (2009).............. 11, 30

Rogers v. Lodge, 458 U.S. 613 (1982) 8, 13

Shelby County v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) ....*passim*

Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 30, 32, 34

Texas v. United States, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012)............ 21

Thornburg v. Gingles, 478 U.S. 30 (1986)......*passim*

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 14

United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007).. 20

United States v. Charleston County Council, 316 F. Supp. 2d 268 (D.S.C. 2003)............... 20

United States v. Charleston County, 365 F.3d 341 (4th Cir. 2004).. 3

United States v. McGregor, 824 F. Supp. 2d 1339 (M.D. Ala. 2011)................................ 11, 20

Voinovich v. Quilter, 507 U.S. 146 (1993)....... 11

Page

CONSTITUTION

U.S. Const. amend. XIV 5, 30, 31

U.S. Const. amend. XV 5, 30, 31

STATUTES AND LEGISLATIVE MATERIALS

Voting Rights Act of 1965, 42 U.S.C. §§ 1973 et seq.: ..... *passim*
 § 2, 42 U.S.C. § 1973 ..... 7, 8, 26, 32
 § 5, 42 U.S.C. § 1973c ..... *passim*
 § 5(b), 42 U.S.C. § 1973c(b) 11

42 U.S.C. § 1983 8

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ("Reauthorization and Amendments Act of 2006") 6, 31
 § Section 2(a) 31
 § Section 2(b)(3) 6, 10, 22
 § Section 2(b)(4) 10

H.R. Rep. No. 109-478 (2006) ..... *passim*

An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Committee on the Judiciary, 109th Cong. (May 9, 2006) (S. Hrg. 109-458) 25

Page

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field, Hearing Before the Subcomm. on the Const., Civil Rights and Prop. Rights of the S. Comm. on the Judiciary, 109th Cong. (June 21, 2006) (S. Hrg. 109-822) 6

To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary, 109th Cong. (Oct. 18, 2005) (Serial No. 109-70) 15

Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary, 109th Cong. (March 8, 2006) (Serial No. 109-103) .... *passim*

Voting Rights Act: The Continuing Need for Section 5, Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary, 109th Cong. (Oct. 25, 2005) (Serial No. 109-75) 12, 26

Voting Rights Act: The Continuing Need for Section 5 Pre-Clearance, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (May 16, 2006) (S. Hrg. 109-569) .... *passim*

Page

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Theodore S. Arrington, *Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research*, The Forum 8 (No. 2, Article 7, 2010) 3

David Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts* (University of Chicago Press 1999) 3, 28

Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 Ariz. St. L.J. 277 2

Richard L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 Legis. Stud. Q. 465 (1977) 2

Richard L. Engstrom & Michael D. McDonald, *Qualitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Law. 369 (Summer 1985) 2

Page

Lisa Handley, *A Voting Rights Analysis of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts*, available at http://www.wkredistricting.org/Files/Final-Report-of-Dr-Lisa-Handley.pdf 23

Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* Voting Rights Act Reauthorization of 2006: Perspectives of Democracy Participation, and Power (Ana. Henderson ed., 2007) 15, 19

Nathan Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174 (2007) 12

Brief for Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III as *Amici Curiae* on Behalf of Neither Party, *Northwest Austin Municipal Utility District Number One v. Holder*, No. 08-322, 2009 WL 526206 (U.S. Feb. 26, 2009) 22

Delbert A. Taebel, Richard L. Engstrom, & Richard L. Cole, *Alternative Electoral Systems as Remedies for Minority Vote Dilution*, 11 Hamline J. Pub. L. & Pol'y 19 (1990) 1

INTEREST OF THE *AMICI CURIAE*

Professors Richard L. Engstrom, Theodore S. Arrington, and David T. Canon are political scientists who have researched and written extensively on election administration and election reform in the United States.[1] *Amici* take an interest in this case because their research concerns race and voting in federal, state, and local elections. *Amici* believe their expertise may be of use to the Court as it considers Congress's basis for reauthorizing Section 5 of the Voting Rights Act ("VRA") in 2006. Because they have specifically studied and analyzed evidence of racially polarized voting and its effects, *amici* can inform this Court about how the existence of racially polarized voting, which is increasing in covered jurisdictions, creates increased opportunities for unconstitutional intentional voting discrimination. Specifically, voting along racial lines, among other things, can interact with electoral schemes to dilute the minority vote and allow elected officials to ignore the interests of racial minorities without political consequence.

Doctor Engstrom was a professor of political science at the University of New Orleans from 1971 to 2006 and is currently a Visiting Professor of Political Science and Visiting Research Fellow at the Center for the Study of Race, Ethnicity, and Gender in the Social Sciences at Duke University. He has conducted extensive research and is widely published on electoral reform and vote dilution. *See, e.g.*, Delbert A. Taebel, Richard L. Engstrom, and Richard

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[1] All parties have given blanket consent to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

L. Cole, *Alternative Electoral Systems as Remedies for Minority Vote Dilution*, 11 Hamline J. Pub. L. & Pol'y 19 (1990); Richard L. Engstrom & Michael D. McDonald, *Qualitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Law. 369, 374 (Summer 1985); Richard L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 Legis. Stud. Q. 465, 465-66 (1977); Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 Ariz. St. L.J. 277, 285-86, 296. Courts have relied upon both his published work and his expert testimony on racially polarized voting and political redistricting. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11, 53 n.20, 71 (1986) (citing three of Dr. Engstrom's articles with approval); *Clark v. Calhoun County*, 88 F.3d 1393, 1397 (5th Cir. 1996) ("[T]he district court's finding that racially polarized voting exists [based in part on Dr. Engstrom's analysis] is beyond question."); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 731-32 (N.D. Tex. 2009) (concluding that plaintiff, through Dr. Engstrom, had proven the existence of racially polarized voting). Professor Engstrom testified before the House Subcommittee on the Constitution of the Committee on the Judiciary in 2005 when reauthorization of the VRA was being considered.

Doctor Arrington is a professor emeritus in the Department of Political Science and Public Administration at the University of North Carolina at Charlotte. His research concerns primarily voting behavior, voting systems, and redistricting, and has been published in many leading political science journals. *See, e.g.*, Theodore S. Arrington, *Affirmative*

Districting and Four Decades of Redistricting: The Seats/Votes Relationship 1972-2008, Politics and Policy 38 (Number 2, 2010) 223-253; Theodore S. Arrington, *Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research*, The Forum 8 (Number 2, Article 7, 2010). Professor Arrington has been retained as an expert witness and given testimony about bloc voting, vote dilution, and redistricting in more than 30 cases in federal courts. *See, e.g., United States v. Charleston Cnty.*, 365 F.3d 341, 350 (4th Cir. 2004) ("[T]he United States' expert, Dr. Arrington, found an even higher overall rate of racially polarized voting."); *Cane v. Worcester Cnty.*, 840 F. Supp. 1081, 1087 (D. Md. 1994) ("The Court qualified Dr. Arrington as an expert to testify on voting behavior, political analysis, party politics and racial voting patterns."). *Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266, 1273 (4th Cir. 1993) (referring explicitly to Dr. Arrington's testimony). He also testified before the Senate Judiciary Committee in 2006 when Congress was considering reauthorization of the VRA.

Doctor Canon is a professor of political science at the University of Wisconsin, Madison. His research interests are in race and representation, political careers, congressional reform, partisan realignments, and the historical analysis of Congress. His major research on the question of racial representation was published in *Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts* (University of Chicago Press 1999). This book was awarded the American Political Science Association's Richard F. Fenno Prize for the best book published on legislative politics in 1999. Professor Canon is the author of approximately 35 scholarly articles and chapters, three scholarly books, three edited volumes, an introductory American politics textbook (currently in its third edition), and a leading reference work on congressional committees. He has testified as an expert in two voting rights cases in federal court and has served as an expert consultant in three other federal voting rights cases on issues concerning redistricting, racial representation, and retrogression under Section 5 of the VRA (in the remand ordered by *Georgia v. Ashcroft*, 539 U.S. 461 (2003)) and racially polarized voting. He also testified before the Senate Subcommittee on the Constitution, Civil Rights, and Property Rights (of the Senate Judiciary Committee) during the consideration of reauthorization of the VRA in 2006. Professor Canon's ongoing research concerns redistricting, election administration, and election reform.

SUMMARY OF ARGUMENT

The district court described the substantial evidence of unconstitutional voting discrimination in the legislative record that justifies the 2006 reauthorization of Section 5. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 463-92 (D.D.C. 2011). This includes evidence that racially polarized voting exists and is increasing in the covered states. *Id.* at 487-88. In this brief, *amici* will explain the nature of racially polarized voting, its implications for vote discrimination, and why its persistence supports reauthorization of Section 5 for covered jurisdictions.

Racially polarized voting exists when there is an empirical correlation between the race of a voter and the way in which the voter votes. Although racially polarized voting is not itself state action, there is a link between racially polarized voting and discriminatory exclusion of minority voters from the democratic process. Specifically, racially polarized voting makes certain discriminatory voting practices, such as vote dilution, increasingly possible. Vote dilution occurs when the effectiveness of minority voters is minimized or canceled out through state action.

The significant potential for vote dilution, which can violate the Fourteenth and the Fifteenth Amendments, provides an important ground for Congress's reauthorization of the pre-clearance mechanism under Section 5. The VRA protects not merely the right to cast a ballot, but also the right to cast a vote that will be meaningful. Vote dilution, therefore, can affect an individual's right to vote just as an absolute prohibition against casting a ballot would.

There is overwhelming evidence that racially polarized voting not only exists in covered jurisdictions, but also that it is more pronounced in covered jurisdictions than in non-covered jurisdictions. Because racially polarized voting makes minority voters vulnerable to vote dilution, evidence of its prevalence in covered jurisdictions, combined with the documented history of discrimination in those areas, supports the reauthorization of Section 5.

ARGUMENT

I. CONGRESS PROPERLY CONSIDERED EVIDENCE OF RACIALLY POLARIZED VOTING IN REAUTHORIZING SECTION 5.

Based on extensive testimony and other evidence, Congress found that "[t]he continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." *See* Fannie Lou Hamer, Rosa

Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(3), 120 Stat. 577 ("Reauthorization and Amendments Act of 2006"). The House Judiciary Committee concluded that "[t]he breadth of racially polarized voting and its impact on minority voters represent a serious concern." H.R. Rep. No. 109-478, at 34 (2006). For the following reasons, *amici* agree with Congress's understanding and conclusions concerning racially polarized voting in the covered jurisdictions and thus believe this Court should not overturn Congress's carefully-considered and well-supported judgment to rely on this factor in reauthorizing Section 5.

A. That Racially Polarized Voting Occurs Is A Fact.

"[R]acial polarization exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes, . . . or to put it differently, where black voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21 (internal quotation marks and citation omitted). In other words, racially polarized voting "occurs when voting blocs within the minority and white communities cast ballots along racial lines." H.R. Rep. No. 109-478, at 34.

To be clear, racially polarized voting is an observed correlation. It is *not*, as the Pacific Legal Foundation asserts in its *amicus* brief (at 9), based on the "perception that members of the same racial group think alike." Indeed, this Court properly rejected the argument that "racially polarized voting refers to voting patterns that are in some way *caused by race*, rather than to voting patterns that are merely *corre-*

lated with the race of the voter . . . ." *Gingles*, 478 U.S. at 63; *see also LaRoque v. Holder*, 831 F. Supp. 2d 183, 227 (D.D.C. 2011) ("[A] group defined by race can be considered a community of interest for voting purposes only when empirical evidence, rather than stereotypes, demonstrates that members of the minority group vote alike."), *vacated on other grounds*, 679 F.3d 905 (D.C. Cir. 2012). Racially polarized voting, therefore, must be proved, not assumed or supposed. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

As recognized by Congress (*see, e.g.*, H.R. Rep. No. 109-478, at 34-35), federal courts have found numerous instances of racially polarized voting.[2] *See, e.g.*,

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[2] Section 2 of the VRA is, of course, a very important part of the statute, and findings from Section 2 cases document the continued existence of racially polarized voting. *Amici* disagree, however, with Shelby County's assertion that "Section 2 is now the 'appropriate' prophylactic remedy for any pattern of discrimination that Congress documented in the 2006 legislative record." Pet. Br. 20. Although a full discussion of this issue is outside the scope of this brief, *amici* wish to point out a few of the flaws in petitioner's argument. For one thing, Section 2 is not "prophylactic" at all. Section 2 only works after a discriminatory practice has been put into place and has been challenged in court. Section 5 is far more prophylactic in its ability to protect minority voting rights by stopping such practices from going into effect through the pre-clearance process. In addition, as one of the *amici* submitting this brief (Prof. Canon) explained in his testimony to the Senate Judiciary Committee, petitioner's argument ignores the deterrent effect of Section 5: "There is no doubt that the deterrent effect is real as documented by a recent study by Luis Fraga of the impact of more information requests by the Justice Department on discriminatory voting changes." *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Const., Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 109th Cong. 191 (June 21, 2006) (S. Hrg. 109-822)

League of United Latin American Citizens v. Perry, 548 U.S. 399, 426 (2006) ("The District Court found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State.'" (citation omitted)); *Gingles*, 478 U.S. at 61 ("We conclude that the District Court's approach, which tested data derived from three election years in each [North Carolina] district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard."); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("There was also overwhelming evidence of bloc voting along racial lines [in Burke County, Georgia]."); *Clark*, 88 F.3d at 1397 ("In this case, the district court's finding that racially polarized voting exists [in Mississippi] is beyond question."); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D. 2004) ("The court concludes that substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians in Districts 26 and 27."); *Dillard v. Baldwin Cnty. Comm'n*, 222 F. Supp. 2d 1283, 1290 (M.D. Ala. 2002) ("Plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting."); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002) ("In this case the

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(testimony of Prof. Canon). Finally, without the "ability to elect" retrogression standard that was restored as part of Section 5 in the 2006 VRA reauthorization, minority voters would have little recourse to protect the representational gains achieved under the statute. Therefore, despite petitioner's assertion to the contrary (Pet. Br. 20), Congress reasonably concluded that measures beyond the "traditional remedies" such as 42 U.S.C. §1983 and Section 2 are necessary to solve the problem of ongoing voting discrimination in covered states.

parties have presented substantial evidence that this disturbing fact has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the State and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute."); *Houston v. LaFayette Cnty.*, 20 F. Supp. 2d 996, 1002 (N.D. Miss. 1998) (finding racially polarized voting in LaFayette County, Mississippi); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 756 (N.D. Ga. 1997) ("The single conclusion that can be drawn from the expert testimony is that LaGrange City-Council elections exhibit racially polarized voting."); *DeGrandy v. Wetherell*, 794 F. Supp. 1078, 1079 (N.D. Fla. 1992) ("The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting."), *aff'd in part and rev'd in part on other grounds sub nom. Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Clark v. Roemer*, 777 F. Supp. 445, 454 (M.D. La. 1990) ("The court would agree that there is, for example, evidence of strong racial polarization in Louisiana statewide."); *Ewing v. Monroe Cnty.*, 740 F. Supp. 417, 423 (N.D. Miss. 1990) ("The court finds that a pattern of voting behavior in county and district races clearly shows 'legally significant' racial polarization among both black and white voters.") *Major v. Treen*, 574 F. Supp. 325, 351-52 (E.D. La. 1983) ("A consistently high degree of electoral polarization in Orleans Parish is proven through both statistical and anecdotal evidence. Particularly as enhanced by Louisiana's majority vote requirement, racial bloc voting substantially impairs the ability of black voters in this parish to become fully involved in the democratic process." (footnote omitted)).

B. There Is A Link Between Racially Polarized Voting And Government Discrimination Against Minority Voters.

Congress (and the district court) correctly described the link between racially polarized voting and discriminatory exclusion of minority voters from the democratic process. H.R. Rep. No. 109-478, at 34 ("The Committee finds it significant that the ability of racial and language minority citizens to elect their candidates of choice is affected by racially polarized voting"); 811 F. Supp. 2d at 488 ("Shelby County fails to recognize the close link between racially polarized voting and intentional, state-sponsored minority vote dilution.").

Shelby County's statement that racially polarized voting is "not governmental discrimination" (Pet. Br. 31) misses the point. As far as *amici* are aware, no one has ever claimed that racially polarized voting is state action or even that it is a form of discrimination *per se*. In its legislative findings, Congress did not list racially polarized voting as "*evidence* of continued discrimination." *See* Reauthorization and Amendments Act of 2006 § 2(b)(4) (emphasis added). Instead, as described above, Congress found that minorities are "politically vulnerable" because of racially polarized voting. *Id.* at § 2(b)(3).

Minorities are made vulnerable by racially polarized voting because "[t]he potential for discrimination in environments characterized by racially polarized voting is great." H.R. Rep. No. 109-478, at 35.

Racially polarized voting makes certain discriminatory voting practices possible. For example, racially polarized voting "enables the use of devices such as multi-member districts and at-large elections that dilute the voting strength of minority communities." *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 263 (D.D.C. 2008), *rev'd and remanded on other grounds*, 557 U.S. 193 (2009).

As a result, state electoral changes, some of which might be acceptable in other jurisdictions, can have a discriminatory purpose or effect when made in areas where racially polarized voting exists:[3] "In an environment characterized by racially polarized voting, politicians can predictably manipulate elections—either by drawing districts or setting an issue for a referendum—to 'minimize or cancel out [minority voters'] ability to elect their preferred candidates.'" *United States v. McGregor*, 824 F. Supp. 2d 1339, 1346 (M.D. Ala. 2011) (quoting *Gingles*, 478 U.S. at 48); *see also Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (explaining how racially polarized voting creates an opportunity for state legislatures to dilute the voting strength of politically cohesive minority groups).

The district court was thus correct that "where minorities and non-minorities tend to prefer different candidates, the ability of minorities to elect their candidates of choice can be intentionally reduced through the adoption of a wide variety of dilutive techniques, including the manipulation of district boundaries, the enactment of discriminatory annexations, and the implementation of majority-vote requirements." 811 F. Supp. 2d at 487 (citing *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcom. on the Const., H. Comm. on the Judiciary*, 109th Cong. 1721 (March 8, 2006) (Serial No. 109-103, Vol. II) (appendix to statement of Wade Henderson). "It is only because of the continued existence of racially polarized voting that covered jurisdictions can structure their electoral processes so as to intentionally diminish the ability of minority voters to elect candidates of their choice." 811 F. Supp. 2d at 488 (citing *Voting Rights Act: The Continuing Need for Section 5, Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 59 (Oct. 25, 2005) (Serial No. 109-75) (prepared statement of Richard Engstrom)).

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[3] *See* 42 U.S.C. § 1973c(b) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.").

As such, "[i]f racially polarized voting disappeared entirely—such that there is no correlation between race and voting—it would be virtually impossible for a districting plan to be retrogressive under Section 5." *LaRoque*, 831 F. Supp. 2d at 227 (citing Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 243 (2007)). This gives Section 5 "an elegant, self executing limitation. . . . [S]hould racially polarized voting substantially diminish before twenty-five years have passed—and with it, the ability (and motivation) for legislators to draw dilutive districts—Section 5 will play a dramatically smaller role in state voting procedures even before it officially expires." 831 F. Supp. 2d at 277.

In the meantime, Congress was correct to take into account racially polarized voting when it reauthorized Section 5. Congress observed that instead of decreasing, racially polarized voting is increasing in covered jurisdictions. *See, e.g.*, H.R. Rep. No. 109-478, at 34 ("Testimony presented indicated that 'the degree of racially polarized voting in the South is increasing, not decreasing . . . [and is] in certain ways re-creating the segregated system of the Old South . . . .'"). When racially polarized voting exists, "there is effectively an election ceiling." *Id.* In other words, "[i]n elections characterized by racially polarized voting, minority voters alone are powerless to elect their candidates. Moreover, it is rare that white voters will cross over to elect minority preferred candidates." *Id.* As a result, "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." *Rogers*, 458 U.S. at 623.

II. THE CONGRESSIONAL RECORD INCLUDES AMPLE EVIDENCE OF RACIALLY POLARIZED VOTING, AND IN ANY EVENT ANY ALLEGED SHORTCOMING IN THE LEGISLATIVE RECORD DOES NOT HELP PETITIONER.

Petitioner also argues (Pet. Br. 45-49) that the congressional record does not contain enough evidence of racially polarized voting, and thus Congress allegedly failed to address the issue in sufficient detail before reauthorizing Section 5. This argument fails for two reasons.

First, the Constitution does not impose on Congress the obligation to create a "record" to support its legislation. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.") (citations and quotations omitted); *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties."). Indeed, this Court has held that "Congress is not required to build a record in the legislative history to defend its policy choices." *Mansell v. Mansell*, 490 U.S. 581, 592 (1989). "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. . . . Any contrary conclusion would require us to be blind to the realities familiar to legislators." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). This is especially true where, as here, Congress is extending a statute that has been debated, examined, and passed multiple times. *See Fullilove*, 448 U.S. at 503 (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considered action in that area."). Petitioner's arguments regarding the congressional record disregard these basic principles.

Moreover, petitioner ignores the predictive aspect of the legislative task. The issue is not only what *past* facts were available to the Congress that reauthorized the VRA, but what Congress legitimately could conclude would be likely to occur in the *future* if Section 5's preclearance requirement were to be eliminated in the covered jurisdictions. Congress properly could consider, in other words, not only what has happened during the years that the VRA has regulated behavior, but also what would be likely to happen in the absence of that regulation. As one commentator has observed, "[t]he continuing need for existing legislation like Section 5 requires not documentation of existing unconstitutional conduct but instead speculation about the scope of such conduct absent the preclearance requirement." *See, e.g.*, Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2, in* Voting Rights Act Reauthorization of 2006: Perspectives of Democracy, Participation, and Power 185 (Ana. Henderson ed., 2007). The prophylactic nature of Section 5 and the evidence of its deterrent effect are sufficient. Congress clearly relied on such evidence when it reauthorized Section 5. *See, e.g., Voting Rights Act: The Continuing Need for Section 5 Pre-Clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22-23 (May 16, 2006) (S. Hrg. 109-569) ("[W]e really will see a huge impact if Section 5 is lost.") (testimony of Anita Earls).

Second, contrary to petitioner's assertions, the congressional record here includes ample evidence regarding the persistence of racially polarized voting. As an initial matter, there was testimony regarding racially polarized voting in general and how racially polarized voting can create an environment in which an electoral result harming minority voters can be achieved by making changes to voting procedures or practices. *See, e.g., To Examine the Impact and Effec-*

tiveness of the Voting Rights Act, Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary, 109th Cong. 23 (Oct. 18, 2005) (Statement of Joe Rogers, former Lt. Gov. of Colo.) (Serial No. 109-70) ("[I]n many areas of the country, voting continues to be racially polarized. . . . One consequence of racially polarized voting is that minority voters cannot elect candidates of choice or preference perhaps if it is by race or ethnicity. That simply may not be an option unless there is a majority or near majority of the electorate."); *id.* at 28-29 ("In the last decade, federal court cases involving statewide redistricting plans in Georgia, Louisiana, South Carolina, South Dakota and Texas have found racially polarized voting exists in their states. . . . Because of racially polarized voting, a new voting procedure that harms minority voters is likely to achieve the electoral result desired by state actors who make the change."); *Evidence of Continued Need*, at 214-17, 219 (Serial No. 109-103, Vol. I) (emphasizing that the degree of racially polarized voting in the South is increasing, that redistricting presents the "most dramatic manifestations" of vote dilution, and that redistricting is a battle fought "at least once a decade, given the widespread persistence of racially polarized voting."); *id.* at 301-02 (testimony by expert who has conducted studies since 2000 census confirming racially polarized voting); *id.* at 356-57 (summary of testimony on existence of racially polarized voting); *id.* at 2415-50 (including an "Assessment of Racially Polarized Voting For and Against Latino Candidates"); *Voting Rights Act: The Continuing Need for Section 5 Pre-Clearance*, at 14-22 (S. Hrg. 109-569) (testimony by experts on continuing existence of racially polarized voting); *see also* H.R. Rep. No. 109-478, at 34-35 (explaining racially polarized voting, explaining how racially polarized voting can enable vote dilution to occur, and citing post-1980 case law in which courts have found the existence of racially polarized voting in Florida, Texas, South Carolina, South Dakota and Louisiana). The above sampling of evidence before Congress is surely sufficient to provide a basis for Congress's correct finding that racially polarized voting continues to exist and makes minorities politically vulnerable to discrimination.

Congress also reviewed evidence of racially polarized voting in the covered jurisdictions, and the evidence showed that racially polarized voting is much more pronounced in covered than in non-covered jurisdictions. *See, e.g.*, H.R. Rep. No. 109-478, at 34 ("Testimony presented indicated that 'the degree of racially polarized voting in the South is increasing, not decreasing.'"); *Evidence of Continued Need*, at 53-54 (Serial No. 109-103, Vol. I) (summarizing report on Alabama that included evidence of racially polarized voting); *id.* at 355 (summarizing testimony on "very high degree of racially polarized voting" in North Carolina and giving example of an election affected by racially polarized voting); *id.* at 362-63 (summarizing testimony on existence of racially polarized voting in Virginia and giving an example of a redistricting meeting in 2002 in which the city council of the City of Fredericksburg instructed the city attorney to find a way to draw the lines to eliminate the African-American majority district); *id.* at 365-67 (summarizing testimony on racially polarized voting in Mississippi and how "racially polarized voting in the state was intense, and had majority-black districts not been drawn, there would be few black lawmakers in office there."); *id.* at 1312, 1349-50 (including evidence that in 2000 redistricting in

Alaska, the redistricting board hired a national voting rights expert who found racially polarized voting in certain areas); *id*. at 1403-10 (explaining electoral actions and changes in Arizona with discriminatory effects that could exist only in the context of racially polarized voting); *Evidence of Continued Need* (Serial No. 109-103, Vol. II) at 1503, 1508, 1510 n.44, 1521 (including evidence that federal courts have continued to find racially polarized voting in Georgia); *id*. at 1601-05, 1607-09, 1614-15, 1618, 1621, 1628, 1637, 1639-40 (including evidence that in the face of "persistent racially polarized voting" in Louisiana, electoral gains have largely come about through the existence of minority-majority districts, and discussing specific examples illustrating the effect of racially polarized voting on elections); *id*. at 1709, 1721-23 (including evidence of racially polarized voting in Mississippi post-1980); *id*. at 1974-75 (emphasizing problem of racially polarized voting in South Carolina and including citations to caselaw making such findings); *id*. at 2012-13 (including evidence discussing a 1984 case from Marengo County, Alabama, in which the court held that racially polarized voting, among other things, led to a depressed level of participation by black voters).

Similarly, in contrast to petitioner's assertion (Pet. Br. 45-46), Congress did hear comparative evidence of racially polarized voting in covered versus non-covered jurisdictions, and it correctly found that racially polarized voting is more pronounced in the former. *See, e.g*., H.R. Rep. No. 109-478, at 34-35 (discussing caselaw in which courts have found the existence of racially polarized voting in Florida, South Carolina, Louisiana, Texas, and South Dakota); *Evidence of Continued Need*, at 351 (Serial No. 109-103, Vol. I) (showing that as recently as 2001, California passed the California Voting Rights Act of 2001, which "is designed to confront the widespread degree of racially polarized voting in the state and the inability of many Latino voters to elect candidates of their choice."); *id.* at 215-17 (comparing racially polarized voting in covered and noncovered jurisdictions); *id.* at 1856-62 (discussing racially polarized voting in New York). As the district court correctly concluded, "there is evidence in the record indicating that racially polarized voting is much more pronounced in covered than in non-covered jurisdictions." 811 F. Supp. 2d at 507 (citing *The Continuing Need for Section 5 Pre-Clearance*, at 48 (response of Anita Earls) (S. Hrg. 109-569)). This conclusion is confirmed by an analysis of Section 2 case law. *See, e.g.*, Katz, *Not Like the South?* 196 ("Of the cases in which courts found legally significant racial bloc voting, courts in covered jurisdictions have documented racial polarization in specific elections that was more extreme than have courts in non-covered ones, and have done so at rates that are statistically significant.").

In addition, Congress heard evidence that although racially polarized voting exists in both covered and non-covered states, its existence in covered states is more of a concern. *See, e.g., Voting Rights Act: The Continuing Need for Section 5 Pre-Clearance*, at 14 (S. Hrg. 109-569) ("The question is how [racially polarized voting] interacts with election procedures, with the traditions in the community, with a number of things, and so I think just to say that racially polarized voting exists everywhere and therefore there is no difference between the covered and uncovered jurisdictions, is simply not true.") (testimony of Theodore S. Arrington).

Not only did Congress have a sufficient record of racially polarized voting, but more recent data and caselaw confirm the continued existence of racially polarized voting in the covered jurisdictions. In 2007 and 2008, federal courts found racially polarized voting and minority vote dilution in Mississippi, and relied in part on these conclusions in holding that certain electoral schemes violated the VRA. *See Jamison v. Tupelo*, 471 F. Supp. 2d 706, 713 (N.D. Miss. 2007) ("[T]he evidence submitted by both the plaintiffs and defendants supports a determination that racially polarized voting occurs within the city of Tupelo with recognizable regularity."); *United States v. Brown*, 494 F. Supp. 2d 440, 484 & n.72 (S.D. Miss. 2007) ("defendants have admitted that voting in Noxubee County is racially polarized," and the court cited the findings of one of the *amici* submitting this brief (Prof. Arrington) showing the degree to which voting is racially polarized); *Fairley v. Hattiesburg*, No. 2:06cv167-KS-MTP, 2008 WL 3287200, at *9 (S.D. Miss. August 7, 2008) ("In addition to this history of official discrimination, the evidence also established that the City exhibited extreme racial bloc voting and racially polarized voting patterns in each of the last two municipal elections."). Similarly, in *McGregor*, 824 F. Supp. 2d at 1346, the court found that politicians in Alabama "plainly singled out African-Americans for mockery and racist abuse." The court concluded that "[i]n an era when the 'degree of racially polarized voting in the South is increasing, not decreasing,' Alabama remains vulnerable to politicians setting an agenda that exploits racial differences." *Id.* at 1347 (citation omitted). The same conclusion has been reached in South Carolina, where federal courts have emphasized the continued existence of racially polarized voting. *See United*

States v. Charleston Cnty. Council, 316 F. Supp. 2d 268 (D.S.C. 2003) (recounting evidence of severe degree of racial polarization in South Carolina elections); *see also Colleton*, 201 F. Supp. 2d at 641. And similar findings have been made in Texas, *see, e.g., Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *32 (D.D.C. Aug. 28, 2012) ("[t]he Texas OAG's analysis shows that Hispanic and Black voters in HD 149 uniformly prefer the same candidates in general elections and that their preferences consistently diverge from those of the district's Anglo voters."); *Fabela v. City of Farmers*, No. 10-1425, 2012 WL 3135545, at *11 (N.D. Tex. Aug. 2, 2012) ("The court finds that plaintiffs have proved racial bloc voting through statistical evidence from four elections and testimony by witnesses regarding their voting, thus satisfying the second and third prongs of *Gingles*."); *Benavidez*, 638 F. Supp. 2d at 726 ("The Court finds that the statistical evidence shows that racially polarized voting occurred and the degree of polarization was significant in the last three elections involving Hispanic candidates."), and Arizona, *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) ("Arizona continues to have some degree of racially polarized voting.").

Electoral data confirm the continued existence of racially polarized voting in the covered jurisdictions. For example, the House Judiciary Committee found that "in 2000, only 8 percent of African Americans [serving in Congress] were elected from majority white districts." H.R. Rep. No. 109-478, at 34. The Committee also found that "[l]anguage minority citizens fared much worse. As of 2000, neither Hispanics nor Native American candidates have been elected to office from a majority white district." *Id.* Furthermore, "[i]n certain covered States, such as

Mississippi, Louisiana, and South Carolina, African Americans have yet to be elected to any Statewide office." *Id*. at 33. Given this evidence, the Committee concluded that racially polarized voting showed "continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process," *id*., and therefore found that "racial and language minorities remain politically vulnerable, warranting the [Act's] continued protection." 2006 Amendments § 2(b)(3), 120 Stat. at 577.

Exit polling data from the 2008 presidential election confirm this conclusion. In 2008, President Obama won only one fully covered state (Virginia), and "[i]n several of the covered states, he did worse among white voters than the Democratic nominee four years earlier."[4] *Northwest Austin Municipal Utility District Number One v. Holder*, No. 08-322, 2009 WL 526206, at *3 (U.S. Feb. 26, 2009) (Brief for Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III as Amici Curiae on Behalf of Neither Party). His victory was a result of "an increase in his share of the white vote in noncovered jurisdictions and a nationwide increase in his share of the vote cast by racial minorities. Whites in the covered jurisdictions did not cross over in significant numbers to vote for Obama." *Id*. A detailed analysis of the data by state shows that "[t]he six states with the lowest percentages of white respondents who reported voting for Obama are covered states. Three of those states (Alabama, Mississippi, and Louisiana) reported a drop in the white vote for the Democratic nominee since 2004. All of the covered states are below the national share of the reported white vote received by Obama." *Id.* at *10. Remarkably, the five states reporting the lowest levels of white voting for Obama and the largest gap between how white citizens and how black citizens voted for Obama (all covered states—Mississippi, Louisiana, Georgia, South Carolina, and Alabama) are also in the top six states in terms of the share of the population that is black. *Id.*

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[4] This supports the conclusion by political scientists that partisanship alone does not explain the voting patterns that have been identified in covered jurisdictions.

A review of voting trends on the local level confirms that racially polarized voting has increased in some of the covered states. For instance, Dr. Lisa Handley, comparing the voting patterns by race in recent Alaska elections with an analysis she conducted ten years ago, concluded that "[o]verall, voting was more polarized in Alaska this past decade (2002-2010) than in the previous decade." Dr. Lisa Handley, *A Voting Rights Analysis of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts*, at 17, § 2.7, *available at* http://www.akredistricting.org/Files/Final-Report-of-Dr-Lisa-Handley.pdf. "The Alaska Native-preferred candidate did not win any of the statewide contests that were polarized." *Id.* This information confirms Justice Kennedy's observation in *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009), that "racially polarized voting [is] not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."

changes devised by covered jurisdictions [since 1982] resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; . . . enacting discriminatory annexations and deannexations; . . . changing elections from single member districts to at-large voting and implementing majority vote requirements.").

This time the situation is no different. The House and Senate Judiciary Committees heard testimony "suggesting that, due to the interaction of racially divergent voting patterns and certain electoral structures, minorities in the covered jurisdictions are less likely to elect their preferred candidates." *See, e.g.*, *The Continuing Need for Section 5*, at 49 (statement of Richard Engstrom) (Serial No. 109-75); *The Continuing Need for Section 5 Pre-Clearance*, at 14, 26 (responses of Theodore S. Arrington) (S. Hrg. 109-569); *id.* at 48 (response of Anita Earls).

B. Racially Polarized Voting Is A Necessary Precondition For Vote Dilution To Occur.

Because vote dilution can occur only in an environment of racially polarized voting, racially polarized voting (even though, as discussed above, not itself state action) is one of the elements of a vote dilution claim under Section 2: "[C]ourts and commentators agree that racial bloc voting is a key element of a vote dilution claim."[6] *Gingles*, 478 U.S. at 55 (citing cases). Specifically, to establish vote dilution under Section 2, the minority group, as an initial matter, must be able to demonstrate that

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[6] "The terms 'racially polarized voting' and 'racial bloc voting' are used interchangeably." 478 U.S. at 52 n.18.

(1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51.

In a decision issued a month before the VRA was reauthorized, this Court recognized the association between racially polarized voting and a vote dilution claim: "[G]iven the presence of racially polarized voting—and the possible submergence of minority votes—throughout Texas, it makes sense to use the entire State in assessing proportionality." *League of United Latin American Citizens*, 548 U.S. at 438.

C. Redistricting Can Be Used to Effect Vote Dilution.

Redistricting is the most obvious example of the importance of racially polarized voting to the Section 5 analysis, as redistricting in areas where racially polarized voting occurs can have the effect of unconstitutional discrimination. For example, redistricting to eliminate minority-majority districts in areas where racially polarized voting occurs can deprive minority citizens of a meaningful, effective vote and can prevent minorities from obtaining office.

Several of the *amici* briefs submitted in support of Shelby County assert that supporting minority-majority districts increases racial polarization. *See, e.g.*, Brief of the Center for Constitutional Jurisprudence as *Amicus Curiae* in Support of Petitioner at 14 ("[I]f Section 5 affects racial polarization at all, it likely exacerbates it rather than diminishes it."). According to the Center for Constitutional Jurisprudence, "[b]y retaining Section 5 pre-clearance, the government would perpetuate the precise racially polarized voting tendencies that the government purports to condemn." (CCJ Br. 15.) None of the *amici* making such an argument, however, provides any empirical evidence to support its claim.

In reality, the assumption that minority-majority districts are racially polarizing is false. David T. Canon, ***Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts*** (University of Chicago Press 1999). Based on his study of sponsorship and co-sponsorship of legislation, speeches on the floor, roll call voting, committee assignments, leadership positions, constituency newsletters, district office location, and coverage of the member's activities in local press reports addressing how legislators represent racial interests, one of the *amici* submitting this brief (Professor Canon), found that African-American members of Congress spent more of their time representing the interests of all of their constituents, while white members of Congress (who had at least 25% of their constituents who were African American) were not as balanced in their legislative behavior. *Id.* at 143-242.

The reason for this, as Professor Canon has explained, is that in primary elections white voters in black majority districts become swing voters who ultimately decide the winner. *Id.* at 126-39. Thus, in Democratic primaries (given that black majority districts are strongly Democratic) in which several African American candidates compete against each other, it is the "commonality" candidate who can appeal to white and black voters alike who is more likely to win. *See id.*, ch. 3. Minority-majority districts, therefore, promote a "politics of commonality" rather than a "politics of difference." *Id.* at 42-51. In short, rather than perpetuating racial polarization, minority-majority districts give African Americans a greater voice in the political process while simultaneously helping promote the effective representation of white voters in such districts.

IV. VOTE DILUTION DOES JUSTIFY PRE-CLEARANCE.

Petitioner argues that vote dilution does not justify pre-clearance, and provides two bases for this argument. Pet. Br. 32. First, petitioner maintains that it is improper to consider evidence of intentional minority vote dilution in justifying reauthorization of Section 5 because Section 5 enforces the Fifteenth Amendment and "vote dilution does not violate the Fifteenth Amendment." *Id.* Second, petitioner contends that "the character of modern vote dilution cannot justify preclearance . . . [because] whereas the South during the 1960s was plagued with vote-denial schemes interfering with ballot access, modern vote dilution claims involve diminishing the effect of ballots once cast." *Id.* Both arguments fail for the same reasons expressed by the lower courts.

A. Vote Dilution Can Be Used As Evidence To Sustain The Reauthorization Of Section 5.

Although this Court has never expressly considered whether vote dilution violates the Fifteenth Amendment, it also has not, as petitioner wrongly argues, held that "vote dilution does not violate the Fifteenth Amendment." Pet. Br. 32. At all events, the argument that evidence of minority vote dilution cannot be relied upon in upholding the constitutionality of

Section 5 is belied by this Court's previous decision in *City of Rome v. United States*, 446 U.S. 156 (1980). *See Shelby Cnty.*, 811 F. Supp. 2d at 489.

In *City of Rome*, the Court relied on evidence of minority vote dilution in upholding the constitutionality of Congress's reauthorization of Section 5 under the Fifteenth Amendment. 446 U.S. at 181-82. In holding that "[t]he extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment," the Court focused, in part, on the following language by Congress to justify extension of the Act:

> The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. *As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength.*

Id. at 181 (emphasis added) (citations omitted). This language is contained within the Court's discussion of the Fifteenth Amendment right specifically.

In addition, as the court of appeals explained here, although previous decisions upholding Section 5 have focused on Congress's power under the Fifteenth Amendment, "the same 'congruent and proportional' standard, refined by the inquiries set forth in *Northwest Austin*, appears to apply 'irrespective of whether Section 5 is considered [Fifteenth Amendment] enforcement legislation, [Fourteenth Amendment] enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments.'" *Shelby Cnty. v. Holder*, 679 F.3d 848, 864 (D.C. Cir. 2012) (citations omitted). This rationale is consistent with

Congress's understanding, as it invoked its authority under both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006. *Id.*

B. The Right To Vote Involves More Than Mere Access To Casting A Ballot, And Includes The Right To A Meaningful Vote.

Petitioner argues that vote dilution does not justify Section 5's pre-clearance requirement because modern vote dilution claims do not involve interference with ballot access, but rather "involve diminishing the effect of ballots once cast." Pet. Br. 32. This is a distinction without a difference, as a diluted and ineffective vote is a vote that does not count. It should go without saying that provision of ballot access to minorities is meaningless if their votes are not given the same meaning and effect as votes cast by persons in the majority group. Thus, "modern vote dilution claims" address the same problem as past vote dilution claims involving interference with ballot access, and provide a sound basis for Section 5's pre-clearance requirement.

Indeed, Congress made clear in its 2006 reauthorization of the VRA that "[t]he purpose of this Act is to ensure that the right of all citizens to vote, including the right to register to vote and *cast meaningful votes*, is preserved and protected as guaranteed by the Constitution." Pub. L. No. 109-246, § 2(a), 120 Stat. 577 (emphasis added). Similarly, this Court has recognized that Section 5 bars electoral changes interfering with a citizen's right to cast a meaningful vote. *See Allen*, 393 U.S. at 569 ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

As one of the *amici* submitting this brief (Prof. Arrington) explained in his testimony before the Senate Judiciary Committee on the reauthorization of the VRA, the interplay between racially polarized voting and election procedures can cause vote dilution, precluding the right to cast a meaningful vote:

> When the candidates chosen by the minority voters and those chosen by the majority group differ, election systems and arrangements must be able to provide equal opportunity for the minority voters to elect representatives of their choice. Section 5 of the Voting Rights Act requires covered jurisdictions to consider whether minority voters have such an equal opportunity. Section 2 of the Voting Rights Act provides a mechanism for assuring such equal opportunity throughout America. Both parts of the Voting Rights Act are still needed because seemingly racially neutral election procedures such as at-large voting, major vote requirements, and anti-single-shot provisions may combine with racially polarized voting to erect effective barriers to the ability of minority voters to have an equal opportunity to participate in the political process and an equal opportunity to elect representatives of their choice.

Continuing Need for Section 5 Pre-Clearance, at 8 (S. Hrg. 109-569) (statement of Theodore S. Arrington); *see also Shelby Cnty.*, 679 F.3d at 865 ("Consideration of this evidence is especially important given that so-called 'second generation' tactics like intentional vote dilution are in fact decades-old forms of gamesmanship.").

"The history of Section 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power." *Georgia v. Ashcroft*, 539 U.S. at 494 (Souter, J., dissenting). Vote dilution perpetuates the exclusion of minority voters from participating on a level playing field in our democratic process. Section 5 never had the limited purpose petitioner claims, and minority vote dilution properly served as a basis for Congress's reauthorization of that statutory provision. This Court recently recognized its duty to save an act of Congress, if such an interpretation exists: "'[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

Congress established a substantial legislative record justifying the renewal of pre-clearance under the VRA for another 25 years. The extension passed with overwhelming bipartisan support in a House and Senate controlled by the Republican Party. The House passed the Act by a 390-33 vote, the Senate passed it by a unanimous 98-0 vote, and it was signed into law by President George W. Bush. In this period of extreme partisan politics, which has reached record levels in recent years, it is difficult to get such strong bipartisan support for anything.

Of course, there are some who disagree with the extension. None of their criticism, however, rises to the level of establishing that the extension is unconstitutional. Both the district court and the court of appeals properly deferred to Congress's judgment: "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 pre-clearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference." *Shelby Cnty.*, 679 F.3d at 874. *Amici* urge this Court to recognize Congress's power under the Constitution to continue the pursuit of true voting equality in this country and to grant the 2006 extension "the full measure of deference owed to federal statutes." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner.
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. EVEN A SIMPLE REAUTHORIZATION OF SECTION 5 IN ITS EXISTING FORM WOULD HAVE BEEN UNCONSTITUTIONAL 5

II. CONGRESS AGGRAVATED THE INHERENT CONSTITUTIONAL DEFECTS OF SECTION 5 BY OVERRULING THIS COURT'S DECISIONS AND ALTERING THE SUBSTANTIVE STANDARD FOR PRECLEARANCE 7

  A. This Court's Decisions in *Georgia v. Ashcroft* and *Bossier Parish II* Were Critical To Alleviating the Constitutional Flaws of Section 5 8

  B. Congress Worsened the Inherent Problems of Section 5 by Overruling *Georgia* and *Bossier Parish II* 11

III. DOJ'S AGGRESSIVE ENFORCEMENT STRATEGY HAS FURTHER EXACERBATED SECTION 5'S CONSTITUTIONAL DEFECTS 17

  A. DOJ Has Refused To Preclear Legislation That is Unquestionably Permissible in Non-Covered Jurisdictions 18

  B. DOJ Has a Long Record of Overreach in Section 5 Cases 22

IV. EXCESSIVE INTERVENTION BY PRIVATE PARTIES AND INTEREST GROUPS IN JUDICIAL PRECLEARANCE CASES HAS COMPOUNDED THE INHERENT CONSTITUTIONAL BURDENS OF SECTION 5 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Beer v. United States,
425 U.S. 130 (1976) 8

City of Boerne v. Flores,
521 U.S. 507 (1997) 5, 16

Crawford v. Marion County Election Bd.,
553 U.S. 181 (2008) 3, 18, 19

Easley v. Cromartie,
532 U.S. 234 (2001) 15

Elkins v. United States,
364 U.S. 206 (1960) 14

Georgia v. Ashcroft,
539 U.S. 461 (2003) .... *passim*

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012),
cert. granted No. 12-71 20

Hays v. Louisiana,
839 F. Supp. 1188 (W.D. La. 1993) 24

Hunt v. Cromartie,
526 U.S. 541 (1999) 15

LaRoque v. Holder,
679 F.3d 905 (D.C. Cir. 2012),
cert. denied No 12-81 22

Miller v. Johnson,
515 U.S. 900 (1995) 7, 15, 22, 23

Morris v. Gressette,
432 U.S. 491 (1977) 27

Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) .... *passim*

Patterson v. New York, 432 U.S. 197 (1977) 14

Perry v. Perez, 132 S.Ct. 934 (2012) 2

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 14

Reno v. Bossier Parish School Board, 528 U.S. 320 (2000) 2, 8, 9, 15

Ricci v. DeStefano, 557 U.S. 557 (2009) 6

Shaw v. Hunt, 517 U.S. 899 (1996) 24

Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012) .... *passim*

South Carolina v. United States, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) 20

Texas v. Holder, 2012 WL 3743676 (D.D.C. Aug. 30, 2012) 20

Texas v. United States, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) 25

Statute

42 U.S.C. § 1973c 1, 7, 12, 14

Other Authorities

Charlie Savage, *Holder, at NAACP Event, Criticizes Voter ID Laws* (July 10, 2012) 20

H.R. Rep. No. 109-478 14

Michael J. Pitts,
Redistricting and Discriminatory Purpose,
59 American Univ. L. Rev. 1575 (2010) 12

National Conference of State Legislatures,
Absentee and Early Voting
(updated Sept. 4, 2012) 21

Nathaniel Persily,
The Promise and Pitfalls of
the New Voting Rights Act,
117 Yale L.J. 174 (2007) 14, 16

United States' Proposed Findings of Fact
and Conclusions of Law,
Florida v. Holder,
No. 1:11-cv-01428 (D.D.C. May 3, 2012) 21

United States' Proposed Findings of Fact
and Conclusions of Law,
Texas v. Holder,
No. 1:12-cv-00128 (D.D.C. June 25, 2012) 21

Letter from William Moschella,
Assistant Attorney General,
to Hon. James Sensenbrenner
(Apr. 12, 2006) 23, 24

INTEREST OF *AMICI CURIAE* [1]

Amici Hans von Spakovsky, J. Christian Adams, Clint Bolick, Roger Clegg, Charles J. Cooper, Robert N. Driscoll, William Bradford Reynolds, and Bradley Schlozman have all served in senior positions in the Civil Rights Division of the Department of Justice. *Amicus* Joel Mandelman served as Deputy General Counsel of the U.S. Commission on Civil Rights. *Amici* have extensive experience with the Voting Rights Act and the Department's enforcement policies, and have a substantial interest in ensuring that that any race-based remedial measures, such as Section 5 of the Act, comply with the Constitution. A number of *amici* joined a brief in support of the petitioner in the last major constitutional challenge to Section 5, *Northwest Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322.

SUMMARY OF ARGUMENT

This Court has rarely mentioned Section 5 of the Voting Rights Act ("VRA") in recent years without mentioning in the same breath the serious constitutional issues raised by that provision. Section 5 prohibits "covered jurisdictions" from implementing any changes to their election procedures until those changes are submitted to, and approved by, either the Attorney General or a three-judge district court. *See* 42 U.S.C. § 1973c. In doing so, Section 5 differentiates between the states despite "our historic tradition that all the states enjoy 'equal sovereignty'"; uses a coverage formula based on 40-year-old data that no longer reflects where discrimination is most likely to occur; and forces states to rely excessively on racial considerations in designing their election policies. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04 (2009); *see also Perry v. Perez*, 132 S.Ct. 934, 942 (2012) (noting the "'serious constitutional questions' raised by § 5's intrusion on state sovereignty").

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Counsel for all parties have consented to the filing of this brief.

In light of this Court's repeated articulation of the constitutional flaws of Section 5, Congress and DOJ could have taken a number of different steps to ease those concerns and place the statute on more sound constitutional footing. Congress, for example, could have updated the coverage formula to ensure a better fit between current burdens and current needs, or relaxed the substantive standard for granting preclearance. DOJ, for its part, could have adopted a restrained enforcement strategy that minimized costly litigation and quickly precleared voting changes in covered jurisdictions that were similar to valid statutes in non-covered jurisdictions.

Instead, both Congress and DOJ have taken a number of actions that have only exacerbated the already-serious constitutional flaws of Section 5. In the 2006 reauthorization of the VRA, Congress abrogated two of this Court's most important decisions interpreting Section 5, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). Both of those decisions relied on the canon of constitutional avoidance and were critical to preventing an unconstitutionally overbroad application of Section 5. Yet the 2006 reauthorization discards *Georgia* and *Bossier Parish II*, and significantly expands the substantive grounds on which DOJ or the district court can refuse to preclear a change in voting procedures.

DOJ, too, has used Section 5 to block a number of voting changes in covered jurisdictions that closely resemble laws already in force in non-covered jurisdictions. For example, this Court has held that an Indiana statute requiring voters to present photo identification is facially constitutional, *see Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), yet DOJ has sought to prevent Texas and South Carolina from adopting similar legislation. Worse yet, many of DOJ's objections to preclearance rely on amorphous allegations of discriminatory "purpose" that cannot be resolved without extensive and costly discovery and, often, a full trial on the merits. Covered jurisdictions are subject to these burdens solely because of a formula that relies on nearly 40-year-old data and has taken no account whatsoever of the fact that "[t]hings have changed" over the intervening four decades. *Northwest Austin*, 557 U.S. at 202.

Moreover, rampant intervention by private parties and interest groups in recent Section 5 cases has significantly exacerbated the inherent constitutional burdens of the statute. Private intervention is unobjectionable in a normal case in which the plaintiff bears the burden of proof. But it is a staggering intrusion into state sovereignty in the

Section 5 context, as intervention allows private parties and interest groups to flip the burden of proof to a covered jurisdiction to justify its duly enacted laws. Indeed, the D.C. district court has routinely allowed private intervenors to raise claims and arguments that DOJ itself has found to be meritless. Intervention by dozens of private parties also significantly increases the monetary costs of Section 5 litigation by compounding the burdens of discovery, motions practice, briefing, and trial. Private parties have a more-than-adequate remedy for any alleged discrimination under Section 2 of the VRA and the Equal Protection Clause. Allowing them to have a second bite at the apple by intervening in Section 5 cases serves no purpose other than to magnify the burdens of the preclearance remedy for covered jurisdictions.

* * *

Rather than heed this Court's repeated calls for restraint, Congress' and DOJ's recent actions—as well as unchecked private intervention in judicial preclearance cases—have only worsened the grave constitutional flaws of Section 5. Things have unquestionably changed for the better in covered jurisdictions over the last 40 years, yet the burdens of Section 5 have become more onerous. Enough is enough. Because the political branches are unable or unwilling to adapt Section 5 to dramatically changed circumstances, this Court's intervention is now warranted. The Court should hold that conditions in covered jurisdictions no longer "continue to justify" the extraordinary burdens imposed by Section 5. *Northwest Austin*, 557 U.S. at 211.

ARGUMENT

I. EVEN A SIMPLE REAUTHORIZATION OF SECTION 5 IN ITS EXISTING FORM WOULD HAVE BEEN UNCONSTITUTIONAL

The 2006 reauthorization of Section 5 would not have passed constitutional muster even if Congress had made no substantive changes to the statute. As Shelby County explains, the formula used to determine which jurisdictions are covered by Section 5 relies on badly outdated data and fails to identify the jurisdictions most likely to engage in discriminatory voting practices. Pet. Br. 43-54; *see also Shelby County v. Holder*, 679 F.3d 848, 889-900 (D.C. Cir. 2012) (Williams, J., dissenting) (concluding that the "equivocal evidence" of discrimination in covered jurisdictions cannot "sustain" Section 5). Indeed, the disparity in voter registration rates between African-American and white citizens in covered jurisdiction has "nearly vanished," and minority registration and turnout rates *exceed* those of white voters in several covered jurisdictions. *Northwest Austin*, 557 U.S. at 227 (Thomas, J., concurring in part and dissenting in part).

Even if there were some plausible nexus between the coverage formula and likely constitutional violations, the severe remedy of forcing covered jurisdictions to seek advance federal approval of their duly enacted laws is "so out of proportion . . . that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997); *see* Pet. Br. 24-33; *Northwest Austin*, 557 U.S. at 228 (Thomas, J., concurring in part and dissenting in part) (concluding that "the existence of discrete and isolated incidents of interference with the right to vote" is not "sufficient justification for the imposition of § 5's extraordinary requirements").

Section 5's use of an "effects" test also raises serious constitutional concerns, as it forces covered jurisdictions to engage in race-conscious decisionmaking. For example, covered jurisdictions will face a strong incentive to engage in racial gerrymandering in order to ensure racially proportionate election results. *See* Part III.B, *infra*; *see also Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (noting that the disparate-impact provisions in Title VII raise serious equal protection concerns because they "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes").

The Fourteenth and Fifteenth Amendments protect every citizen's right to vote and right to have that vote accurately tallied, regardless of the voter's race. But no citizen has a constitutional right to any particular electoral *outcome*—*i.e.*, being represented by someone of the same race, national origin, or ethnic background. Yet Section 5's "effects" test mandates just such a result—a particularly dramatic illustration of why the statute exceeds Congress' enforcement authority under the Fourteenth and Fifteenth Amendments.

II. CONGRESS AGGRAVATED THE INHERENT CONSTITUTIONAL DEFECTS OF SECTION 5 BY OVERRULING THIS COURT'S DECISIONS AND ALTERING THE SUBSTANTIVE STANDARD FOR PRECLEARANCE

In order to obtain preclearance under Section 5, a covered jurisdiction must demonstrate that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The "limited substantive goal" of Section 5 is to ensure that "'no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise.'" *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

When Congress reauthorized Section 5 in 2006, it did not write on a blank slate. This Court's decisions in *Georgia v. Ashcroft* and *Bossier Parish II* had interpreted both the "purpose" and "effects" prongs of the statutory test in a manner that ameliorated the inherent constitutional burdens of the statute. Remarkably, Congress abrogated both of those decisions in the 2006 reauthorization. As a result, even though covered jurisdictions have made great progress since the VRA was enacted in 1965—and now perform as well as (or better than) non-covered jurisdictions on most measures of voting equality, *see Northwest Austin*, 557 U.S. at 202-04; Pet. Br. 28-33, 43-54—it has become considerably harder for covered jurisdictions to meet the substantive standard for preclearance.

A. This Court's Decisions in *Georgia v. Ashcroft* and *Bossier Parish II* Were Critical To Alleviating the Constitutional Flaws of Section 5

1. *Bossier Parish II* involved a challenge to the new electoral districts for a Louisiana school board. It was undisputed that, compared to the preexisting "benchmark" plan, the new plan "did not worsen the position of minority voters," and thus did not have a retrogressive effect. 528 U.S. at 324. The Attorney General nonetheless denied preclearance, arguing that new plan had a discriminatory purpose because the Parish did not maximize the number of majority-minority districts. *Id.* at 325.

This Court squarely rejected DOJ's interpretation of the "purpose" test, holding that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Id.* at 341. That is, the relevant inquiry is not whether there was *any* discriminatory purpose, but whether there was a *specific* purpose to retrogress minority voting strength compared to the benchmark plan. As the Court explained, Section 5 "prevents nothing but backsliding, and preclearance under Section 5 affirms nothing but the absence of backsliding." *Id.* at 336. A holding that Section 5 reached any kind of discriminatory purpose also would have been inconsistent with this Court's decisions interpreting the "effects" prong of the statute as requiring "*retrogressive* effects." *Beer*, 425 U.S. at 141 (emphasis added); *see id.* (noting that "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account or race").

The decision in *Bossier Parish II* expressly turned on the canon of constitutional avoidance. This Court emphasized that extending Section 5 to "discriminatory but nonretrogressive vote-dilutive purposes" would "blur the distinction between Section 2 and Section 5," and "change the Section 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." 528 U.S. at 336. That reading of the statute would "exacerbate the 'substantial' federalism costs the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about Section 5's constitutionality." *Id.*

2. *Georgia v. Ashcroft*, which addressed Georgia's redistricting plans following the 2000 census, was an equally important decision regarding the "effects" prong of the preclearance standard. The challenged plans, which were strongly supported by African-American legislators, "unpacked" the most heavily concentrated majority-minority districts in order to create several new "influence" districts. 539 U.S. at 470-71. That is, the legislature chose to reduce the number of districts with a black voting age population in excess of 60% and instead create additional districts with a black voting age population between 25% and 50%. The goal of this plan was to "bring[] people together" by eliminating districts that overwhelmingly consisted of voters of a single race. *Id.* at 470. The district court nonetheless refused to preclear Georgia's plans,

holding that the plans had a retrogressive effect because they reduced the opportunity for the "black candidate of choice" to win election, and "diminish[ed] African American voting strength" in existing majority-minority districts. *Id.* at 474.

This Court reversed. The Court held that the question whether a challenged practice has a retrogressive effect "depends on an examination of *all the relevant circumstances*, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id.* at 479 (emphasis added). The comparative ability of a minority group to elect a candidate of its choice is "important" in the retrogression inquiry but "cannot be dispositive or exclusive." *Id.* at 480.

The Court further held that "Section 5 gives States the flexibility to choose one theory of effective representation over the other." *Id.* at 482. Some states might choose to create a small number of "safe" majority-minority districts. That approach "virtually guarantee[s]" the election of the group's preferred candidate, but "risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts." *Id.* at 480-81. Alternatively, a state might choose to create "influence districts" with lower percentages of minority voters. This increases the risk that the preferred candidate will lose, but promotes the creation of multi-racial coalitions. *Id.* at 481. The core holding of *Georgia* is that Section 5 does not mandate one approach over the other, but leaves each state substantial discretion about how best to accommodate its own unique interests. *See id.* at 483 (Section 5 "leaves room for States to use these types of influence and coalitional districts").

The Court emphasized once again that "[t]he purpose of the [VRA] is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Id.* at 490. Thus, "the [VRA], as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Id.* at 490-91.

Justice Kennedy concurred. While agreeing that "our decisions controlling the § 5 analysis require the Court's ruling here," he noted that "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5." *Id.* at 491 (Kennedy, J., concurring). Justice Kennedy emphasized that "the discord and inconsistency" between § 2 and § 5 "should be confronted," and that "[t]here is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Id.*

B. Congress Worsened the Inherent Problems of Section 5 by Overruling *Georgia* and *Bossier Parish II*

Because of the badly outdated coverage formula and disproportionate remedy, even a simple reauthorization of Section 5 would have been unconstitutional. *See supra* Part I. But the 2006 reauthorization goes far beyond that, by significantly broadening the substantive grounds on which voting changes can be denied preclearance. Congress expressly overruled this Court's decisions in *Georgia* and *Bossier Parish II*, even though both of those decisions relied on the canon of constitutional avoidance and were critical to alleviating Section 5's inherent constitutional defects. That is, despite "warning upon warning upon warning regarding Section 5's constitutional frailties," Congress "responded in its 2006 extension of Section 5 not with conciliation toward the Court's concerns but by poking the Court in the eye."[2]

1. As explained above, *Georgia* gave states significant discretion to choose whether to have a smaller number of "safe" majority-minority districts or a larger number of "influence" districts. The 2006 amendments to the VRA foreclose that choice. Congress rejected *Georgia*'s totality-of-the-circumstances analysis and instead provided that the sole inquiry is whether the challenged law "has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b); *see also id.* § 1973c(d) (providing that the purpose of this amendment "is to protect the ability of [minority] citizens to elect their preferred candidates of choice").

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[2] Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 American Univ. L. Rev. 1575, 1652-53 (2010).

The "exclusive focus" of Section 5 is now "whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting). As Judge Williams explained, this amendment to Section 5's substantive standard "not only mandates race-conscious decisionmaking, but a particular brand of it." *Id.*

The effect will be ossification of existing majority-minority districts, which will prevent policymakers from experimenting with different types of districts that may promote good governance and cooperation between racial groups. For example, influence and coalition districts may "increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group." *Georgia*, 539 U.S. at 481. Yet the 2006 amendment to Section 5 creates a one-way ratchet that bars covered jurisdictions from making existing majority-minority districts less "safe." This is a severe intrusion into state redistricting prerogatives, and it guarantees that racial considerations will continue to be front and center in the redistricting process.

Congress' overruling of *Georgia* thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between Section 5 and the Reconstruction Amendments' commitment to nondiscrimination." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting).

2. In the 2006 reauthorization, Congress also abrogated this Court's decision in *Bossier Parish II* by adding to Section 5 a new provision stating that the term "purpose" "shall include *any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added); *see also* H.R. Rep. No. 109-478, at 93 (Congress "rejects the Supreme Court's holding in *Reno v. Bossier Parish*").

This change is no mere technicality. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 217 n.165 (2007) (arguing that the "potential impact" of overruling *Bossier Parish II* "should not be understated"). Because Section 5 reverses the ordinary burden of proof, the new "any discriminatory purpose" standard will effectively force covered jurisdictions to prove that hundreds of legislators *did not* act with a particular motivation in passing the challenged law. *See Elkins v. United States*, 364 U.S. 206, 218 (1960) (it is "never easy to prove a negative"); *Patterson v. New York*, 432 U.S. 197, 211 n.13 (1977) (finding it "generally unfair" to require a litigant to prove a negative).

That inherently amorphous inquiry will be even more complicated when race and partisan affiliation are closely correlated. This Court has repeatedly held that discriminatory purpose requires an action to be taken "'because of,' not merely in 'spite of,'" racial considerations. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). That is, "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be [minority] Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("[c]aution is especially appropriate" before finding a discriminatory purpose when "the voting population is one in which race and political affiliation are highly correlated"). When the burden of proof is on the state, and race and partisanship substantially overlap, it will be extremely difficult for the state to prove that it was acting with a legitimate partisan purpose rather than an unlawful racial purpose. As a result, Section 5 will often serve to protect the *political party* favored by minority voters, even if the challenged voting change was not made "on account of" (*i.e.*, because of) racial considerations.

Moreover, if Section 5 broadly bars "any" discriminatory purpose, then DOJ can use it to block voting changes on grounds that have nothing to do with retrogression. Indeed, in *Bossier Parish II*, DOJ divined a discriminatory purpose from the district's *failure to maximize* minority seats, even though it was undisputed that there was no actual retrogression compared to the benchmark plan. 528 U.S. at 324-25; *see also Miller*, 515 U.S. at 927 (DOJ's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act . . . into tension with the Fourteenth Amendment").

By overruling *Bossier Parish II*, Congress has now reauthorized the same type of free-ranging "purpose" inquiry under which DOJ pursued its patently unconstitutional failure-to-maximize policies throughout the 1990s. *See Shelby County*, 679 F.3d at 887-88 (Williams, J., dissenting) (discriminatory purpose claims under Section 5 were "precisely the device that [DOJ] had employed in its pursuit of maximizing majority-minority districts at any cost"). As Professor Persily presciently explained in 2007, "[t]here is a risk that the purpose inquiry will turn into another opportunity for partisan infection of the preclearance process—for example, with a Democratic-leaning DOJ determining that all Republican gerrymanders in jurisdictions with heavy minority populations have discriminatory purposes or finding that failure to maximize the number of majority-minority districts constitutes discriminatory purpose." Persily, 117 Yale L.J. at 217 n.165. At the very least, "[t]he purpose inquiry provides a lot of discretion to the DOJ," and "[j]urisdictions may feel that they must accede to DOJ pressures applied in the short, stressful period preceding an election." *Id.*

3. The D.C. Circuit majority refused to address Congress' alteration of the preclearance standard on the ground that Shelby County had not brought a *separate* challenge to the substantive amendments to Section 5. *See Shelby County*, 679 F.3d at 883-84. But Shelby County did bring a facial challenge to "Congress' decision in 2006 to reauthorize until 2031 the preclearance obligation of Section 5 of the VRA under the pre-existing coverage formula." Pet. 2. The substantive standard for granting preclearance is critical to any assessment of whether Section 5, on its face, is "congruen[t] and proportional[]" to the harm Congress sought to remedy. *Boerne*, 521 U.S. at 520. As Judge Williams explained, "[t]o answer that question one must necessarily first assess the severity of the consequences of coverage." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting).[3] Congress' abrogation of *Georgia* and *Bossier Parish II* is properly before the Court, and further underscores the unconstitutionality of the 2006 reauthorization of Section 5.

III. DOJ'S AGGRESSIVE ENFORCEMENT STRATEGY HAS FURTHER EXACERBATED SECTION 5'S CONSTITUTIONAL DEFECTS

Not content with both the reauthorization of Section 5 and a significant expansion of the substantive grounds on which preclearance can be denied, DOJ has also doubled down on an aggressive enforcement strategy that has dramatically increased the costs and burdens borne by covered jurisdictions.

In particular, DOJ has refused to preclear a number of state laws in covered jurisdictions that are routinely implemented in non-covered jurisdictions. As a result, covered jurisdictions must engage in costly and wasteful litigation in order for their statutes to take effect, while similar laws in non-covered jurisdictions are presumptively valid and may take effect immediately. *See Shelby County*, 679 F.3d at 885 (Williams, J., dissenting) (Section 5 requires "state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes"). The sole reason for this grossly disparate treatment is a formula based on 40-year-old data that fails to acknowledge in any way that "[t]hings have changed" in covered jurisdictions since the VRA was enacted in 1965. *Northwest Austin*, 557 U.S. at 202.

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[3] The majority was also wrong on the facts, as Shelby County did challenge Congress' modifications of the substantive preclearance standard. *See* Plaintiff's Consolidated Reply Memorandum in Support of Motion for Summary Judgment at 50-51, Dkt. 65, No. 1:10-cv-651 (D.D.C. Dec. 13, 2010); Reply Brief for Appellant at 24-25, No. 11-5256 (D.C. Cir. Dec. 15, 2011).

A. DOJ Has Refused To Preclear Legislation That is Unquestionably Permissible in Non-Covered Jurisdictions

1. The second-class status of covered jurisdictions is most readily apparent in the context of laws requiring voters to present photo identification at the polls.

This Court has emphasized that "[t]here is no question about the legitimacy or importance of [a] State's interest in counting only the votes of eligible voters." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op.). Moreover, "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* While "the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.*; *see also id.* at 197 (noting that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process").

The Court thus rejected a facial challenge to Indiana's voter identification law. For most voters, the law was unlikely to "even represent a significant increase over the usual burdens of voting." *Id.* at 198. And, although "a somewhat heavier burden may be placed on a limited number of persons," the Court concluded that the "severity" of this burden would be lessened by a provision allowing voters to cast provisional ballots if they did not have photo identification at the polls. *Id.* at 199. The challengers bore a "heavy burden of persuasion," and this Court found that the "precise interests advanced by the State" were "sufficient to defeat [the] facial challenge. *Id.* at 200, 203; *see also id.* at 204 (Scalia, J., concurring) (concluding that the "burden at issue is minimal and justified").

Non-covered jurisdictions are thus free to enact laws requiring voters to present photo identification, and Indiana, Kansas, Pennsylvania, and Tennessee have done just that. Those statutes are deemed facially valid, and the burden of proof is on the plaintiffs in any Section 2 or Equal Protection challenge.

In light of this Court's decision in *Marion County*, one might have expected that DOJ would readily preclear voter identification statutes in covered jurisdictions as well. Instead, however, DOJ sought to prevent Texas and South Carolina from implementing statutes that closely resemble the Indiana law this Court found to be facially constitutional.[4] Both cases have entailed massive document discovery, dozens of intervenors, dueling expert witnesses, and trials with live testimony. Even though the Texas and South Carolina statutes were both enacted in May 2011, neither was in force for the fall 2012 election cycle because Section 5 litigation remained pending.[5]

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[4] The Texas and South Carolina statutes are also similar to a Georgia voter identification law that DOJ precleared in 2005 under the previous administration.

This disparate treatment is particularly baffling given that Texas and South Carolina have *higher* minority registration and voting rates, and more African-American elected officials, than Indiana. *See Shelby County*, 679 F.3d at 902 (Williams, J., dissenting). Yet DOJ has refused to allow Texas' and South Carolina's duly enacted statutes to take effect, and the Attorney General has grossly mischaracterized these statutes as "poll taxes."[6] It strains credulity to suggest that statutes offering *free* identification to voters—and that are similar to a statute this Court found to be facially constitutional—are akin to the most egregious form of voting discrimination from the Jim Crow era. *See Gonzalez v. Arizona*, 677 F.3d 383, 408-410 (9th Cir. 2012) (*en banc*), *cert. granted* No. 12-71 (rejecting argument that a proof-of-citizenship requirement was analogous to a poll tax because that requirement "is related to the state's legitimate interest in assessing the eligibility and qualifications of voters ... and the burden is minimal under [*Marion County*]").

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[5] After nearly a year of litigation, South Carolina received judicial preclearance of its voter identification statute, albeit not in time for the 2012 election cycle. *See South Carolina v. United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). The D.C. district court refused to preclear Texas' voter identification law, *see Texas v. Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), and Texas has announced that it intends to appeal that decision.

[6] *See* Charlie Savage, *Holder, at NAACP Event, Criticizes Voter ID Laws* (July 10, 2012), *available at* http://thecaucus.blogs.nytimes.com/2012/07/10/holder-at-n-a-a-c-p-event-criticizes-voter-id-laws/.

2. These are not isolated examples. Eighteen states do not currently offer *any* in-person early voting.[7] Yet DOJ refused to preclear a Florida law that merely altered the days and times of early voting, while preserving the same total number of early voting hours (and adding new weekend hours and days). In refusing to preclear that change, DOJ advanced exactly the sort of amorphous, purpose-based claim that this Court found constitutionally problematic in *Bossier Parish II*, but that Congress reinvigorated in the 2006 reauthorization.[8] Florida was not allowed to implement these trivial changes in its election procedures until it proved the negative that its legislators were *not* acting with such a purpose.

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[7] *See* National Conference of State Legislatures, *Absentee and Early Voting* (updated September 4, 2012), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx.

[8] *See* United States' Proposed Findings of Fact and Conclusions of Law at 17-25, *Florida v. Holder*, No. 1:11-cv-01428 (D.D.C. May 3, 2012); *see also* United States' Proposed Findings of Fact and Conclusions of Law at 24, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. June 25, 2012) (asserting that Texas' "stated purposes" for adopting a photo identification requirements "cloak a discriminatory purpose"); *id.* at 63-71.

Similarly, in November 2008, voters in Kinston, North Carolina (which is a majority African-American city) approved a referendum shifting to a system of non-partisan local elections. Countless jurisdictions in the United States use some form of non-partisan elections to choose local officials or judges. Yet DOJ refused to preclear the Kinston plan on the rather paternalistic theory that minority candidates would receive fewer "crossover" votes if they could not identify themselves as Democrats. *See LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012), *cert. denied* No. 12-81.[9] After nearly three years of litigation, and on the eve of a second trip to the D.C. Circuit, DOJ withdrew its objection and mooted the case. *Id.*

B. DOJ Has a Long Record of Overreach in Section 5 Cases

This overreach is nothing new. Throughout the 1990s, DOJ routinely invoked a discriminatory "purpose" as the basis for withholding preclearance from redistricting plans that did not *maximize* minority voting strength. For example, in *Miller v. Johnson*, DOJ twice denied preclearance of Georgia's redistricting plans on the ground that the state "'failed to explain adequately' its failure to create a third majority-minority district." 515 U.S. at 907. Georgia eventually obtained administrative preclearance from DOJ only by adopting a severely gerrymandered plan that used the ACLU's so-called "max-black" plan as the benchmark. *Id.* at 907-08.

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[9] *Amicus* J. Christian Adams expresses no position on the Kinston case.

DOJ's approach to preclearance effectively forced Georgia to violate the Equal Protection Clause. Race was "the predominant, overriding factor" explaining why the new plan attached to existing districts "various appendages containing dense majority-black populations." *Id.* at 920. As this Court explained, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear that [DOJ] was driven by its policy of maximizing majority-black districts." *Id.* at 924. The Court found DOJ's position to be "insupportable," and emphasized that "[w]e do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 922-24. "In utilizing § 5 to require States to create majority-minority districts wherever possible, [DOJ] expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.* at 925. DOJ eventually agreed to pay nearly $600,000 in attorneys' fees to the plaintiffs for the protracted litigation in the *Miller* case.[10]

Similarly, in a case arising out of Louisiana's 1990 redistricting, DOJ "let it be known that preclearance would not be forthcoming for any plan that did not include at least two 'safe' black districts out of seven." *Hays v. Louisiana*, 839 F. Supp. 1188,

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[10] *See* Letter from William Moschella, Assistant Attorney General, to Hon. James Sensenbrenner (Apr. 12, 2006) at 3, *at* http://www.scribd.com/doc/48673021/2006-0412-Ltr-to-House-of-Rep-re-Voting-Rights-Act-Procedures ("Moschella Letter") (detailing cases in which the Civil Rights Division was admonished by a court or forced to pay attorneys' fees to the opposing party).

1196 n.21 (W.D. La. 1993). The court held that "neither Section 2 nor Section 5" justifies this approach, and that DOJ's position was "nothing more than . . 'gloss' on the [VRA]—a gloss unapproved by Congress and unsanctioned by the courts." *Id.*; *see also id.* (DOJ "arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies"); *Hays v. Louisiana*, 936 F. Supp. 360, 369, 372 (W.D. La. 1996) (DOJ "impermissibly encouraged—nay, mandated—racial gerrymandering," and "the Legislature succumbed to [DOJ's] illegitimate preclearance demands"). DOJ paid more than $1.1 million to settle claims for attorneys' fees arising out of the *Hays* case. *See* Moschella Letter at 4.[11]

IV. EXCESSIVE INTERVENTION BY PRIVATE PARTIES AND INTEREST GROUPS IN JUDICIAL PRECLEARANCE CASES HAS COMPOUNDED THE INHERENT CONSTITUTIONAL BURDENS OF SECTION 5

Finally, rampant intervention by private parties in judicial preclearance cases has significantly increased both the federalism costs and the monetary costs of the preclearance regime. This is not just some procedural technicality: in several recent Section 5 cases, states have been forced to litigate against dozens of interest groups and private parties in addition to DOJ. For example, in *Texas v. Holder*,

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[11] *See also Shaw v. Hunt*, 517 U.S. 899, 912-13 (1996) (holding that North Carolina redistricting plan violated the Equal Protection Clause, and that DOJ's insistence upon the maximum number of race-based districts was "unsupportable").

No. 12-cv-203 (D.D.C.), Texas' judicial preclearance suit was opposed by more than 30 private intervenors, represented by 36 attorneys (compared to just 10 DOJ attorneys). *See also South Carolina v. United States*, No. 12-cv-203 (D.D.C.) (court allowed intervention by 18 private parties, represented by more than 25 attorneys); *Texas v. United States*, No. 11-cv-1303 (D.D.C) (intervention by 24 private parties, represented by 22 lawyers); *Florida v. United States*, No. 11-cv-1428 (D.D.C.) (29 private intervenors, represented by 19 attorneys).

This unchecked intervention by private parties has exacerbated the constitutional burden of Section 5 in two distinct but related ways:

First, the D.C. district court has allowed private intervenors and interest groups to raise Section 5 objections to laws that DOJ has not challenged. For example, DOJ conceded that Texas' 2010 redistricting plan for the state senate had neither a retrogressive purpose nor a retrogressive effect, yet the district court allowed private parties to interpose objections to that plan under Section 5.[12]

In a run-of-the-mill case in which the plaintiff bears the burden of proof, intervention is simply a fact of life for litigants; indeed, it often promotes efficiency by ensuring that similar claims are all litigated together in one forum. But Section 5, alone among all federal statutes, inverts the ordinary burden of proof and forces covered jurisdictions to justify their duly enacted laws. That is a severe intrusion into state sovereignty even when DOJ is responsible for determining which voting changes should be challenged. But it becomes constitutionally intolerable when a single private party or interest group is able to flip the burden of proof to a state to justify its own legislation. And that burden is only magnified by the new "purpose" standard from the 2006 reauthorization, which forces covered jurisdictions to *disprove* that they acted with a particular intent. *See supra* Part II.B.

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[12] *See Texas v. United States*, No. 11-cv-1303, 2012 WL 3671924, at *21 (D.D.C. Aug. 28, 2012) ("The United States has not objected to this plan, but the Davis Intervenors, the Texas State Conference of NAACP Branches, the League of United Latin America Citizens, and the Texas Legislative Black Caucus argue that the Senate Plan retrogresses and was enacted with discriminatory intent.").

Second, rampant intervention in Section 5 cases has also significantly increased the out-of-pocket litigation costs incurred by covered jurisdictions. Each additional intervenor means more discovery requests, more motions practice, more expert reports, and additional merits briefs that often raise distinct arguments and claims. Over the course of a six-month or year-long trial, these costs can become substantial.

Worse yet, these costs are unnecessary and redundant given that there is often substantial (if not complete) overlap between the private intervenors in a Section 5 preclearance case and the plaintiffs in a Section 2 challenge to the same state law. For example, in the pending challenges to Texas' new redistricting plans, more than half of the private intervenors in the Section 5 case are also plaintiffs in the parallel Section 2 proceedings.[13]

Section 2 suits provide a more-than-adequate remedy for any alleged discriminatory practices. As this Court has explained, even "[w]here the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." *Morris v. Gressette*, 432 U.S. 491, 506–07 (1977). Parties concerned about the short-term impact of a recently enacted law "may as always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting). In short, "the ubiquitous availability of Section 2 is of course a reminder that Section 5 was created for the *specific* purpose of overcoming state and local resistance to federal antidiscrimination policy." *Id.* (emphasis added). As Shelby County explains, the pervasive discrimination and legislative gamesmanship that led Congress to enact Section 5 ceased to exist long ago, and can no longer justify the extraordinary preclearance remedy. Pet. Br. 27-33.

CONCLUSION

DOJ's current approach to Section 5 closely resembles its enforcement strategy during the 1990s, which was roundly rejected by the courts as indefensible and, indeed, unconstitutional. Because of DOJ's aggressive approach to Section 5 enforcement—as well as rampant private intervention in judicial preclearance cases—covered jurisdictions must incur millions of dollars of costs, countless hours of wasted time, and the inherent sovereign indignity of being forced to go "hat in hand" to federal officials just to implement their duly enacted laws. And those laws are often nearly identical to facially valid legislation in non-covered jurisdictions.

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[13] *Compare Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex.) and *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex) (Section 2 cases); *with Texas v. United States*, No. 11-cv-1303 (D.D.C.) (Section 5 case).

The 2006 reauthorization of Section 5, which continues to rely on the badly outdated coverage formula, would have been unconstitutional even if Congress had preserved the preexisting substantive standard for preclearance and DOJ had taken a restrained approach to enforcement. Congress' failure to update the coverage formula, combined with its overruling of *Georgia* and *Bossier Parish II* and DOJ's aggressive enforcement strategy, cannot satisfy any plausible standard of constitutionality. The Court should hold that the 2006 reauthorization of Section 5 exceeded Congress' enforcement authority under the Fourteenth and Fifteenth Amendments.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE MARCIA L. FUDGE, MEMBER OF CONGRESS AND CHAIR OF THE CONGRESSIONAL BLACK CAUCUS, RUBÉN HINOJOSA, MEMBER OF CONGRESS AND CHAIR OF THE CONGRESSIONAL HISPANIC CAUCUS, AND JUDY CHU, MEMBER OF CONGRESS AND CHAIR OF THE CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS, ET AL., IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. A DEFERENTIAL STANDARD GOVERNS JUDICIAL REVIEW OF CONGRESS'S DECISION TO REAUTHORIZE SECTION 5 IN THE COVERED JURISDICTIONS 6

II. IN 2006, CONGRESS MADE A CONSIDERED AND WELL-SUPPORTED JUDGMENT THAT SECTION 5 REMAINS NECESSARY TO PROTECT MINORITY VOTING RIGHTS 8

- A. The Record Before Congress Demonstrated The Continuing Need For Section 5 9
  - 1. Turnout and registration 9
  - 2. Minority elected officials 10
  - 3. Section 5 objections 12
  - 4. Other categories of evidence 14
- B. Congress Properly Determined That Bailout And Bail-in Mechanisms Would Ensure That Section 5 Applied Only To Jurisdictions Where It Was Needed 16

TABLE OF CONTENTS—Continued

Page

III. DEVELOPMENTS SINCE 2006 CONFIRM THE REASONABLENESS OF CONGRESS'S JUDGMENT THAT THERE IS A CONTINUING NEED FOR SECTION 5 IN THE COVERED JURISDICTIONS 19

A. The Court May Consider Post-Enactment Evidence 19

B. Post-Enactment Objections Confirm The Continuing Need For Section 5 20

C. Post-2006 Litigation Over Texas's Redistricting Underscores The Ongoing Importance Of The Section 5 Preclearance Process 25

D. Post-2006 Evidence Confirms That The Bailout Mechanism Continues To Advance The Requirement Of Proportionality 27

IV. CONGRESS PROPERLY DETERMINED THAT SECTION 2 ALONE IS AN "INADEQUATE REMEDY" 29

CONCLUSION 34

ADDENDUM

TABLE OF AUTHORITIES

CASES

Page(s)

Bartlett v. *Strickland*, 556 U.S. 1 (2009) 3, 19

Board of Trustees of the University of Alabama v. *Garrett*, 531 U.S. 356 (2001) 8

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 8, 17, 29

City of Mobile v. *Bolden*, 446 U.S. 55 (1980) 30

City of Rome v. *United States*, 446 U.S. 156 (1980) .... *passim*

Coleman v. *Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) 5

Favors v. *Cuomo*, 2012 WL 1802073 (E.D.N.Y. May 16, 2012) 31

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 7

Georgia v. *United States*, 411 U.S. 526 (1973) 4

Gonzalez v. *Raich*, 545 U.S. 1 (2005) 20

Jackson v. *Perry*, 124 S. Ct. 1143 (2004) 31

Johnson v. *California*, 543 U.S. 499 (2005) 8

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 8

Lopez v. *Monterey County*, 525 U.S. 266 (1999) 4

LULAC v. *Perry*, 548 U.S. 399 (2006) 27, 31

Nevada Department of Human Resources v. *Hibbs*, 538 U.S. 721 (2003) 19

Northwest Austin Municipal Utility District Number One v. *Holder*, 557 U.S. 193 (2009) .... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Northwest Austin Municipal Utility District Number One Austin v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008)..13

Perry v. *Perez*, 132 S. Ct. 934 (2012)................................31

Reynolds v. *Sims*, 377 U.S. 533 (1964)...........................31

Rogers v. *Lodge*, 458 U.S. 613 (1982)..............................12

Rostker v. *Goldberg*, 453 U.S. 57 (1981)...........................6

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966)..4, 9, 29

South Carolina v. *United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012)...........................24, 25

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Texas v. *Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012)...22, 23, 24

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Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994)..7, 33

Village of Arlington Heights v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)..21, 26, 27

Wold Communications, Inc. v. *FCC*, 735 F.2d 1465 (D.C. Cir. 1984)...20

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886).........................8

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

Texas v. *Holder*, No. 12-cv-128 (D.D.C.) 24

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. Const.
  amend. XIV, § 5 4
  amend. XV, § 2 4

Voting Rights Act of 1965, 42 U.S.C.
  §§ 1973 *et seq.* 2
  § 1973a(c) 18
  § 1973b(a) 17
  § 1973*l*(e) 32

Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velasquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, *as amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008)
  § 2(a) 4
  § 2(b)(3) 11, 12, 27
  § 2(b)(4) 14
  § 2(b)(4)(A) 12
  § 2(b)(5) 14
  § 2(b)(7) 3, 18
  § 2(b)(9) 3, 18
  § 3(c) 17
  § 6 32

28 C.F.R. § 51.37 16

Page(s)

LEGISLATIVE MATERIALS

An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 31

Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 16

Modern Enforcement of the Voting Rights Act, Hearing Before the S. Committee on the Judiciary, 109th Congress (2006) 30, 33

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary, 109th Cong. (2006) 29, 30, 32

The Continuing Need for Section 5 Preclearance, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 13

To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcomm. on the Constitution of the H. Judiciary Comm., 109th Cong. (2005) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Understanding the Benefits and Costs of Section 5 Preclearance, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 29, 32

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Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

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Voting Rights Act: Section 5 of the Act—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 13, 21

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H.R. Rep. No. 109-478 (2006) .... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

S. Rep. No. 109-295 (2006) 5, 9, 12, 13, 15

S. Rep. No. 94-295 (1975) 10

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TABLE OF AUTHORITIES—Continued

Page(s)

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Pitts, Michael J., *Let's Not Call the Whole Thing Off Just Yet*, 84 Neb. L. Rev. 605 (2005) 30

INTEREST OF AMICI CURIAE[1]

Amici curiae are elected members of the United States House of Representatives and members of the Congressional Black Caucus (CBC), the Congressional Hispanic Caucus (CHC), or the Congressional Asian Pacific American Caucus (CAPAC).[2] Amici collectively serve millions of Americans from communities whose experiences with racial discrimination in voting are the core concern of the Voting Rights Act (VRA).

1. Each of the three caucuses was established to provide representation and constituency services for communities that have experienced racial discrimination and political exclusion firsthand. The CBC was formed more than forty years ago to promote racial equality in the design and content of domestic and international policies, programs, and services. The CBC has been at the forefront of issues affecting African Americans and has garnered international acclaim for advancing agendas aimed at protecting human rights and civil rights for all people. Today, the CBC is comprised of 42 Members of Congress.

The CHC was formed in 1976 with the mission of voicing and advancing, through the legislative process, issues affecting Hispanic Americans in the United States and the insular areas. The CHC actively addresses national issues that impact the Hispanic community and serves as a forum for Hispanic Members of Congress to coalesce around a collective legislative agenda. Today, the CHC is comprised of 27 Members of Congress.

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[1] Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

[2] A complete list of amici is attached as an addendum to this brief.

The CAPAC was founded in 1994 to enhance the ability of Members of Congress and their allies to represent the Asian American and Pacific Islander community's concerns effectively in policy debates. Today, the CAPAC is comprised of 38 Members of Congress.

2. Amici—many of whom voted in favor of reauthorizing Section 5 of the VRA in 2006—write to offer their perspective on why this Court should affirm the constitutionality of one of the most important pieces of civil rights legislation in the nation's history. Since its enactment in 1965, the Section 5 preclearance mechanism of the VRA, 42 U.S.C. §§ 1973 *et seq.*, has prevented state and local jurisdictions from implementing thousands of discriminatory voting procedures and practices. Congress's reauthorization of that provision in 2006 is a landmark accomplishment that serves the fundamental purpose of guaranteeing the right of all citizens to cast meaningful and unfettered votes and to be represented by candidates of their choice.

The extensive legislative record Congress compiled in reauthorizing Section 5 of the VRA revealed that racial discrimination remains an enduring problem for minority voters in the covered jurisdictions. Based on that record—among the most substantial ever amassed—Congress made the quintessentially legislative judgment that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment." Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velasquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577, 578 (VRARAA), *as amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008). Congress concluded that "without the continuation of the [VRA's] protections" in the covered jurisdictions, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9).

This Court should not second-guess those determinations. Amici, who represent voters in both covered and non-covered jurisdictions, are uniquely positioned to attest that Section 5 remains an essential tool in the nation's ongoing struggle to guarantee an equal right to vote regardless of race, and that Section 5's work of remedying unconstitutional exclusion from the political process in certain jurisdictions is not yet done.

Amici acknowledge—indeed, celebrate—that the VRA has led to measurable progress since 1965 in combatting racial discrimination in voting. The increasing diversity of Congress—including amici themselves—is evidence of the VRA's effect. These gains, however, are incomplete and only recently won. Continued protection is critical to ensuring that the nation's long history of backsliding and retrenchment in the area of voting rights is not repeated.

As this Court has recently noted, "racial discrimination and racially polarized voting are not ancient history." *Bartlett* v. *Strickland,* 556 U.S. 1, 25 (2009). Amici thus have a profound interest in ensuring that Congress's considered judgment with respect to the necessity of Section 5 is implemented. Amici urge this

Court to uphold the reauthorization of Section 5 under the existing coverage scope of Section 4(b) as a proper exercise of congressional power under the enforcement provisions of the Fourteenth and Fifteenth Amendments. *See* U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1965, Congress and five Presidents have acted to create or preserve the VRA—the nation's landmark commitment "to ensur[ing] that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." VRARAA § 2(a). And on four occasions, this Court has upheld the constitutionality of the political branches' informed judgment that the VRA and its preclearance requirement are necessary to safeguard that right. *See Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177-178 (1980); *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1966).

In 2006, Congress again reauthorized the VRA, exercising the broad power granted to it by the Reconstruction Amendments. Just as with prior reauthorizations, Congress acted in 2006 on the basis of a "sizable record." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009). Both courts below held that the record Congress compiled sufficiently demonstrated a continuing need for Section 5 that justified the continuing burden on covered jurisdictions. *See* Pet. App. 48a, 269a-270a.

The decisions below are correct. The massive legislative record includes 21 hearings before the House and

Senate Judiciary Committees; the testimony of more than 90 witnesses—including state and federal officials, litigators, and scholars—both for and against reauthorization; and 15,000 pages of supporting materials. That record leaves no doubt that "'conduct transgressing the Fourteenth Amendment's substantive provisions,'" *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012), persists in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 5 (2006); S. Rep. No. 109-295, at 2-4, 10 (2006). Congress found substantial evidence of voting discrimination in these jurisdictions, including intentional discrimination, as documented by continued disparities in registration and turnout; low levels of minority elected officials; the number of Section 5 enforcement actions since 1982; the volume of Section 2 litigation; and evidence of racially polarized voting. Congress also determined that the VRA's bailout and bail-in mechanisms would work hand-in-hand to ensure that Section 5 remains targeted only where it is needed.

Developments since 2006 have proven that Congress's judgments were well-founded. The number of Section 5 objections since the reauthorization of the VRA, by itself, is powerful evidence of the continuing need for Section 5 to deter core violations of the Fourteenth and Fifteenth Amendments in the covered jurisdictions. Indeed, Section 5 recently blocked a burdensome Texas photo ID law that would have had a retrogressive effect on minority voters' access to the ballot, and it led South Carolina officials to reinterpret a photo ID law to ameliorate its discriminatory effect. Recent litigation involving Texas redistricting further validates Congress's concern that intentional racial discrimination in voting continues to pose a concrete threat to the rights of minority voters. Moreover, the post-2006 record shows that Congress rightly determined that the VRA's bailout and bail-in mechanisms would ensure that Section 5 remains geographically tailored.

Finally, Congress's decision in 2006 that Section 2 remains an inadequate remedy in covered jurisdictions—a fact-based, predictive judgment that deserves special judicial deference—was well-founded. In reaching its conclusion, Congress credited evidence that Section 2 claims are ineffective substitutes for Section 5 because they shift the burden of proof to minority voters, occur after the fact, and require complex litigation that is costly and time-consuming. That, together with the magnitude and persistence of discrimination in covered jurisdictions, provided convincing support for Congress's judgment that case-by-case litigation would be ineffective to protect the rights of minority voters in those jurisdictions. H.R. Rep. No. 109-478, at 57.

ARGUMENT

I. A DEFERENTIAL STANDARD GOVERNS JUDICIAL REVIEW OF CONGRESS'S DECISION TO REAUTHORIZE SECTION 5 IN THE COVERED JURISDICTIONS

Congress is "a coequal branch of government whose Members take the same oath ... to uphold the Constitution" as the Justices of this Court. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). In part for that reason, when this Court is "called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that [it] is called upon to perform'—the Court accords 'great weight to the decisions of Congress.'" *Id.* (citations omitted); *accord Northwest Austin*, 557 U.S. at 204-205.

In reviewing any legislation, this Court defers to Congress's fact-finding, and it "accord[s] substantial deference" to Congress's "predictive judgments." *Turner Broad. Sys., Inc.* v. *FCC,* 512 U.S. 622, 665 (1994) (plurality opinion). That deference is accorded not simply because Congress is a co-equal branch of government, but also because "[a]s an institution, ... Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon a[] ... complex and dynamic [issue]." *Id.* at 665-666; *see Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring) (noting "special attribute[s]" of Congress as a fact-finding body). Therefore, in reviewing Congress's findings, the proper inquiry is not whether this Court would reach the same decision, but whether there is sufficient evidence showing Congress's decision was reasonable. *Turner Broad.*, 512 U.S. at 666. Although this Court must "exercise independent judgment when [constitutional] rights are implicated," that "is not a license [for the Court] to reweigh the evidence *de novo*, or to replace Congress' factual predictions" with its own. *Id.*

In the context of the VRA, the necessity of deference to Congress's judgments is especially strong for two reasons. First, members of Congress are intimately involved with and knowledgeable about the electoral process, voting problems, and the operation of the VRA. Members of Congress bring to bear local knowledge of the effects of racial discrimination on their district's electoral systems and are well-positioned to assess what measures are necessary to ensure the right of all citizens to vote is guaranteed.

Second, in reauthorizing Section 5, Congress exercised the unique constitutional authority textually committed to it by the Reconstruction Amendments. The Amendments' enforcement provisions embody "'a positive grant of legislative power' to Congress" that this Court has consistently described in "broad terms." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997); *Northwest Austin*, 557 U.S. at 205. Congress is accordingly "entitled to much deference" in "'determin[ing] whether and what legislation is needed to secure th[ose] guarantees.'" *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). Indeed, in reauthorizing the VRA, Congress was acting within the heartland of the Reconstruction Amendments: The VRA combats an evil lying at the crossroads of the "'immediately suspect'" classification of race, *Johnson* v. *California*, 543 U.S. 499, 509 (2005), and the "fundamental political right" to vote, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). *See Tennessee* v. *Lane*, 541 U.S. 509, 561-562 (2004) (Scalia, J., dissenting). Congress's considered judgment in favor of reauthorizing Section 5 is therefore entitled to great respect.

II. IN 2006, CONGRESS MADE A CONSIDERED AND WELL-SUPPORTED JUDGMENT THAT SECTION 5 REMAINS NECESSARY TO PROTECT MINORITY VOTING RIGHTS

In 2006, Congress determined that the record documenting the continuing need for Section 5 in the covered jurisdictions "resemble[d] the evidence before [it] in 1965 and the evidence that was present again in 1970, 1975, 1982, and 1992." H.R. Rep. No. 109-478, at 6; *see id.* at 11-12. This Court in each instance approved the sufficiency of those records—both directly in *Katzenbach* and *City of Rome*, and indirectly as examples of how to "document[] a marked pattern of unconstitutional action," *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001). The expansive record before Congress in 2006 made clear that our nation's struggle to overcome a century of state-sanctioned voting discrimination in the covered jurisdictions was not yet complete and thus that there remained a "current need[]" for Section 5, *Northwest Austin*, 557 U.S. at 203.

A. The Record Before Congress Demonstrated The Continuing Need For Section 5

In exercising its authority under the Reconstruction Amendments to redress the "evil[]" of race discrimination in voting, "Congress ... may avail itself of information from any probative source." *South Carolina*, 383 U.S. at 330. In 2006, Congress was not writing on a blank slate. Instead, operating against a backdrop of several reauthorizations, each upheld by this Court against a constitutional challenge, Congress looked to the same categories of evidence this Court approved in *South Carolina* and *City of Rome*—namely, disparities in turnout and registration, disproportionately low numbers of minority elected officials, and the nature and number of Section 5 objections in the covered jurisdictions. In each of these categories, and in several others, Congress confronted probative, unassailable evidence of a continuing need for Section 5.

1. Turnout and registration

As it had in prior reauthorizations of the VRA, Congress found that, despite progress, "[s]ignificant disparit[ies] persisted ... in at least several of the covered jurisdictions" with respect to registration and turnout. *City of Rome*, 446 U.S. at 180. Congress learned, for example, that in Texas in 2004 white voter registration exceeded Hispanic registration by 20 percentage points. S. Rep. No. 109-295, at 11. In Virginia, white voter registration exceeded black voter registration by 11 percentage points, and white turnout exceeded black turnout by 13 percentage points. *Id.*

In fact, these disparities were even more pronounced than Congress realized. The figures before Congress included Hispanics in the registration and turnout rates for whites, "reducing the true disparity between black and white voter registration and turnout (as well as [masking] the disparity between Hispanic and white voter registration and turnout)." Pet. App. 200a. When the statistics are adjusted, black registration rates in 2004 trail those of non-Hispanic whites in all but one covered state. *Id.* 201a; *see id.* 200a-203a.

Congress also reviewed testimony and other evidence demonstrating that "there remains an enormous gap in political participation" for language minority citizens in many of the covered jurisdictions. *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2006); *see, e.g., id.* 68-69 (Florida); *id.* 309 (Texas); *id.* 1313 (Alaska); *id.* 1379 (Arizona). Together, Congress reasonably concluded that these disparities were comparable to those this Court found sufficient in *City of Rome* when it upheld a past reauthorization of Section 5. 446 U.S. at 180; Pet. App. 199a (citing S. Rep. No. 94-295, at 779 (1975)).

2. Minority elected officials

In deciding whether to reauthorize Section 5, Congress also considered evidence of the disproportionately low numbers of minority elected officials in covered jurisdictions. As in *City of Rome*, Congress recognized that "'undeniable'" progress had been made, *see* 446 U.S. at 181, but it found that troubling disparities persisted.

Congress found, for example, that in Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, African Americans comprised 35% of the population, but only 20.7% of the state legislators. H.R. Rep. No. 109-478, at 33. Latino and Asian-American elected officials similarly "failed to keep pace with [the relevant] population growth," *id.* at 33, demonstrating on the whole that the "number [of minority elected officials] ... in the state legislatures" again "fell ... short of being representative of the number of [minority voters] residing in the covered jurisdictions," *City of Rome*, 446 U.S. at 180-181.

Moreover, as of 2000, only 35 African Americans held a statewide office in the covered jurisdictions, and some of these officials had initially been appointed, rather than elected, to those positions. H.R. Rep. No. 109-478, at 33. In three of the nine covered states—Mississippi, Louisiana, and South Carolina—*no* African American had been elected to statewide office despite substantial African-American voting populations. *Id.* (quoting 2005 statement from Governor of South Carolina indicating that he "did not expect to see such an election in the foreseeable future"); *see City of Rome*, 446 U.S. at 180 (noting that minority elected officials "held only relatively minor positions, none held statewide office"). And language minority candidates fared no better, "rarely garner[ing] the support of white voters, resulting in a disparity [in office-holding]." *Id.* at 34.[3] When confronted with similar evidence in *City of Rome*, this Court found that an extension of Section 5 was warranted. *See* 446 U.S. at 181.

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[3] Congress found that racially polarized voting in the covered jurisdictions "demonstrates that [minority voters] remain politically vulnerable" and undermined their ability to elect candidates of their choice. *See* VRARAA § 2(b)(3); H.R. Rep. No. 109-478, at 34. That finding is relevant because, as this Court has recognized, racially polarized voting provides facially neutral voting changes

3. Section 5 objections

Finally, in 2006, Congress carefully considered Section 5 objections, a category of evidence that "'clearly bespeak[s] the continuing need for this preclearance mechanism.'" *City of Rome*, 446 U.S. at 181; VRARAA § 2(b)(4)(A). From 1982 to 2006, the Attorney General interposed more than 700 objections—*more* than were lodged between 1965 and 1982. H.R. Rep. No. 109-478, at 21-22, 36; *see* S. Rep. No. 109-295, at 13; *Evidence of Continued Need* 177-178 (noting a similar pattern for judicial denials of preclearance). Each fully covered state drew at least two statewide objections, with most fully covered states drawing many more. *See Evidence of Continued Need* 260. Notably, a single objection may encompass more than one voting change, and a single voting change may affect thousands of voters. Between 2000 and 2006, objections interposed by the Attorney General affected some 660,000 minority voters. *The Continuing Need for Section 5 Pre-clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 58 (2006).

Petitioner (Br. 29-30) discounts the significance of Section 5 objections, arguing that "the objection rate has been declining steadily." But the decline in the rate of objections is "a product of submissions becoming ...

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with their retrogressive force. *See City of Rome*, 446 U.S. at 183-184; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). Congress's determination that racially polarized voting persists—and was increasing, *see* H.R. Rep. No. 109-295, at 34-35—in the covered jurisdictions thus supported its judgment that minority voters remain "vulnerable" to discriminatory voting schemes, VRARAA § 2(b)(3).

more frequent." *Continuing Need* 58. In any event, any decline in the "rate" of objections in no way diminishes the significance this Court—and Congress—has attributed to the "number and nature" of Section 5 objections, *City of Rome*, 446 U.S. at 181, which remain significant and serious.

Of the Attorney General objections interposed between 1980 and 2000, nearly two-thirds related to voting changes enacted with racial animus. *See Voting Rights Act: Section 5 of the Act—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 180 tbl.2 (2005) (McCrary Study). The record Congress examined was replete with such examples. *See* S. Rep. No. 109-295, at 14-15; Pet. App. 212a-220a (reciting record evidence); *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 289-301 (D.D.C. 2008) (same). To recount just a few: Objections prevented the Mayor and Board of Aldermen in Kilmichael, Mississippi from cancelling an election after Census data revealed that African Americans had become a majority in the town, and an unprecedented number of African Americans were running for office, H.R. Rep. No. 109-478, at 36-37; thwarted threats by the Waller County, Texas district attorney to prosecute students from Prairie View A&M, a local historically black university, for illegal voting if they voted in the 2004 election for County Commissioners' Court and frustrated the county's subsequent attempt to limit early voting to reduce student participation in the same election, *Evidence of Continued Need* 185-186; and blocked a majority vote requirement for a city council election in Freeport, Texas after the first Latino-preferred candidate was elected, *Voting Rights Act: Section 5—History, Scope, and Purpose, Hearing Be-*

fore the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 2291-2292, 2528-2530 (2005).

4. Other categories of evidence

In addition to the categories of evidence on which this Court relied in *City of Rome*, Congress reviewed other probative evidence of discrimination against minority voters. Congress found, for example, that "[e]vidence of continued discrimination includes ... the continued filing of section 2 cases ... in covered jurisdictions." VRARAA § 2(b)(4); *see* H.R. Rep. No. 109-478, at 52-53. More than 600 successful Section 2 cases were filed in covered jurisdictions between 1982 and 2005, affecting 825 counties. *Evidence of Continued Need* 205-208, 251. Among successful Section 2 suits that ended in a published decision, more than half involved a covered jurisdiction, even though covered jurisdictions account for less than a quarter of the country's population. *See* Pet. App. 49a; Katz et al., *Documenting Discrimination in Voting*, 39 U. Mich. J.L. Reform 643, 655-656 (2006). And a significant number of successful Section 2 suits involved intentional discrimination. *See* Pet. App. 232a.

Congress also found "indicia of discrimination" in the ongoing need for federal observers to monitor and report "harassment and intimidation inside polling locations" in covered jurisdictions. H.R. Rep. No. 109-478, at 44; VRARAA § 2(b)(5). Two-thirds of observers dispatched between 1982 and 2005 on the basis of meritorious threats of misconduct were dispatched to covered jurisdictions. H.R. Rep. No. 109-478, at 44. Congress learned, for example, that observers had been "recently assigned to ... Georgia, Alabama, and Texas, to protect Latino and Asian American voters." *Id.* at 45.[4]

Furthermore, Congress logically concluded that any assessment of the continuing need for Section 5 must account for those discriminatory voting changes "that have never gone forward as a result of Section 5." H.R. Rep. No. 109-478, at 24; S. Rep. No. 109-295, at 11 ("without the Voting Rights Act's deterrent effect," evidence of discrimination in the covered jurisdictions "might be considerably worse"). This determination was not guesswork, but was informed by expert testimony about and specific examples of Section 5's deterrent effect. For example, when Georgia redrew its congressional districts in 2005, it began by adopting resolutions that required compliance with Section 5 and proceeded to draw non-retrogressive plans that maintained the black voting age population in majority black districts. H.R. Rep. No. 109-478, at 24. As Congress explained, "'officials in covered jurisdictions ... understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables[] because the chances are good that an objection will result.'" *Id.* (quoting National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 57 (Feb. 2006)); *see* Pet. App. 252a-255a.

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[4] Notwithstanding petitioner's effort (Br. 31) to cast observers and the events they witness as mere hypotheticals or conjecture, the record before Congress demonstrated that once dispatched, federal observers witnessed harassment and racial animus. One particularly disturbing incident occurred in Alabama, where observers witnessed a white poll worker asking a black voter whether he "want[ed] to vote for white or niggers," and remarking "niggers don't have principle enough to vote and they shouldn't be allowed." *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program, Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (2005). The legislative record documented additional incidents in covered jurisdictions affecting Hispanic and Asian-American voters. *See id.* 34-35; Pet. App. 242a-245a (citing examples).

In addition, Congress observed that between 1982 and 2003 covered jurisdictions withdrew more than 205 Section 5 submissions after receiving a request for more information (MIR) from the Attorney General—a reaction Congress reasonably determined is "illustrative of a jurisdiction's motives." H.R. Rep. No. 109-478, at 40, 41; *see* 28 C.F.R. § 51.37; *Evidence of Continued Need* 124 ("a withdrawal suggests ... officials in the jurisdiction concluded that the change would [occasion an objection]"). Combining withdrawals with the number of material alterations made to proposed voting changes after receipt of an MIR, Congress learned that MIRs deterred more than 800 potentially discriminatory voting changes. H.R. Rep. No. 109-478, at 40; *Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 213, 223 (2006).

B. Congress Properly Determined That Bailout And Bail-in Mechanisms Would Ensure That Section 5 Applied Only To Jurisdictions Where It Was Needed

In addition to the record demonstrating the continuing need for a preclearance remedy in the covered jurisdictions, Congress took into account the bailout and bail-in mechanisms in ensuring that the VRA would remain appropriately targeted. Although petitioner suggests (Br. 54) that bailout is a minor provision of the VRA, in 2006 Congress understood things differently.[5]

Under the statutory bailout mechanism, which Congress expanded in 1982, any covered jurisdiction may terminate its Section 5 coverage by demonstrating a 10-year record of nondiscriminatory practices and a current effort to eliminate intimidation and harassment of voters. *See* 42 U.S.C. § 1973b(a). This Court has observed the importance of the bailout procedure to the constitutionality of Section 5. *See City of Boerne*, 521 U.S. at 533 (availability of bailout "reduce[s] the possibility of overbreadth" and helps "ensure Congress' means are proportionate to [its] ends").

In 2006, Congress again determined that the bailout mechanism helped to ensure geographic tailoring of Section 5. *See* H.R. Rep. No. 109-478, at 25. Congress considered testimony from legal scholars, voting rights practitioners, and DOJ officials to this effect. *See, e.g., Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005). Congress also learned that between August 1984—when the 1982 amendments took effect—and the 2006 reauthorization, 10 jurisdictions successfully bailed out. *Evidence of Continued Need* 2677, 2691. No jurisdiction seeking a bailout was denied one. *Id.* at 2683. Based on this evidence, Congress reasonably concluded that: "(1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. Rep. No. 109-478, at 25. "Bailout ... has proven to be achievable [by] those jurisdictions that can demonstrate an end to their discriminatory histories." *Id.* at 61.

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[5] By contrast, where the record before Congress required it to amend the Act, it did not hesitate to ensure that the VRA implemented only "relevant and ... effective remed[ies]." H.R. Rep. No. 109-478, at 61; *see id.* at 61-62 (allowing the federal examiner program to expire); VRARAA § 3(c).

While the bailout process guards against over-inclusiveness, the bail-in procedure guards against under-inclusiveness. Under the VRA, federal courts may place states and political subdivisions under the preclearance requirement upon a finding of a Fourteenth or Fifteenth Amendment violation. *See* 42 U.S.C. § 1973a(c). Congress had before it evidence that this provision, too, was working: From 1982 to 2006, courts bailed-in two states (Arkansas and New Mexico), three counties (including Los Angeles County), and one city (Chattanooga, Tennessee). *See Evidence of Continued Need* 154; U.S. Br. App. A.

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In short, the record before Congress in 2006 amply supported Congress's judgment that "[f]orty years" of Section 5 in the covered jurisdictions had been "an insufficient amount of time to address the century during which racial minorities were denied the full rights of citizenship." H.R. Rep. No. 109-478, at 56; VRARAA § 2(b)(7), (9). Against a voluminous record of pervasive discrimination and a tragic history of backsliding and retrenchment, Congress made an informed judgment that Section 5 reauthorization was "appropriate legislation" to protect the fundamental rights guaranteed by the Reconstruction Amendments.

III. DEVELOPMENTS SINCE 2006 CONFIRM THE REASONABLENESS OF CONGRESS'S JUDGMENT THAT THERE IS A CONTINUING NEED FOR SECTION 5 IN THE COVERED JURISDICTIONS

Congress reauthorized Section 5 in 2006 based on a robust record of discrimination in the covered jurisdictions. Congress's conclusion—that the work of this monumental civil rights legislation was not done—was compelled by historical facts and reflected reasonable predictive judgments. Indeed, developments since 2006 confirm the wisdom of Congress's determinations that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions," *Strickland*, 556 U.S. at 25, and that Section 5 remains critical to achieving those goals.

A. The Court May Consider Post-Enactment Evidence

The court of appeals correctly held that "post-enactment" evidence may bear on whether Congress properly exercised its authority under the Reconstruction Amendments in reauthorizing Section 5. Pet. App. 54a. In *Lane*, for example, this Court concluded, in part based on post-enactment evidence, that Title II of the Americans with Disabilities Act was a valid exercise of Congress's enforcement power under the Fourteenth Amendment. 541 U.S. at 524-525 & nn.6-8, 11, 13-14. Indeed, as the court of appeals noted, this Court relied in *Lane* on "articles and cases published ten or more years after the Americans with Disabilities Act was enacted." Pet. App. 54a; *see Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 733-734 & nn.6-9 (2003) (citing discriminatory state laws from 1997-2003 in rejecting constitutional challenge to FMLA, enacted in 1993);

see also Gonzalez v. *Raich*, 545 U.S. 1, 21 & n.31 (2005) (considering post-enactment evidence in reviewing exercise of Congress's Commerce Clause authority).

Consideration of post-enactment evidence is especially relevant here in assessing the reasonableness of Congress's predictive judgments: "Subsequent events have borne [them] out[.]" *Wold Commc'ns, Inc.* v. *FCC*, 735 F.2d 1465, 1478 n.29 (D.C. Cir. 1984) (Ginsburg, R.B., J.) (considering after-the-fact evidence in assessing challenged agency decision).

B. Post-Enactment Objections Confirm The Continuing Need For Section 5

Objections interposed through administrative and judicial preclearance are, of course, probative evidence of the need for Section 5. *See City of Rome*, 446 U.S. at 181; Pet. App. 206a. And the record of objections since the 2006 reauthorization strongly supports Congress's judgment that Section 5 remains necessary to protect minority voting rights.

The sheer number of objections is telling. By amici's count, covered jurisdictions have proposed 42 voting changes since 2006 that have occasioned objections. Of those, the Attorney General blocked 37 and the District Court for the District of Columbia prevented five from taking effect. Fourteen objections reflected evidence of a discriminatory purpose, as did two of the five changes blocked by the district court.[6]

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[6] This analysis is based on reported Attorney General objections since 2006, *see* DOJ, *Section 5 Objection Determinations*, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Jan. 31, 2013), and follows the methodology of an academic study of Section 5 objection letters by a historian of the Civil Rights Division, which was considered by Congress.

Amici offer only a few examples of voting changes blocked by the Attorney General on the basis of purposeful discrimination. Since 2006, Section 5 has prevented the Board of Registrars of Randolph County, Georgia from reassigning (in contravention of two court decisions) a black county official from the majority-black district he had long represented to a majority-white district, where the County could not show that the change did not have the "purpose ... of denying or abridging the right to vote on account of race." DOJ Objection Letter 2006-3856, at 3 (Sept. 12, 2006). It has blocked a redistricting plan in Galveston County, Texas where, on the day before the final vote on the plan, the county judge and several county commissioners redrew the district of the sole minority commissioner without informing him, resulting in a "loss of the ability of minority voters to elect a candidate of choice." DOJ Objection Letter 2011-4317/4374, at 3 (Mar. 5, 2012). Section 5 also prevented the implementation of Gonzales County, Texas's inadequate and retrogressive plan for assigning bilingual poll workers, noting that, in addition to the county's history of refusing to provide bilingual election materials and turning away bilingual citizens

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See Preclearance Standards 126-130, 180 tbl.2; *see also* McCrary et al., *The End of Preclearance As We Knew It*, 11 Mich. J. Race & L. 275 (2006). Objections were coded as involving discriminatory purpose where "the letter cited at least some specific evidence of the sort set forth by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corporation* [429 U.S. 252 (1977)]." *Preclearance Standards* 129. Those factors include the impact on minority groups, the historical background of the action, the sequence of events leading up to the action, the legislative or administrative history regarding the action, departures from normal procedures, and evidence that the decision-maker ignored factors it had otherwise considered important or controlling in similar decisions. *See Arlington Heights*, 429 U.S. at 265-266.

who volunteered as poll workers, "[c]ounty officials have openly expressed hostility toward complying with the [VRA]." DOJ Objection Letter 2009-3078, at 5 (Mar. 12, 2010). And it has blocked a redistricting plan for Clinton, Mississippi that "unnecessarily fragment[ed]" black minority populations and was rushed through to avoid consideration of an alternative plan by the NAACP that would have allowed black voters the ability to elect a candidate of choice. DOJ Objection Letter 2012-3120, at 2 (Dec. 3, 2012).

Although the significant number of Attorney General objections and the intentionally discriminatory nature of many of the blocked changes are compelling evidence of continuing need for a prophylactic remedy, two objections—pertaining to photo ID laws in Texas and South Carolina—warrant further discussion. These cases illustrate Section 5's central role in preventing and deterring discriminatory electoral changes and highlight that preclearance continues to block not only tactics that undermine the strength of minority votes, but also laws that block minority ballot access.

We begin with Texas. In 2011, Texas passed one of the "most stringent" voter ID laws in the nation. *Texas* v. *Holder*, 2012 WL 3743676, at *33 (D.D.C. Aug. 30, 2012). The law would have required all voters to have one of five forms of photo ID and barred the use of nonphotographic IDs or voter registration cards (permissible under preexisting state law). *See id.* at *1. After carefully studying the law and calling for additional information from the State, the Attorney General denied preclearance. *See* DOJ Objection Letter 2011-2775, at 3 (Mar. 12. 2012) (noting that "a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack this identification" and that the State had provided "no data" on African-American or Asian registered voters).

Texas also sought judicial preclearance before the District Court for the District of Columbia. After a week-long trial, the three-judge court declined preclearance, concluding that the law, if implemented, "would in fact have a retrogressive effect on Hispanic and African American voters." *Texas*, 2012 WL 3743676, at *26. That finding rested on "three basic facts: (1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty." *Id.* The court concluded that "many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by [the new law], likely be unable to vote in the next election." *Id.* at *29.

Although neither the Attorney General nor the district court needed to decide whether the law was enacted with a discriminatory purpose—because the discriminatory effect was palpable, *see* DOJ Objection Letter 2011-2775, at 2-3; *Texas*, 2012 WL 3743676, at *32—the example nonetheless underscores that Section 5 remains vital to preventing changes in voting laws that suppress minority turnout.[7] It also highlights the substantial risk of backsliding absent Section 5.

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[7] Had the court reached the purpose prong of Section 5, there was ample evidence demonstrating that the law was enacted with discriminatory intent. In addition to the "strict, unforgiving burdens" the law would impose on minorities, the court stated that the legislature "ignor[ed] warnings that [the law] would disenfranchise minorities and the poor" and tabled or defeated amendments

The South Carolina case illustrates an equally essential attribute of continued Section 5 enforcement. In that case, the Attorney General objected to a South Carolina law imposing new photo ID requirements because "the state's data demonstrate that non-white voters are both significantly burdened by [the photo ID requirement] in absolute terms, and also disproportionately unlikely to possess the most common types of photo identification ... that would be necessary for in-person voting under the proposed law." DOJ Objection Letter 2011-2495, at 3 (Dec. 23, 2011).

The District Court for the District of Columbia later precleared the law, but only after South Carolina officials offered an interpretation of the law that significantly ameliorated the burden on minority voters. *See South Carolina* v. *United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). As the litigation unfolded, South Carolina officials expansively construed the law's "reasonable impediment" provision to "allow[] registered voters with non-photo voter registration cards to vote without photo IDs," so long as the voters took minor administrative steps at the polling place. *Id.* at *5. Because that interpretation would "deny *no* voters the ability to vote and have their votes counted," *id.*, the court was able to determine that the law lacked retrogressive effect, *id.* at *12. The court took pains to emphasize, however, that the State's "extremely broad interpretation" was "central to [its] resolution of the

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to alleviate these burdens. *Texas*, 2012 WL 3743676, at *33. Moreover, DOJ and intervenors presented substantial evidence of discriminatory intent. *See* Attorney General's Proposed Findings of Fact 24-40, 58-71, Dkt. No. 223, *Texas* v. *Holder*, No. 12-cv-128 (D.D.C. June 25, 2012); Def.-Intervenors' Proposed Supplemental Findings of Fact 28-40, Dkt. No. 241, *Texas* v. *Holder*, No. 12-cv-128 (D.D.C. June 27, 2012).

case," *id.* at *6, and cautioned that "[i]f South Carolina were to alter its interpretation of the reasonable impediment provision ... the State would have to obtain pre-clearance ... before applying that new interpretation," *id.* at *19.

Although South Carolina's law was ultimately precleared, the example illustrates the "continuing utility" of Section 5. *South Carolina*, 2012 WL 4814094 at *21-22 (Bates, J., concurring) ("[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here."). Absent the preclearance process, South Carolina almost certainly would have implemented a law with a substantial—and unnecessary—retrogressive effect.

C. Post-2006 Litigation Over Texas's Redistricting Underscores The Ongoing Importance Of The Section 5 Preclearance Process

The ongoing Texas redistricting litigation also speaks to the wisdom of Congress's predictive judgment that intentional voting discrimination in covered jurisdictions persists and that Section 5 plays a central role in preventing it.

In 2011, after experiencing a surge in population growth (two-thirds of which occurred among Hispanics), Texas redrew and sought judicial preclearance of its redistricting plans for the U.S. House of Representatives, the Texas House of Representatives, and the Texas Senate. *See Texas* v. *United States*, 2012 WL 3671924, at *1, *17 (D.D.C. Aug. 28, 2012), *jurisdictional statement filed*, No. 12-496 (U.S. Oct. 19, 2012). Following an eight-day trial and after review of a "voluminous" record, the three-judge court, in an opinion by Judge Griffith, unanimously denied preclearance for all three plans. *Id.* at *2. Importantly, the court detailed substantial circumstantial evidence of intentional race-based discrimination with respect to each of the plans.[8]

The most damning evidence of intentional discrimination, however, related to the U.S. congressional districts. On that score, the court made specific findings of "discriminatory purpose." *Texas*, 2012 WL 3671924, at *18. The court, for example, credited evidence that substantial "'surgery'" was performed on each of the state's three districts where blacks had an ability to elect a candidate of their choice even though the districts were already of ideal size. *Id.* at *19. The court cited "unchallenged evidence" that the districts represented by the only three black members of Texas's congressional delegation had both the key economic engines of their districts (e.g., convention centers, sports arenas, and universities) and the representative's district offices moved into other districts. *Id.* at *19-20. Map-drawers also removed the district office and economic engines from a Hispanic ability district. *Id.* at *19.

"No such surgery," however, was performed on the districts of Anglo incumbents. *Texas*, 2012 WL 3671924, at *20. "In fact, *every* Anglo member of Congress retained his or her district office." *Id.* The court concluded that these changes, even apart from the other *Arlington Heights* factors, were no mere coincidence and reflected a pattern "'unexplainable on grounds other than race.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 266); *see id.* at *21 (making findings with respect to other *Arlington Heights* factors). The court explained that "the totality of the evidence" demonstrated that the plan "was motivated, at least in part, by discriminatory intent." *Id.* at *21.[9]

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[8] *See id.* at *23-26 (evidence of intentional cracking—i.e., spreading out minority voters among many districts in order to deny them a voting bloc anywhere—in the State Senate plan); *id.* at *36, *37 (not reaching intent issue with respect to State House plan, but detailing "record evidence that causes concern," including a pattern of swapping precincts with high Hispanic turnout for those with low turnout, suggesting "a deliberate, race-conscious method to manipulate not simply the Democratic vote, but more specifically the *Hispanic* vote").

The Texas redistricting litigation demonstrates that, despite gains effected by the VRA, Congress was prescient in its judgment that "racial and language minorities remain politically vulnerable, warranting the continued protection" of Section 5. VRARAA § 2(b)(3); *see also LULAC* v. *Perry*, 548 U.S. 399, 440 (2006) ("the 'political, social, and economic legacy of past discrimination' for Latinos in Texas may well 'hinder their ability to participate effectively in the political process'" (citations omitted)).

D. Post-2006 Evidence Confirms That The Bailout Mechanism Continues To Advance The Requirement Of Proportionality

As shown in Part II.B, Congress's decision to reauthorize Section 5 in covered jurisdictions rested in part on its judgment that the bailout mechanism would continue to ensure that the Section 5 remedy applied only where it is needed. Congress's judgment has proven well-founded, particularly in the wake of this Court's broad interpretation of the scope of the bailout provision in *Northwest Austin*, 557 U.S. at 211.

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[9] The court also determined that the Texas State House Plan had a retrogressive effect because it dismantled the coalition district of prominent Asian-American legislator Hubert Vo. *See Texas*, 2012 WL 3671924, at *31-34.

Bailout has been granted in 27 cases since VRA reauthorization in 2006, with many of the bailout cases covering multiple jurisdictions. *See* DOJ, *Section 4 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Jan. 31, 2013). And it has occurred in 20 cases in the relatively short time since this Court's decision in *Northwest Austin*. *See id.* As the United States has noted, "the rate of successful bailouts has rapidly increased" since this Court "vastly expanded" bailout eligibility. U.S. Br. 54; *see* Pet. App. 62a (as of May 2012, "136 jurisdictions and subjurisdictions [have] bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts").[10] Moreover, as the court of appeals found below, the Attorney General has a number of active bailout investigations pending, covering 100 jurisdictions and subjurisdictions in several states. Pet. App. 63a. The number of bailouts, their increasing frequency, and the pending investigations all reveal the error in petitioner's claim (Br. 54) that bailout matters "only at the margin." To the contrary, the post-2006 record establishes that bailout is functioning precisely as Congress expected: as an important statutory safeguard ensuring Section 5 applies only where it is needed. *See* H.R. Rep. No. 109-478, at 25 ("covered status has been and continues to be within the control of the jurisdiction").[11]

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[10] Petitioner Shelby County, of course, is unable to seek bailout because it "held several special elections under a law for which it failed to seek preclearance and because the Attorney General had recently objected to annexations and a redistricting plan proposed by a city within Shelby County." Pet. App. 11a.

[11] Petitioner discounts bailout (Br. 54) because "only a tiny percentage of ... covered jurisdictions have bailed out of coverage." But many jurisdictions view preclearance positively and

IV. CONGRESS PROPERLY DETERMINED THAT SECTION 2 ALONE IS AN "INADEQUATE REMEDY"

In reauthorizing Section 5 in 2006, Congress found that, without preclearance in covered jurisdictions, minority voters would be left only with the "inadequate remedy" of Section 2. H.R. Rep. No. 109-478, at 57. Congress's assessment—one that this Court has consistently credited, *see City of Boerne*, 521 U.S. at 525-526; *South Carolina*, 383 U.S. at 313-314—was well-supported. In particular, the record before Congress demonstrated that Section 2 is an "ineffective" substitute for preclearance, H.R. Rep. No. 109-478, at 57, because case-by-case enforcement shifts the burden to the victim, permits the discriminatory voting change to go into effect, and is expensive and time consuming. *See Understanding the Benefits and Costs of Section 5 Preclearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (2006).

First, Congress appropriately declined to "'reverse the burden of proof'" in covered jurisdictions by forcing minority voters to rely on Section 2 litigation. H.R. Rep. No. 109-478, at 66. Rather than shift the burden of "time and inertia" onto minority voters, *South Carolina*, 383 U.S. at 328, Congress decided that the burden should rest with jurisdictions with historical records of racial discrimination in voting.

The record amassed by Congress supported that judgment. Congress learned that mounting Section 2

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have no desire to bail out. *See Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 313-314 (2006). Indeed, as discussed *supra* p. 17, every jurisdiction that has sought bailout has succeeded.

litigation is particularly troublesome for voters in local and rural communities who often experience discrimination but lack access to the resources and expertise necessary to pursue Section 2 suits. *See History, Scope, and Purpose* 79, 84; *Modern Enforcement of the Voting Rights Act, Hearing Before the S. Committee on the Judiciary*, 109th Congress 96 (2006) (without Section 5, "discriminatory voting changes ... will not be adequately or evenly addressed by private litigation under Section 2"); Pet. App. 45a-46a; Pitts, *Let's Not Call the Whole Thing Off Just Yet*, 84 Neb. L. Rev. 605, 612-613, 616 (2005). Congress reasonably concluded that continuing to place the burden on covered jurisdictions, where it is most efficiently borne, would enable "the Federal Government and court[s] to stay one step ahead of ... jurisdictions that have a documented history of denying minorities the protections guaranteed by the Constitution." H.R. Rep. No. 109-478, at 65.

Second, Congress reasonably determined that Section 2 lacked the "vital prophylactic" effect, H.R. Rep. No. 109-478, at 21, essential in covered jurisdictions. Unlike the Section 5 process, Section 2 suits are typically brought only after the voting change has gone into effect. *See, e.g., City of Mobile* v. *Bolden*, 446 U.S. 55, 59 (1980) (plurality opinion) (challenged method of election "enacted in 1911"). Congress learned that it may take several election cycles before enough evidence is available to mount a successful Section 2 challenge, and, even then, these suits can take years to litigate, during which time the challenged practice remains in place and incumbents may reap the rewards of a discriminatory scheme. *See History, Scope, and Purpose* 92; *id.* 101 ("2 to 5 years" to litigate a Section 2 suit a "rough average"); *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from* *the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 121 (2006) ("several years ... exclusive of any appeals"). This Court is familiar with this concern: When the Court struck down part of Texas's 2003 congressional redistricting plan, *LULAC*, 548 U.S. at 440 (noting that it "[bore] the mark of intentional discrimination"), the 2004 congressional elections had already occurred.[12]

Finally, Congress reasonably concluded that Section 2 litigation imposes a substantial financial burden on minority voters. *See History, Scope, and Purpose* 92, 97. Those burdens include not only attorney's fees and other routine litigation costs, but also fees for experts necessary in voting litigation, such as demographers, statisticians, and political scientists. *Id.* at 97; *see also An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to*

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[12] Plaintiffs in *LULAC* applied to this Court for a stay, which was denied. *See Jackson* v. *Perry*, 124 S. Ct. 1143 (2004). *LULAC* thus illustrates why seeking injunctive relief is a "heavy burden ... insufficient to alleviate [Congress's] concerns about the inadequacy of section 2 actions." Pet. App. 47a; *see, e.g., Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964) ("general equitable principles" may counsel against injunctive relief where an "election is imminent and a State's election machinery is already in progress"); *Favors* v. *Cuomo*, 2012 WL 1802073, at *9, *10 (E.D.N.Y. May 16, 2012) (denying preliminary injunction in part for failure to establish likelihood of success because Section 2 claims are "factually and legally complex" and "typically require substantial expert testimony and analysis"). For the contrary position, petitioner and its amici rely on Judge Williams' dissent, which in turn relies on *Perry* v. *Perez*, 132 S. Ct. 934, 942 (2012). *See* Pet. App. 77a-78a. But *Perry* did not suggest that preliminary relief for Section 2 plaintiffs was "standard." *Id.* 77a. Rather, it addressed the proper parameters of a plan drawn by the district court to replace a state-drawn plan challenged under Section 2. *See Perry*, 132 S. Ct. at 942.

Reauthorization, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 141 (2006). Indeed, "much of the burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare." H.R. Rep. No. 109-478, at 64.[13] Congress learned that voting cases rank near the top of all civil cases in complexity, *Understanding the Benefits and Costs of Section 5 Preclearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 20, 80 (2006), and that the cost of litigation routinely approaches "millions of dollars," *To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong. 42 (2005); *see Benefits and Costs* 20 (Section 2 suit "took over 3 years" and cost over "$2 million"); *Evidence of Continued Need* 175-176. Section 5, by contrast, appropriately relieves minority voters of the burden of bankrolling large-scale litigation while placing on covered jurisdictions the comparatively small financial burden associated with administrative preclearance. *See History, Scope, and Purpose* 79.

Based on these findings, Congress concluded that, if Section 2 were the sole remedy in the covered jurisdictions, "many discriminatory voting changes [would] go unchecked." *Reauthorizing the Temporary Provisions* 120; H.R. Rep. No. 109-478 at 57 (Section 2 "ineffective ... in light of the increased activity under Sections 5 and 8 over the last 25 years"). There are "not enough lawyers who practice in th[is] area to carry the load," nor are there the necessary financial resources to pursue private challenges under the Act. *Modern Enforcement of the Voting Rights Act, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 149 (2006); *cf.* Cunningham Resp.-Intervenor Br. 42, 43 ("[no]thing in ... 'the record to support ... speculation' that DOJ could [adequately] scale up its Section 2 enforcement," and noting that DOJ participates in only "a small fraction" of Section 2 suits). Given the magnitude and persistence of discrimination in covered jurisdictions, Congress reasonably determined that case-by-case litigation in the covered jurisdictions—slow, costly, and lacking Section 5's prophylactic effect—"would be ineffective to protect the rights of minority voters." H.R. Rep. No. 109–478, at 57.

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[13] In 2006, Congress amended the VRA to include expert fees in the category of fees and expenses that can be awarded to prevailing plaintiffs. *See* VRARAA § 6, amending 42 U.S.C. § 1973*l*(e). However, "prevailing plaintiffs typically do not recover all of their costs in voting cases, and even the addition of expert witness fees [to § 1973*l*(e)] will not change th[at] result." *Reauthorizing the Temporary Provisions* 121; *see also History, Scope, and Purpose* 92.

In short, Congress's decision that "Section 5 ... continue[s] to be a shield that prevents backsliding from the gains previously won," H.R. Rep. No. 109–478, at 53—and that Section 2 standing alone was insufficient to achieve that goal—was reasonable and rested on substantial evidence, *see Turner Broad.*, 512 U.S. at 666. This Court should decline petitioner's invitation to second-guess that legislative judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RECORD
AND
BRIEFS

No. 12-96

IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF HISTORIANS AND SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The VRA Has Provided and Remains a Critical Tool in Preventing a Wide Array of Minority Vote-Suppression Tactics in Covered Jurisdictions 5

A. In Enacting the VRA in 1965, Congress Was Confronted with a History of Extensive Vote-Dilution Tactics 5

B. VRA § 5 Has Successfully Curtailed Both Vote-Suppression and Vote-Dilution Tactics.. 8

C. The Legislative History of the VRA's Reauthorizations Evidences Congress's Intent To Prevent Both Vote-Suppression and Vote-Dilution Tactics 15

1. The 1970 Reauthorization.................. 15

2. The 1975 Reauthorization.................. 16

3. The 1982 Reauthorization.................. 17

D. Section 5 Continues To Be Critical To Ensuring Racial Equality at the Ballot Box.................................. 17

- II. The Geographical Coverage Provision Always Has Covered States with Persistent and Widespread Abuses 22
  - A. The VRA's Coverage Provision Has Never Achieved 100% Precision 23
    - 1. The Development of the Original Coverage Provision 23
    - 2. The 1965 Coverage Provision Did Not Achieve a Perfect Fit 25
    - 3. Congress's Reauthorizations of the Coverage Provision 29
  - B. The Current VRA Coverage Provision Is Consistent with the Standard Adopted by Congress and Upheld by This Court 32

CONCLUSION 35

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Alaska v. United States, No. 66-101 (D.D.C. Aug. 17, 1966) 28-29

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 13, 14

Apache Cnty. v. United States, 256 F. Supp. 903 (D.D.C. 1966) 29

Beer v. United States, 425 U.S. 130 (1976) 14

Brown v. Board of Comm'rs of the City of Chattanooga, No. 87-388 (E.D. Tenn. Jan. 11, 1990) 27

City of Rome v. United States, 446 U.S. 156 (1980) 30, 35

County Council of Sumter Cnty. v. United States, 596 F. Supp. 35 (D.D.C. 1984) 12

Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949) 6

Elmore County v. United States, No. 66-820 (D.D.C. Sept. 22, 1966) 28

Garza v. Los Angeles Cnty., Nos. 88-5143 & 88-5435 (C.D. Cal. Apr. 25, 1991) 31

Georgia v. United States, 411 U.S. 526 (1973) 14

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 7

Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990) 26

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 26

McMillan v. Escambia Cnty., No. 77-0432 (N.D. Fla. Dec. 3, 1979) 27

NAACP v. Gadsden Cnty. Sch. Bd., 589 F. Supp. 953 (N.D. Fla. 1984) 27

Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 32

Perkins v. City of West Helena, 675 F.2d 201 (8th Cir.), *aff'd*, 459 U.S. 801 (1982) 26

Perkins v. Matthews, 400 U.S. 379 (1971) 14, 15

Presley v. Etowah Cnty. Comm'n, 502 U.S. 491 (1992) 14

Smith v. Allwright, 321 U.S. 649 (1944) 6

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 23, 24, 25, 30, 35

White v. Regester, 412 U.S. 755 (1973) 26

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

- Amend. XIV 3, 35
- Amend. XV 3, 35

Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 30

- §§ 201-202, 89 Stat. 400-01 30
- § 203, 89 Stat. 401 30

Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 7

Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 29

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 131 31-32

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 *et seq.*) .... *passim*

§ 3(c), 79 Stat. 437 28

§ 4(a), 79 Stat. 438.. 28

§ 4(b), 79 Stat. 438.. 25

§ 2, 42 U.S.C. § 1973..................................4, 10, 18, 19, 21, 33, 34

§ 4, 42 U.S.C. § 1973b.. 3

§ 4(a), 42 U.S.C. § 1973b(a) 30

§ 4(b), 42 U.S.C. § 1973b(b) 30

§ 4(c), 42 U.S.C. § 1973b(c)................................... 24

§ 4(f), 42 U.S.C. § 1973b(f) 30

§ 5, 42 U.S.C. § 1973c 1, 2, 3, 4, 8, 10, 13, 14, 15, 16, 17, 18, 19, 21, 22, 30, 32, 33, 35

§ 14(c)(1), 42 U.S.C. § 1973*l*(c)(1) (1964) 13

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIALS

Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong. (1975) 30, 31

Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 97th Cong. (1981) 31

H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437 .... 24, 27-28

H.R. Rep. No. 91-397 (1969), *reprinted in* 1970 U.S.C.C.A.N. 3277 .... 16, 29

H.R. Rep. No. 94-196 (1975) 17, 27, 29, 30, 31, 34

H.R. Rep. No. 97-227 (1981) 11, 17, 31, 32

H.R. Rep. No. 109-478 (2006) 21

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S. Rep. No. 89-162, pt. 3 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508 27

S. Rep. No. 94-295 (1975) 30

S. Rep. No. 97-417 (1982) 32

To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 33

U.S. Senate, Roll Call Vote for H.R. 9, 109th Cong., *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212 3

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Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. (1965) 24, 25, 26, 27, 28

1 *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) 24

Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005)........................20, 21

Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. (1969) 15-16, 29

ADMINISTRATIVE MATERIALS

U.S. Dep't of Justice, Objection Letter to Baldwin County, Georgia (Sept. 19, 1983) 12

U.S. Dep't of Justice, Objection Letter to Barnwell City Council, Barnwell County, South Carolina (Mar. 26, 1984) 13

U.S. Dep't of Justice, Objection Letter to Hayneville, Lowndes County, Alabama (Dec. 29, 1978) 11

U.S. Dep't of Justice, Objection Letter to Jefferson, Chesterfield County, South Carolina (Mar. 26, 1984) 13

U.S. Dep't of Justice, Objection Letter to Jonesboro, Clayton County, Georgia (Feb. 4, 1972) 13

U.S. Dep't of Justice, Objection Letter to Lancaster County, South Carolina (Oct. 1, 1974) 12

U.S. Dep't of Justice, Objection Letter to Lancaster County School District, South Carolina (Apr. 27, 1984) 13

U.S. Dep't of Justice, Objection Letter to Reidsville, Rockingham County, North Carolina (Aug. 3, 1979) 13

U.S. Dep't of Justice, Objection Letter to State of North Carolina (Nov. 30, 1981) 11

U.S. Dep't of Justice, Objection Letter to State of North Carolina (Dec. 7, 1981) 11-12

U.S. Dep't of Justice, Objection Letter to State of North Carolina (Jan. 20, 1982) 11

U.S. Dep't of Justice, Objection Letter to Sumter County, South Carolina (Dec. 3, 1976) 12

U.S. Dep't of Justice, Objection Letter to Twiggs County, Georgia (Aug. 7, 1972) 11

OTHER MATERIALS

Brief of the Plaintiff, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22, Orig.) (filed Dec. 20, 1965), 1965 WL 130083 22

Chandler Davidson (ed.), *Minority Vote Dilution* (1984) 9

Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (3d ed. 2007) 2

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Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990, 5 U. Pa. J. Const. L. 665 (2003) 20

Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom, 14 Soc. Sci. Hist. 507 (1990) 9

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Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994):

Ch. 1 (Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*) 9, 13

Ch. 2 (Peyton McCrary et al., *Alabama*).....5, 6, 7, 8, 10, 12, 18, 19

Ch. 7 (Orville Vernon Burton et al., *South Carolina*) 12

Ch. 11 (Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*) 19

Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 Pub. Papers 841 (Aug. 6, 1965) 2

INTEREST OF *AMICI CURIAE*[1]

Amici are U.S. historians and other scholars, some of whom have devoted their entire careers to the study of the American South and, in particular, to racial and ethnic minorities' long struggle for equal civil rights in that region.[2] Collectively, *amici* have written more than 50 books and nearly 200 articles or book chapters on those topics. All *amici* agree that the Voting Rights Act of 1965 ("VRA") is the most effective and important civil rights legislation in U.S. history. They also believe that the history of the VRA demonstrates that many of Congress's objectives in enacting and reauthorizing the VRA remain unfinished. *Amici* believe that their expertise will aid the Court's understanding of the indispensable role that the Act, and in particular § 5, has played in promoting and continuing to ensure equal rights in the American South.

In particular, *amici* wish to draw the Court's attention to two important historical considerations that are relevant to this case:

1. Section 5 of the VRA was designed, from its inception, to prevent not just laws that denied racial minorities access to the ballot, but also other discriminatory laws and policies that

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Rockefeller Brothers Fund provided a grant to one *amicus* for research intended to be used in the preparation of this brief. Both petitioner and respondents have consented to the filing of this brief, and letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

[2] A list of the *amici* and their biographical information are included as Appendix A to this brief.

sought to diminish the effectiveness of minority voting strength. Congress's focus on these "second-generation" tactics in the 2006 reauthorization was thus fully consistent with the original purposes of the VRA.

2. The VRA's original geographical coverage provision targeted the states and localities that, prior to 1965, had the most persistent and widespread voting rights abuses. Congress recognized that the covered jurisdictions were both over- and under-inclusive, but this Court has never demanded perfect precision. The law's current coverage provision is substantially as precise as those the Court has upheld in the past.

INTRODUCTION

The VRA has been widely recognized as the most important civil rights act in the nation's history. Professor Pamela S. Karlan, co-author of the leading election-law text, *The Law of Democracy*, described the Act as "the cornerstone of the 'Second Reconstruction.'"[3] Her view of the Act's accomplishments echoed the hopes of President Lyndon B. Johnson at the signing ceremony of the Act in 1965, when he characterized it as "one of the most monumental laws in the entire history of American freedom."[4]

VRA § 5, which originally was scheduled to expire in 1970, has been renewed by Congress four times. The 2006 renewal was endorsed by an overwhelming majority of both houses of Congress. The vote in the Senate was 98 to 0, and included Senators from every covered State. Moreover, the original enactment in 1965 and each of the reauthorizations of § 5 in 1970, 1975, and 1982 have been overwhelmingly bipartisan.[5] In light of the polarization between the two parties that prevails in our day, we find the overwhelming bipartisan support for § 5's reauthorization a significant fact.

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[3] Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 2 (2007).

[4] Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 Pub. Papers 841 (Aug. 6, 1965), *quoted in* Karlan, 44 Houston L. Rev. at 2.

As we understand the issues before the Court, it must decide whether there is still evidence that racial discrimination affecting voting is a problem great enough in magnitude to justify the preclearance requirement and whether the coverage formula set forth in § 4 of the Act appropriately targets the jurisdictions where racial discrimination affecting voting is concentrated. We believe that the historical evidence in this *amicus* brief will assist the Court in resolving the issues before it.

It is the consensus view of the signatories to this brief – historians and social scientists, much of whose work has focused on the VRA and barriers to voting encountered by racial minorities, most particularly blacks, Latinos, Native Americans, and Asians – that § 5 remains a necessary federal weapon in the long battle to uphold the promise of the Fourteenth and Fifteenth Amendments, given the history of racial discrimination affecting voting, particularly in covered jurisdictions.

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[5] For 1970, 1975, and 1982, see Colin D. Moore, *Extensions of the Voting Rights Act, in The Voting Rights Act: Securing the Ballot* 95, 101 (Richard M. Valelly ed., 2006); for 2006, see http://clerk.house.gov/evs/2006/roll374.xml and http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212.

SUMMARY OF ARGUMENT

From its inception, VRA § 5 has been intended – and applied in practice – to prevent changes in voting laws that have the potential to undermine minority voters' effective use of the electoral franchise. In conjunction with § 2 of the Act, § 5 has proven a critical tool in preventing covered jurisdictions from backsliding on their duty to protect minority voting rights, and has helped minority voters in covered jurisdictions press white majorities to gain the full benefit of the electoral franchise. Despite these accomplishments, the persistence of racially polarized voting and vote-dilution tactics in covered jurisdictions demonstrate the continuing need for the robust protections afforded by § 5.

The coverage provision is not and never has been designed to capture every last place in America where racial discrimination in voting exists. Rather, from 1965 through today, the provision has excluded jurisdictions with significant voting discrimination problems. And, in some (but rare) cases, it has included jurisdictions with benign records. Perfection in this area cannot reasonably be expected. However, the provision adopted by Congress captures the jurisdictions with the most significant history of voting discrimination using the best data available.

ARGUMENT

I. The VRA Has Provided and Remains a Critical Tool in Preventing a Wide Array of Minority Vote-Suppression Tactics in Covered Jurisdictions

The VRA was never limited to preventing racial minorities from being literally denied access to the ballot. Rather, Congress always recognized the multiplicity of devices for denying racial minorities the full benefit of the electoral franchise. The history leading up to the VRA's passage, as well as the history of its enforcement, demonstrates that the VRA was always intended to prevent not only "first-generation" tactics that deny access to the vote, but also "second-generation" tactics that seek to dilute minority voting power or diminish the value of minorities' votes.[6]

A. In Enacting the VRA in 1965, Congress Was Confronted with a History of Extensive Vote-Dilution Tactics

Even before the VRA, Southern states had engaged in a wide range of tactics that sought not only to deny racial minorities ballot access but also to diminish the power of their vote. Alabama provides a good illustration of these purposefully discriminatory tactics. In the decades before 1965, Alabama, like most states of the former Confederacy, protected the white monopoly on elective office primarily through onerous voter-registration requirements that disenfranchised the vast majority of the State's black citizens.[7]

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[6] *See* J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 16 (1999).

[7] *See* Peyton McCrary et al., *Alabama* ("McCrary, *Alabama*"), *in Quiet Revolution in the South: The Impact of the Voting*

At Alabama's 1900 state constitutional convention, the delegates "enacted a cumulative poll tax, a literacy test, a long residency requirement, and required gainful employment for the past year" as conditions to registration. McCrary, *Alabama* at 44. And the lucky few black voters who were able to register were prevented from influencing the electoral process by the "white primary" – Alabama's "insurance policy" against black voting rights. *Id.*

After this Court invalidated the white primary in *Smith v. Allwright*, 321 U.S. 649 (1944), removing "probably the most efficacious method of denying the vote to African Americans"[8] from the South's "multilayered system of discriminatory election laws," McCrary, *Alabama* at 45, large numbers of black citizens in the Alabama cities of Mobile, Birmingham, and Tuskegee, *see id.*, were among the "tens of thousands [who] began to line up to register for Democratic primaries throughout the South," Keyssar at 199. Determined not to cede any ground to black voters, Alabama's governor and legislature quickly amended its constitution to give local voter registrars broad discretion to disqualify voters, which was intended to (and did) disenfranchise black citizens. *See* McCrary, *Alabama* at 45. When this law was struck down in 1949, *see Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949) (per curiam), Alabama passed a constitutional amendment requiring its Supreme Court to develop a registration application that was intended to be so complicated that blacks, who generally had less education

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Rights Act, 1965-1990, ch. 2, at 38, 43-45 (Chandler Davidson & Bernard Grofman eds., 1994) ("*Quiet Revolution*").

[8] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 199 (2009 rev. ed.) ("Keyssar").

than whites, would be unable to understand it. *See* McCrary, *Alabama* at 45.

Sensing sweeping federal intervention on the horizon, Alabama politicians took measures to entrench the political power of the State's white citizens by resurrecting vote-dilution laws that had been abandoned decades earlier in favor of wholesale disenfranchisement. *See id.* at 42-44. In one particularly notorious episode in the late 1950s, the Alabama legislature purposefully re-drew the municipal boundaries of Tuskegee to de-annex nearly all of the city's black neighborhoods because "black registrants were sufficiently numerous that they posed a threat to white political control of the city." Keyssar at 233; *see* McCrary, *Alabama* at 45.[9]

Alabama also passed laws to prevent black citizens from pooling their votes to elect a candidate of their choice in at-large municipal elections. The State's 1951 law prevented such "single-shot voting" strategies by requiring all voters to cast ballots for a full slate of the offices to be filled.[10] *See* McCrary, *Alabama* at 46. The legislature amended the law in 1961 to require each candidate to run for a separate numbered place or post. Because voters were required to cast a ballot for each numbered post, black citizens could no longer band together to elect a candidate of their choice. One Alabama Democratic Party leader explained that these laws were necessary because of the "'increasing Federal pressure' . . . 'to register negroes en masse.'" *Id.*

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[9] Though "racial districting had been a common form of political warfare throughout the South, particularly in the years before wholesale disenfranchisement," Keyssar at 233, the unusually flagrant "Tuskegee Gerrymander," McCrary, *Alabama* at 45, was immediately challenged under the Civil Rights Act of 1957 and eventually invalidated by this Court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[10] Even when voting patterns are racially polarized, in a simple at-large system a cohesive minority group can use single-shot voting to elect one representative if several offices are to be filled.

"By the time the [VRA] was adopted, Alabama had perfected a system of local and state laws that, for most jurisdictions, required at-large elections, numbered places, and a majority vote, making it virtually impossible for blacks to elect candidates of their choice without substantial cross-over voting." *Id.* at 47.

B. VRA § 5 Has Successfully Curtailed Both Vote-Suppression and Vote-Dilution Tactics

1. In his comprehensive history of voting rights in America, Alexander Keyssar explains that the VRA "did not suddenly put an end to racial discrimination in [S]outhern politics. To a considerable degree, the locus of conflict shifted from the *right* to vote to the *value* of the vote." Keyssar at 212 (emphases added). Southern responses to federal intervention in voter registration, like Alabama's Tuskegee Gerrymander, proved to federal officials and Southern blacks alike that, "[i]f the federal government insisted on black enfranchisement, conservative Southerners would attempt to vitiate its consequences by altering the structures of representation." *Id.* at 233.

To do this, white politicians in covered jurisdictions intentionally exploited a well-known fact about Southern politics: given a choice, black voters will generally vote for certain candidates, while white voters will generally prefer different candidates, even within the same party. The practical effect of this "racially polarized" voting pattern is that the candidate preferred by black voters will not be elected in jurisdictions where white voters are the majority if white voters vote cohesively as a bloc. Thus, white politicians could frustrate black voters' efforts to elect sympathetic representatives simply by configuring electoral structures to ensure that whites were a majority.[11]

Southern whites had many tactics at their disposal to take advantage of racially polarized voting. "In the numerous cities with white majorities but sizable black populations, whites could maintain a monopoly on political power by having all city council members elected 'at large' rather than from single-member districts" or by "insisting on majority runoffs rather than plurality victories." *Id.* at 234. These tactics were especially discriminatory when accompanied by "enhancing devices," such as numbered-place and majority-vote requirements.[12] Southern jurisdictions also annexed and de-annexed territory to change the racial composition of the electorate, or racially gerrymandered electoral districts either to "crack" black voters into different districts to prevent them from gaining a majority in any particular district or to "pack" black voters into a single electoral district to decrease the number of districts in which black voters had a majority. *See id.* at 233-34.

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[11] *See* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities* ("Davidson, *Recent Evolution*"), *in Quiet Revolution* ch. 1, at 21, 22-24.

[12] Chandler Davidson (ed.), *Minority Vote Dilution* 1, 4-5 (1984); *see* Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 Soc. Sci. Hist. 507 (1990).

The seminal book on the effect of the VRA on minority political power in the South, *Quiet Revolution in the South*, collects a series of studies of voting patterns, electoral structures, and VRA enforcement activity in each of the Southern states covered by § 5. Consistent with an extensive body of research on the subject, the studies published in *Quiet Revolution* demonstrate that VRA § 2 and § 5 – effectuated through Department of Justice ("DOJ") objections to preclearance and § 2 litigation – have worked in tandem to defeat and deter second-generation barriers to minority groups' effective exercise of the electoral franchise.

2. Alabama once again serves as a powerful example. Given Alabama's pre-VRA history, it is unsurprising that DOJ used its § 5 authority repeatedly to prevent municipalities from undermining minority representation. The first DOJ § 5 objection to voting-law changes intended to dilute the effectiveness of black votes in Alabama was interposed in 1971 to stop the legislature from requiring numbered-place voting in the City of Birmingham's at-large elections, shortly after the City Council appointed a black attorney to a vacant seat. *See* McCrary, *Alabama* at 47.

DOJ also interposed objections that prevented 11 of the 16 attempts made by Alabama county commissions to move from single-member-district to at-large electoral schemes during the period from 1965 to 1985. *See id.* at 48. DOJ granted preclearance to the other five because the changes would not have a retrogressive effect on black voting power. *See id.*

In its report on the 1982 reauthorization bill, the House Judiciary Committee discussed two examples of DOJ objections to voting-law changes submitted by

Alabama jurisdictions, including a 1971 attempt by the Clark County Commission to switch from a single-member-district to an at-large system, and a 1968 attempt by the town of Hayneville to incorporate itself with boundaries that made its electorate 85% white even though Hayneville was in a county in which 77% of the residents were black. H.R. Rep. No. 97-227, at 18-19 (1981). DOJ denied preclearance to the Clark County Commission. *Id.* It granted Hayneville preclearance only after the legislature annexed to Hayneville the predominantly black communities it had sought to exclude. *Id.*; U.S. Dep't of Justice, Objection Letter to Hayneville, Lowndes County, Alabama (Dec. 29, 1978).

The history in other states is similar. For example, in 1972, DOJ objected to Twiggs County, Georgia's attempt to change to at-large elections with numbered-post and majority-vote requirements for its county commission, because the move would dilute the voting power of African-Americans, who comprised a majority of the registered voters in one of the existing districts but a minority countywide.[13] Similarly, DOJ objected to North Carolina's constitutional amendment prohibiting the splitting of any county in legislative districting, on the grounds that it effectively required multi-member districts and thus increased the likelihood of minority vote dilution due to the State's pattern of racially polarized voting.[14]

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[13] U.S. Dep't of Justice, Objection Letter to Twiggs County, Georgia (Aug. 7, 1972).

[14] U.S. Dep't of Justice, Objection Letter to State of North Carolina (Nov. 30, 1981) (identifying the change as retrogressive); *see also* U.S. Dep't of Justice, Objection Letter to State of North Carolina (Jan. 20, 1982) (state house); U.S. Dep't of

DOJ also objected to changes from appointive to elective offices where the jurisdiction chose to use at-large elections. For example, it objected to the South Carolina legislature's adoption of at-large elections for the county council of Sumter County to replace a system of gubernatorial appointments after the governor began appointing blacks to the county's governing body.[15] It also objected to a similar change for the school board in a Georgia county on both purpose and retrogression grounds.[16]

Southern states also sought to impose obstacles to single-shot voting similar to the laws enacted in Alabama in 1961. *See* McCrary, *Alabama* at 46. As DOJ explained, minority voters' ability to elect a candidate of their choice through single-shot voting is thwarted "if an otherwise at-large election to fill multiple identical offices is transformed into a number of separate election contests through the use of numbered and residency post requirements and the staggering of terms of office."[17] DOJ has consistently objected to these types of devices. For example, it did so in Clayton County, Georgia, when majority-vote and numbered-place requirements led to the defeat

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Justice, Objection Letter to State of North Carolina (Dec. 7, 1981) (state senate).

[15] U.S. Dep't of Justice, Objection Letter to Sumter County, South Carolina (Dec. 3, 1976); *see also County Council of Sumter Cnty. v. United States*, 596 F. Supp. 35, 37-39 (D.D.C. 1984) (per curiam); Orville Vernon Burton et al., *South Carolina, in Quiet Revolution* ch. 7, at 191, 208-09.

[16] U.S. Dep't of Justice, Objection Letter to Baldwin County, Georgia (Sept. 19, 1983).

[17] U.S. Dep't of Justice, Objection Letter to Lancaster County, South Carolina (Oct. 1, 1974).

of a black incumbent,[18] and when municipalities in North Carolina[19] and South Carolina[20] created staggered-term systems to engineer the defeat of black candidates.

3. As these examples illustrate, the VRA was not limited to ending "first-generation" ballot-denial tactics; it was intended and applied to stop "second-generation" forms of indirect, but no less intentional, vote discrimination. This Court also has recognized that the "right to vote" protected by § 5 is not limited to the literal right to cast a ballot, but broadly includes "'all action necessary to make a vote effective.'" *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (quoting 42 U.S.C. § 1973*l*(c)(1) (1964)). Giving effect to § 5's broad scope, *Allen* enjoined enforcement of "a change from district to at-large voting for county supervisors," noting that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569.

After *Allen*, the Court gave broad effect to its holding, denying preclearance to a wide variety of attempts by covered jurisdictions to change voting laws to undermine minority groups' use of the franchise. *See* Davidson, *Recent Evolution* at 32-33; *see*

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[18] U.S. Dep't of Justice, Objection Letter to Jonesboro, Clayton County, Georgia (Feb. 4, 1972).

[19] U.S. Dep't of Justice, Objection Letter to Reidsville, Rockingham County, North Carolina (Aug. 3, 1979).

[20] U.S. Dep't of Justice, Objection Letter to Jefferson, Chesterfield County, South Carolina (Mar. 26, 1984); *see also* U.S. Dep't of Justice, Objection Letter to Lancaster County School District, South Carolina (Apr. 27, 1984); U.S. Dep't of Justice, Objection Letter to Barnwell City Council, Barnwell County, South Carolina (Mar. 26, 1984).

also Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 502-03 (1992) (reviewing and summarizing *Allen*'s progeny). In 1971, the Court extended *Allen* to include a covered jurisdiction's attempt to annex neighboring white communities while excluding minority populations and to change the location of polling places. *See Perkins v. Matthews*, 400 U.S. 379, 390-91 (1971). The *Perkins* Court observed that, "[i]n terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation that changes both the boundaries and ward lines of a city to include more voters." *Id.* at 390.

Although litigants challenged the *Allen* Court's expansive interpretation of § 5's scope in later years, this Court repeatedly reaffirmed *Allen*'s holding that § 5 prohibits second-generation vote-dilution tactics. *See Georgia v. United States*, 411 U.S. 526, 533 (1973) (concluding that Congress's decision to reauthorize VRA and § 5 as written indicated "that *Allen* correctly interpreted the congressional design"). "In other words the purpose of § 5 *has always been* to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976) (emphasis added). Thus, contrary to arguments advanced by petitioner's *amici*,[21] this Court has long recognized that defeating second-generation barriers to minorities' voting rights is a central purpose of § 5.

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[21] *See* Landmark Legal Found. Br. 11-16.

C. The Legislative History of the VRA's Reauthorizations Evidences Congress's Intent To Prevent Both Vote-Suppression and Vote-Dilution Tactics

The legislative history accompanying the VRA's 1970, 1975, and 1982 reauthorizations confirms that Congress intended § 5 to apply expansively so as to prevent new forms of vote discrimination intended to diminish minority groups' voting power and undermine their hard-won gains.

1. ***The 1970 Reauthorization.*** Congress approved of using § 5 to defeat vote-dilution tactics when it first reauthorized the VRA in 1970. In *Perkins*, this Court quoted at length from the remarks made by one member of Congress in 1969:

> "When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be ample time. But resistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.
>
> Section 5 was intended to prevent the use of most of these devices."

400 U.S. at 389 n.8 (quoting *Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the H.*

Comm. on the Judiciary, 91st Cong. 3-4 (1969) ("1969 House Hr'gs") (remarks of Rep. McCulloch)).

The House Judiciary Committee's report also reflects concern about the "new, unlawful ways to diminish the Negroes' franchise" as "Negro voter registration has increased under the Voting Rights Act." H.R. Rep. No. 91-397, at 7 (1969), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3283. The Committee specifically cited evidence that covered jurisdictions had been "switching to at-large elections where negro voting strength is concentrated in particular election districts and facilitating the consolidation of predominantly negro and predominantly white counties." *Id.*

2. ***The 1975 Reauthorization.*** In 1975, Congress expressly relied on evidence of DOJ's use of § 5 objections to challenge dilutive redistricting plans, *see supra* Point I.B.2, in finding that § 5 remained necessary:

> As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength. Such other measures may include switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans. In fact, the Justice Department has recently entered objections, at the state and local level, to at-large requirements, . . . majority vote requirements, . . . redistrictings, . . . multimember districts, and annexations. . . . . This past experience ought not be ignored in terms of assessing the future need for the Act. . . . . [I]t is likewise Section 5 which serves to insure that progress not be destroyed through new procedures and techniques.

H.R. Rep. No. 94-196, at 10-11 (1975) (citations omitted).

3. ***The 1982 Reauthorization.*** In 1982, Congress likewise cited numerous examples of second-generation tactics in covered jurisdictions as evidence for the continuing need of § 5. *See* H.R. Rep. No. 97-227, at 17-20. Congress noted that, although non-covered jurisdictions also used electoral structures similar to those targeted in VRA enforcement actions, "in the covered jurisdictions, where there is severe racially polarized voting, they often dilute emerging minority political strength." *Id.* at 18. Citing *Allen*, Congress reiterated that "[t]he Congress and the courts have long recognized that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render votes meaningless." *Id.* at 17.

In sum, Congress consistently has recognized – in the original VRA and every reauthorization since – that the VRA serves not only to prevent actual denial of ballot access, but also to foreclose "second-generation" vote-dilution tactics that have been used to deprive racial minorities of the effective exercise of the franchise.

D. Section 5 Continues To Be Critical To Ensuring Racial Equality at the Ballot Box

The historical evidence demonstrates that § 5 remains critical to ensuring racial minorities effective voting power.

1. To the extent unconstitutional voting-rights deprivations have diminished in covered jurisdictions, that progress is directly attributable to vigor-

ous enforcement of VRA § 2 and § 5. Eliminating § 5 would jeopardize that progress and threaten a return to the intentional vote-dilution tactics that Congress and DOJ have fought so hard to eliminate.

Taking Alabama again as the primary example, historical research demonstrates that both enforcement of § 5 through DOJ objections and § 2 litigation have proven critical to the progress achieved since 1965. When the VRA was enacted in 1965, black elected officeholders in the State "were restricted to communities in which blacks constituted a majority of the registered voters." McCrary, *Alabama* at 54. Even five years after passage of the Act, little progress had been made; only two black officials had been elected in at-large elections in white-majority cities by 1970. *Id.* By 1989, black officials held office in Alabama in numbers roughly proportional to black voters' representation in the State's population. *Id.*

As to the cause of these considerable changes, McCrary and his colleagues found that, between 1970 and 1989, 42 of 48 Alabama cities with 6,000 or more persons and populations that were at least 10% black switched from at-large to single-member-district or mixed electoral plans. *Id.* at 55. That change was critical, because, "[a]s long as at-large elections were in place, white majorities voting as a bloc were able to prevent black citizens enfranchised by the Voting Rights Act from winning local office." *Id.* at 56. And the VRA was the critical force behind that change: DOJ objections to preclearance requests prompted 4 of the changes, 27 cities changed their electoral plans in response to litigation, and 11 changed voluntarily, but aware of the possibility of litigation or DOJ opposition. In the six cities that retained at-large electoral plans, three were white-majority cities with proportional black representation, while the other three were black-majority cities. *Id.* at 55.

Empirical studies of other states further support the conclusion that the VRA has been instrumental to achieving racial equality in voting in the South. Lisa Handley and Bernard Grofman's analysis of data obtained from studies of voting patterns, electoral structures, and VRA enforcement activity in Southern states found that post-VRA gains in the offices held by black voters' preferred representatives in Southern legislatures and congressional delegations were almost entirely attributable to changes in electoral structures caused by VRA enforcement activity.[22] For example, Handley and Grofman found that the increase in black office-holding was mostly attributable to the creation of more majority-black electoral districts and not changing racial attitudes among voters. Handley, *Black Officeholding* at 340-43. Moreover, the authors compared changes in Southern states that were covered by § 5 and those that were not and found that, on average, covered states had 2.8 more black representatives than Southern states that were subject only to § 2. *Id.* at 342-44.

2. Empirical research showing the continued racial polarization of the electorate in the South demonstrates that the VRA remains essential to preventing a return to the types of vote-dilution tactics that historically have been used to diminish minorities' effective franchise. Contrary to the arguments advanced by petitioner's *amici* that the continued prevalence of racial polarization, or racial bloc voting, is an "offensive stereotype" forced on covered jurisdictions by DOJ,[23] racial polarization is a fact that has been proven time and again in litigation and academic studies of voter behavior. "No court has ever found a violation in a voting rights case absent proof, typically presented through expert statistical analysis, that white or Anglo voters routinely defeat the candidates of choice of minority voters." Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. Pa. J. Const. L. 665, 700 (2003).

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[22] *See* Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations* ("Handley, *Black Officeholding*"), *in Quiet Revolution* ch. 11, at 335.

In trial after trial, expert witnesses across the South showed that white bloc voting kept blacks from electing the candidates of their clear choice, except in districts where they were a substantial majority. During the 2005 congressional reauthorization hearings, Richard Engstrom presented findings that, "[i]n 78 of the 90 [Louisiana] elections analyzed, 86.7 percent, all available estimates show that African Americans cast a majority of their votes, usually extraordinary majorities of them, in support of an African American candidate, while a majority, also usually an extraordinary majority, of the non-African Americans voted for a non-African American candidate."[24] Engstrom also cited decisions issued between 2002 and 2004 by federal courts in South Carolina, Texas, Florida, and Georgia that identified significant racial polarization in those states. *See* 2005 House "Need" Hr'g 59-60. The National Commission on the Voting Rights Act's February 2006 report highlighted a University of Michigan analysis of federal court decisions in § 2 cases issued since 1982. Out of 186 published decisions that addressed racial polarization in both covered and non-covered jurisdictions, 91 (49%) included a judicial finding of racially polarized voting.[25]

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[23] *See* Project 21 Br. 18-19; Mountain States Legal Found. Br. 26.

[24] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 58 (2005) ("2005 House 'Need' Hr'g").

In reauthorizing § 5, Congress recognized that racial polarization remains a fact of Southern politics. Indeed, Congress found "that 'the degree of racially polarized voting in the South is increasing, not decreasing . . . [and is] in certain ways re-creating the segregated system of the Old South, albeit a de facto system with minimal violence rather than the de jure system of late.'" H.R. Rep. No. 109-478, at 34 (2006) (quoting *Protecting Minority Voters* at 95) (alterations in original). And it concluded that, despite § 5, Southern jurisdictions have repeatedly attempted in recent years to make changes to voting laws with the intent of diminishing the influence of minority voters by subsuming them into electoral structures dominated by white majorities. *Id.* at 36-43, 56 (discussing use of § 5 to combat continued discrimination). The conditions underlying second-generation vote-dilution efforts – racially polarized voting – remain prevalent throughout the jurisdictions covered by the VRA. Thus, if § 5 were struck down, there is little doubt that politicians in covered jurisdictions would be able to resuscitate the types of intentional, retrogressive voting-law changes that Congress and DOJ have long fought to eliminate.

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[25] Lawyers' Comm. for Civil Rights Under Law, Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 97 (Feb. 2006) ("*Protecting Minority Voters*"), *available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf.

II. The Geographical Coverage Provision Always Has Covered States with Persistent and Widespread Abuses

One of the key issues before the Court is the degree to which the § 5 coverage provision accurately targets the locations where racial discrimination affecting voting is greatest. Petitioner and its *amici* criticize the coverage provision for not perfectly capturing the areas where significant voting discrimination problems persist. This is not the first time that argument has been advanced in this Court. In challenging the original VRA, South Carolina contended that the coverage provision was "arbitrary" and "absurd[]" because Florida, Arkansas, Texas, Tennessee, Kentucky, and New York were not covered despite "evidence submitted of known voter discrimination," while South Carolina was covered "even though [Attorney General Katzenbach] testified that South Carolina, unlike [other] states, was free of voter discrimination." Brief of the Plaintiff at 17-18, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22, Orig.) (filed Dec. 20, 1965), 1965 WL 130083.[26]

This Court rejected South Carolina's challenge, recognizing the wealth of evidence of the covered jurisdictions' serious and pervasive efforts to disenfranchise African-American voters, and because of the flexible "bail in" and "bail out" provisions built into the VRA. *Katzenbach*, 383 U.S. at 329-31. As a review of the history of the VRA's enactment makes clear, the coverage provision has never achieved a perfect "fit," and this Court has never expected perfection. Rather, Congress and this Court have appropriately recognized that the provision reflects Congress's legislative judgment to target the jurisdictions with the gravest danger of voting discrimination using the best evidence available.

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[26] Attorney General Katzenbach had testified that "voting discrimination has been unquestionably widespread in all but South Carolina and Virginia, and other forms of racial discrimination, suggestive of voting discrimination, are general in both of these States." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 12 (1965) ("1965 House Hr'gs").

A. The VRA's Coverage Provision Has Never Achieved 100% Precision

1. The Development of the Original Coverage Provision

The evidence before Congress in 1965 illuminates the degree of "fit" that this Court demanded in upholding the original VRA. Congress had significant evidence of racial discrimination in voting in three states: Louisiana, Mississippi, and Alabama. *See Katzenbach*, 383 U.S. at 329. Prior to 1965, it had brought 26 successful voting rights suits in those states. *See id.* at 312. Yet the results were meager. The registration rates for black citizens had risen from 14.2% to 19.4% in Alabama, from 31.7% to 31.8% in Louisiana, and from 4.4% to 6.4% in Mississippi. *See id.* at 313. DOJ's experience in Dallas County, Alabama, is emblematic. After four years of drawn-out litigation, only 383 out of 15,000 black citizens were registered. *See id.* at 314-15; 1965 House Hr'gs 5-6.

Congress had "more fragmentary" evidence of voting discrimination in three other states: Georgia, North Carolina, and South Carolina. *See Katzenbach*, 383 U.S. at 329-30 & n.39. It primarily consisted of several suits and investigations.[27] The reason this evidence was "fragmentary" was not for lack of voting discrimination in those three states but rather because DOJ had been too busy in Louisiana, Mississippi, and Alabama. 1965 Senate Hr'gs 28, 39-40; 1965 House Hr'gs 89-90. Congress thus wished to include these states within the coverage formula.

Once Congress decided which states it wanted to cover, it reverse-engineered the coverage criteria to capture those states. Congress, "[knowing] the states they wanted to 'cover' and, by a process of trial and error, determined the [formula] that would single them out." 1 *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 68 (2005) (statement of Abigail Thernstrom); *see* H.R. Rep. No. 89-439, at 41 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2470 ("[A] target for the bill was selected before the means to reach the mark were devised.") (minority view); *see also Katzenbach*, 383 U.S. at 329 ("[t]he formula eventually evolved to describe [the] areas" where Congress had evidence of voting discrimination).[28]

The final provision covered any state that "maintained on November 1, 1964, any test or device," as defined in § 4(c), with respect to which "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." VRA § 4(b), 79 Stat. 438. As intended, these criteria led to coverage of the seven Southern states in which DOJ knew voting discrimination was rampant – Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and portions of North Carolina. Also included were several other scattered jurisdictions – Alaska, three counties in Arizona, and one county in Idaho.

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[27] *See* 1965 House Hr'gs 114-16; *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 27-28, 39, 246-48, 1182-83, 1237, 1253, 1300-01, 1336-45, 1353-54 (1965) ("1965 Senate Hr'gs").

[28] Conversely, Congress attempted to change the formula after it became clear that it covered unexpected jurisdictions like Alaska. *See* 1965 Senate Hr'gs 13, 37-38.

2. The 1965 Coverage Provision Did Not Achieve a Perfect Fit

Nobody expected the coverage provision to be 100% precise. Congress "knew no way of accurately forecasting whether the evil might spread elsewhere in the future." *Katzenbach*, 383 U.S. at 328; *see* 1965 House Hr'gs 80-81 ("The difficulty . . . is we cannot get completely accurate figures . . . , and in the[ir] absence . . . it seems to me that Congress should make the judgment . . . on the best evidence available.") (statement of Attorney General Katzenbach).[29] In fact, the formula did not cover several jurisdictions with abysmal voting-rights records, namely Texas, Arkansas, Tennessee, and Florida.[30]

Texas. By 1965, "Texas ha[d] a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods [were] an unfortunate part of this State's minority voting rights history." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (internal quotation marks omitted); *see also White v. Regester*, 412 U.S. 755, 765-69 (1973). This discrimination was evidenced in 1965 by a state-wide voting turnout of only 44% in the 1964 presidential election, 17% below the national average. *See* 1965 Senate Hr'gs 33-34.

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[29] *See also* 1965 House Hr'gs 27-28, 48, 78, 91-92 ("We don't have racial statistics on registration or on voting for all States that we believe would form the basis for a congressional determination."), 122, 289, 293-94, 419, 693-94; 1965 Senate Hr'gs 147-49, 179, 203, 596, 598-600.

[30] *See* 1965 House Hr'gs 694 ("[T]here are four other States where there is pretty well-known discrimination against Negroes. It runs downhill from Florida and Arkansas to Tennessee and Texas.") (statement of Joseph L. Rauh, Jr., Counsel for the NAACP Legal Defense Fund).

Arkansas. In 1965, many African Americans in Arkansas were disenfranchised to the same extent as those in neighboring Louisiana and Mississippi. For example in Crittenden County, which borders Memphis and Mississippi, only 1,777 out of 12,871 (13.8%) of African-Americans were registered to vote, compared to 7,299 out of 10,569 (69%) of whites. *See* 1965 House Hr'gs 144; *see also id.* at 405 ("Arkansas has nine counties in which there is not a single Negro registered, yet, Arkansas is not covered."). Arkansas's "long history of invidious discrimination in the election process," *Perkins v. City of West Helena*, 675 F.2d 201, 211 (8th Cir.), *aff'd*, 459 U.S. 801 (1982), eventually led to the entire State being "bailed in" under § 3(c). *See Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990).

Florida. In the 1965 debates, DOJ affirmed to Congress that voting discrimination was ongoing in northern Florida. *See* 1965 House Hr'gs 69, 77, 89-90; 1965 Senate Hr'gs 147. Gadsden County, which borders Alabama, was emblematic. Only 1,425 out of 12,261 (11.6%) African-Americans were registered.

See 1965 House Hr'gs 154, 418-19. Because of this discrimination, Gadsden and Escambia (another northern Florida county) were later "bailed in" under § 3. *See NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953, 958-59 (N.D. Fla. 1984); *McMillan v. Escambia Cnty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979) (order).

Tennessee. DOJ had been active in combating voting discrimination in Tennessee in the years leading up to the VRA. *See* 1965 Senate Hr'gs 240. Four years prior, DOJ won an injunction against two Tennessee counties where sharecroppers had been evicted from their homes after attempting to register. *See* 1965 House Hr'gs 667, 681-85. Yet disenfranchisement persisted, as evidenced by the low registration rates for certain counties with significant African-American populations. *See, e.g.*, *id.* at 203, 205-06 (registration rates for Davidson, Hardeman and Haywood counties were 8.7%, 15.3%, and 8.7% lower than the statewide average, respectively). Chattanooga County was eventually "bailed in" under § 3 because of its discriminatory voting practices. *See Brown v. Board of Comm'rs of the City of Chattanooga*, No. 87-388 (E.D. Tenn. Jan. 11, 1990).

The VRA's original coverage provision also included areas for which there was no evidence at that time of voting discrimination – Alaska and portions of Arizona, Hawaii, and Idaho.[31] *See* S. Rep. No. 89-162, pt. 3, at 37-38 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2575-76; H.R. Rep. No. 89-439, at

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[31] While there was no evidence submitted of voting discrimination in Alaska in 1965 (or 1970), there was evidence for the 1975 reauthorization relating to the barriers posed by English-only tests to native Alaskan populations' ballot access. *See* H.R. Rep. No. 94-196, at 20-21.

73, 1965 U.S.C.C.A.N. 2492 (minority view); 1965 House Hr'gs 61, 88, 94, 450-51, 765; 1965 Senate Hr'gs 103. Alaska and Hawaii fell within the provision because they had large alien and military populations that were either ineligible or unlikely to vote, which drove voter turnout below 50% in the 1964 presidential election. *See* 1965 House Hr'gs 277. There were also small pockets in the covered Southern states that had made advances toward voting equality and yet fell within the coverage provision. For example, a few parishes in southern Louisiana had almost reached parity in voting registration for white and black citizens. *See, e.g., id.* at 179 (Evangeline Parish), 181 (St. Charles Parish), 183 (Vermillion Parish); *see also id.* at 48, 85-86 ("There has been at least no significant discrimination, no discrimination that I am aware of, in several of the parishes of Louisiana."); 1965 Senate Hr'gs 36-37.

Nonetheless, despite these imperfections, the coverage addressed the "heart of the problem" using "the best evidence available." 1965 House Hr'gs 77, 80-81. Congress minimized the impact of any imperfections by allowing a jurisdiction to "bail out," if it could prove it had not discriminated for a period of time, and by allowing a court to "bail in" a jurisdiction that engaged in voting discrimination. *See* VRA §§ 3(c), 4(a), 79 Stat. 437-38. These provisions proved effective in the years immediately following the VRA's enactment. Jurisdictions for which there was no evidence of voting discrimination – Alaska, two counties in Arizona, and a county in Idaho – successfully "bailed out."[32] And, as noted above, several jurisdictions that had records of voting discrimination – portions of Arkansas, Tennessee, and Florida – were "bailed in."

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[32] *See Elmore County v. United States*, No. 66-820 (D.D.C. Sept. 22, 1966); *Alaska v. United States*, No. 66-101 (D.D.C.

3. Congress's Reauthorizations of the Coverage Provision

The history of the VRA's subsequent reauthorizations further demonstrates that the coverage provisions always have approximated – and never perfectly captured – the geographical areas where voting rights abuses were occurring.

In 1970, Congress extended the preclearance regime for all previously covered states for five years. H.R. Rep. No. 91-397, at 6-7, 1970 U.S.C.C.A.N. 3282-83; *see* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315. Despite concerns about the over-inclusiveness of the coverage provision,[33] Congress did not significantly alter it. It extended coverage to any jurisdiction that had a "test or device" as of 1968 and in which the voter turnout was less than 50% in the 1968 presidential election, which had the effect of covering portions of several other states. *See* H.R. Rep. No. 94-196, at 5-6. Congress, however, rejected a proposal to use only the 1968 voting figures after learning that doing so would have excluded Alabama, Louisiana, Mississippi, and Virginia. *See* 1969 House Hr'gs 93.

Aug. 17, 1966); *Apache Cnty. v. United States*, 256 F. Supp. 903 (D.D.C. 1966).

[33] *See* H.R. Rep. No. 91-397, at 14, 1970 U.S.C.C.A.N. 3289 ("Sections 4 and 5 are mischievous because in their application they are promiscuous. They cover some States and counties which are innocent and fail to cover some which are guilty.") (Rep. Poff dissenting); *id.* at 15, 1970 U.S.C.C.A.N. 3289 (complaining that Virginia remained covered even though the Attorney General had not sent any observers or examiners to Virginia).

In 1975, Congress extended the VRA for an additional seven years for already-covered jurisdictions "to insure that that progress not be destroyed through new procedures and techniques" for vote dilution. H.R. Rep. No. 94-196, at 10-11; S. Rep. No. 94-295, at 16-19 (1975).[34] Congress did not undertake a comparative analysis of voting discrimination across the country or endeavor to fix any perceived existing imperfections in the coverage provision. It considered only whether there was a continuing need for the VRA in covered jurisdictions. The reasonableness of Congress's judgment on that issue was again challenged. And, as in *Katzenbach*, this Court rejected that challenge in *City of Rome v. United States*, 446 U.S. 156 (1980).

Although Congress did not remove any already-covered jurisdictions in 1975, it expanded the definition of "test or device" to include the practice of providing English-only voting materials in any jurisdiction where more than 5% of the citizens were of a single-language minority. 1975 Act § 203, 89 Stat. 401 (adding VRA § 4(f)). That change effectively expanded § 5 to new jurisdictions in which Hispanic and Native American voters had suffered voting discrimination. Here, too, the coverage provision was both over-inclusive and under-inclusive. *See* H.R. Rep. No. 94-196, at 27 ("[T]here may be areas covered by this [provision] where there has been no voting discrimination."); *id.* at 87 (dissenting view); 1975 House Hr'gs 84-85, 87-88, 503, 621, 884, 934. For instance, it did not cover Los Angeles, which had a recent record of racial gerrymanders that diluted Hispanic voting power. *See* 1975 House Hr'gs 151-55. Once again, the Act's bail-in and bail-out provisions proved effective in curing this imperfection, as Los Angeles County was eventually bailed in. *See Garza v. Los Angeles Cnty.*, Nos. 88-5143 & 88-5435 (C.D. Cal. Apr. 25, 1991) (bailing in Los Angeles).

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[34] Similar to the 1970 reauthorization, Congress covered additional jurisdictions that had a "test or device" as of November 1, 1972, and that had a voting turnout less than 50% in the 1972 presidential election. *See* Act of Aug. 6, 1975, Pub. L. No. 94-73, §§ 201-202, 89 Stat. 400, 400-01 ("1975 Act") (amending VRA § 4(a)-(b)). This change was inconsequential. *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 53 (1975) ("1975 House Hr'gs").

In 1982, Congress again extended the preclearance regime because of the continued disparity in white and black registration rates, the inability of black politicians to win higher political offices, and the numerous discriminatory voting changes attempted by covered jurisdictions. *See* H.R. Rep. No. 97-227, at 7-10, 13-20. Rather than modifying the coverage provision, Congress modified the bail-out provision.[35] It allowed bailout by jurisdictions that could show substantial improvement in minority voting rights,[36] and it allowed piecemeal bailout by political subdivisions in covered states. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96

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[35] *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 468 (1981) ("I have tried to think of a better coverage formula, and I have to admit I have not successfully convinced myself that I know of one. . . . I would think, rather than change the coverage formula, changing the bailout procedure may be a more fruitful thing.") (statement of Professor Richard Engstrom).

[36] Under the 1965, 1970, and 1975 versions of the VRA, jurisdictions could bail out only upon a showing that they had not made discriminatory use of a "test or device" for a specified period of time that extended into the years before 1965.

Stat. 131, 131; H.R. Rep. No. 97-227, at 32-33, 39-45; S. Rep. No. 97-417, at 43-62 (1982); *see Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 209 (2009). These changes assured that any over-inclusiveness could be solved by the covered jurisdictions themselves.

B. The Current VRA Coverage Provision Is Consistent with the Standard Adopted by Congress and Upheld by This Court

Congress's reauthorization of the VRA's coverage provision in 2006 is consistent with its prior findings that the covered jurisdictions continued to experience significantly higher rates of purposeful voting discrimination than other areas of the country. Congress found that significant registration disparities persisted in Virginia and South Carolina, and African-Americans had yet to be elected to statewide office in Mississippi, Louisiana, or South Carolina. *See Shelby Cnty. v. Holder*, 679 F.3d 848, 862-63 (D.C. Cir. 2012). Moreover, second-generation tactics remained prevalent in the covered jurisdictions leading up to the 2006 reauthorization. *Id.* at 865-66 (listing examples in Mississippi, Georgia, Louisiana, and Texas).

As in the past, Congress heeded DOJ's experience in enforcing the VRA: DOJ had lodged at least 626 objections to changes in voting practices by the covered jurisdictions, an average of 28.5 per year, *id.* at 866; it had issued many "more information requests," which prompted submitting jurisdictions to withdraw or modify potentially discriminatory changes, *id.* at 866-68; it had dispatched thousands of examiners to jurisdictions where voting rights abuses were ongoing, *id.* at 869-70; and it had brought 105 successful § 5 enforcement actions, *id.* at 870.

There also had been 653 successful § 2 suits in covered jurisdictions from 1982 to 2005. *Id.* at 868-69. Congress reasoned that the specter of § 5 had prevented many more would-be attempts at voting discrimination. *Id.* at 871.

Placed in historical context, this evidence of continued discrimination in the covered jurisdictions was at least as strong as had been presented in prior reauthorizations. *See id.* at 872 (summarizing the evidence before Congress). Accordingly, Congress determined that preclearance was still necessary for the already-covered states.

In fact, Congress's analysis of the geographical coverage issue was more extensive than in past reauthorizations. Unlike prior reauthorizations, evidence available in 2006 allowed for a comparison between voting discrimination in covered and non-covered jurisdictions. According to the Katz study, 56% of all successful § 2 litigation occurred in covered jurisdictions, despite the fact that those jurisdictions accounted for only 25% of the nation's population. *See To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 974 (2005) (report by Ellen Katz et al.). The results are more pronounced when unpublished § 2 cases were considered: 81% of successful § 2 suits were filed in covered jurisdictions, with covered states having the eight highest per capita rates of successful § 2 suits. *See Shelby Cnty.*, 679 F.3d at 875 (citing Decl. of Dr. Peyton McCrary). This comparative evidence provided more robust support for the coverage provision than existed for prior reauthorizations.

The dissenting opinion in the court below offered numerous criticisms of the 2006 coverage criteria based on statistical data for covered and non-covered states. Some of those criticisms – for example, that there is no "positive correlation" between low black registration or voter turnout rates and inclusion in the provision, *id.* at 891 (Williams, J., dissenting) – ignore the fact that the primary discriminatory tactic that exists today (vote dilution) remains pervasive despite higher minority registration and turnout rates. Moreover, the suggestion that the coverage provision is irrational because covered jurisdictions have a high rate of minority elected officials is misleading, because whites still dominate major political offices, while many black officials hold local positions. *Id.* at 892 fig. 3 (Williams, J., dissenting); *see id.* at 862 (majority); H.R. Rep. No. 94-196, at 7.

The dissenting judge also contended that the coverage provision was unsustainable because some uncovered jurisdictions have worse records with respect to published successful § 2 suits than some of the covered jurisdictions. But that criticism is no different from the one lodged against the original VRA, and every reauthorization since. Just as Texas, Arkansas, Tennessee, and Florida were not included in the VRA's coverage provision in 1965, it may well be that certain uncovered states today experience significant incidence of purposeful discrimination in voting. But the fact that the coverage provision is *under-inclusive* certainly does not mean inclusion of the *covered* jurisdictions is arbitrary or irrational, especially in light of the law's flexible "bail in" and "bail out" provisions.

In sum, the VRA's coverage provision is as precise as it has been in the past, and Congress repeatedly has reaffirmed it as appropriate because it concentrates on areas of demonstrated need. That need is confirmed by the history of purposeful discrimination in the covered jurisdictions and the very real risk that invalidating § 5 will result in retrogression in those areas. This Court has twice – in *Katzenbach* and *City of Rome* – upheld Congress's judgment as an appropriate exercise of its authority under the Fourteenth and Fifteenth Amendments. It should do so again.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

List of Amici
(titles and institutional affiliations are provided for identification purposes only)

Chandler Davidson, Tsanoff Professor of Public Affairs Emeritus, Rice University

Professor Davidson was co-director, along with Professor Bernard Grofman of the University of California at Irvine, of perhaps the most comprehensive scholarly effort to assess the impact of the Voting Rights Act of 1965 in the South. The project involved almost thirty political scientists, historians, sociologists, and voting rights lawyers. The resulting book, *Quiet Revolution in the South* (Princeton University Press, 1994), was awarded the Richard Fenno Prize by the American Political Science Association. In 2005-06, Davidson served on the National Commission on the Voting Rights Act and was the primary drafter and author of the Commission's 2006 report, Protecting Minority Voters. Davidson's scholarship on voting rights has been cited at least seven times in U.S. Supreme Court opinions and numerous times in lower court opinions.

Alexander Keyssar, Matthew W. Stirling, Jr. Professor of History and Social Policy, Kennedy School of Government, Harvard University

Professor Keyssar is a historian who has specialized in the study of voting in the United States. His book, *The Right to Vote: The Contested History of Democracy in the United States* (2000), was named the best book in U.S. history by both the American Historical Association and the Historical Society; it was also a finalist for the Pulitzer Prize and the Los Angeles Times Book Award. In 2004 and 2005, Keyssar chaired the Social Science Research Council's National Research Commission on Voting and Elections.

Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University

Professor Katznelson's work has straddled comparative politics and political theory as well as political and social history. His most recent books are *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*; *Black Men, White Cities: Race, Politics and Migration in the United States, 1900-1930, and Britain, 1948-1968*; *Schooling for All: Class, Race, and the Decline of the Democratic Ideal* (with Margaret Weir). Professor Katznelson was President of the American Political Science Association for 2005-2006. Previously, he served as President of the Social Science History Association and Chair of the Russell Sage Foundation Board of Trustees. He has been a Guggenheim Fellow and is a Fellow of the American Academy of Arts and Sciences and the American Philosophical Society.

James Wayne Flynt, Distinguished University Professor Emeritus, Auburn University

Professor Flynt has written 11 books that focus largely on the historical, economic and social fabric of Alabama, including *Poor But Proud: Alabama's Poor Whites* (1990), and he co-wrote *Alabama: A History of a Deep South State*, both of which were nominated for Pulitzer Prizes. He is editor-in-chief of the online *Encyclopedia of Alabama*, a partnership of Auburn University and the Alabama Humanities Foundation.

George Korbel, Esq., San Antonio, Texas

Mr. Korbel was the Litigation Coordinator for Texas Rural Legal Aid, Inc. from 1981 to 1985 and has been the Director of the Constitutional and Civil Rights Litigation Project for Texas Rural Legal Aid since 1985. He has been involved in Texas redistricting litigation for much of his career, including *NAMUDNO v. Holder*, 557 U.S. 193 (2009), and *LULAC v. Perry*, 548 U.S. 399 (2006).

Nicolaus Mills, Professor of American Studies, Sarah Lawrence College

Professor Mills is the author of *Like a Holy Crusade: Mississippi 1964 – The Turning of the Civil Rights Movement in America* – a book documenting the "Summer Project" of 1964 where thousands of Northern white college students were recruited to come south that summer in an effort to "break" Mississippi and secure voting rights for its black citizens.

Minion K.C. Morrison, Professor and Head, Department of Political Science and Public Administration, Mississippi State University

Professor Morrison's professional work focuses on electoral politics in the South. His publications include three books, and numerous articles and book reviews. He is the past President of the National Conference of Black Political Scientists and has served on the editorial board of the American Political Science Review.

Richard M. Valelly, Professor of Political Science, Swarthmore College

Professor Valelly is an expert on American party politics, election law, voting rights, and the institutional development of the House and the Senate. Among many other works, he is the author of *The Two Reconstructions: The Struggle for Black Enfranchisement* (University of Chicago Press, 2004), which won the Ralph Bunche and J. David Greenstone book awards of the American Political Science Association, and the V.O. Key, Jr., book award of the Southern Political Science Association.

Michael McDonald, Associate Professor, Department of Public and International Affairs, George Mason University

Professor McDonald received his Ph.D. in Political Science from University of California, San Diego and B.S. in Economics from California Institute of Technology. His research includes voting behavior, redistricting, Congress, American political development, and political methodology. He has written numerous articles in edited volumes and in scholarly journals.

Lorraine Minnite, Associate Professor of Public Policy and Administration, Rutgers University

Professor Minnite's research is concerned with issues of inequality, social and racial justice, political conflict, and institutional change. She is the author or co-author of two books on electoral rules and racial and class politics in the U.S., *The Myth of Voter Fraud*, and *Keeping Down the Black Vote: Race and the Demobilization of American Voters*.

Orville Vernon Burton, Professor of History and Computer Science, Clemson University

Professor Burton's research and teaching focuses on the American South, especially race relations and community, and the intersection of humanities and social sciences. He has 16 authored or edited books and more than one hundred eighty articles. His book, *The Age of Lincoln* (2007), won the Chicago Tribune Heartland Literary Award for Nonfiction.

James Loewen, Emeritus Professor of Sociology, University of Vermont

Professor Loewen has taught race relations for twenty years at the University of Vermont and, before that, at Tougaloo College in Mississippi. His books include *Mississippi: Conflict and Change* (co-authored), which won the Lillian Smith Award for Best Southern Nonfiction but was rejected for public-school text use by the State of Mississippi, leading to the path-breaking First Amendment lawsuit, *Loewen, et al. v. Turnipseed, et al.* He also wrote *Lies My Teacher Told Me*, a winner of the 1996 American Book Award.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE SUPREME COURT OF THE UNITED STATES

SHELBY COUNTY, ALABAMA, *Petitioner*,

v.

ERIC H. HOLDER, JR., ET AL., *Respondents*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF SENATOR C. BRADLEY HUTTO, SENATOR GERALD MALLOY, SENATOR JOHN L. SCOTT, JR., REPRESENTATIVE GILDA COBB-HUNTER, and THE LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA as *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 8

I. SOUTH CAROLINA'S LEGACY OF STATE-SPONSORED DISCRIMINATION CONTINUES TODAY. 9

II. SECTION 5 INCENTIVIZED SOUTH CAROLINA TO CONFRONT AND ULTIMATELY MITIGATE LIKELY NEGATIVE EFFECTS ON MINORITY VOTING. 16

- A. Section 5 Influenced the Legislative Process 16
- B. Section 5 Influenced the Administrative Preclearance and Litigation Processes. 22
  - 1. Procedures for Obtaining a Photo Voter Registration Card 22
  - 2. Voter Education 24
  - 3. Reasonable Impediment Exception 25

III. SECTION 5 WAS APPLIED IN SOUTH CAROLINA WITH APPROPRIATE DEFERENCE TO LEGITIMATE STATE INTERESTS. 31

A. The Procedural Background of South Carolina v. United States. 32

B. South Carolina Exemplifies the Procedural Approach Taken in Recent, Similar Cases. 37

CONCLUSION 41

TABLE OF AUTHORITIES

Page(s)

CASES

Bartlett v. *Strickland*,
556 U.S. 1 (2009) 9

Colleton County Council v. *McConnell*,
201 F. Supp. 2d 618 (D.S.C. 2002) 12

Condon v. *Reno*,
913 F. Supp. 946 (D.S.C. 1995) 10

County Council of Sumter v. *United States*,
596 F. Supp. 35 (D.D.C. 1984) 12

Crawford v. *Marion County Election Board*,
553 U.S. 181 (2008) 4, 36

Florida v. *United States*,
--- F. Supp. 2d ----, 2012 WL 3538298
(D.D.C. Aug. 16 2012) 34, 38, 39, 40

Jackson v. *Edgefield County School District*,
650 F. Supp. 1176 (D.S.C. 1986) 12

Northwest Austin Municipal Utilities District No. 1 v. *Holder*,
557 U.S. 193 (2009) 3, 31

South Carolina v. *United States*,
--- F. Supp. 2d ----, 2012 WL 4814094
(D.D.C. Oct. 10, 2012) .... passim

Texas v. *Holder*,
--- F. Supp. 2d ----, 2012 WL 3743676
(D.D.C. Aug. 30, 2012) 5, 37, 38, 39, 40

United States v. *Charleston County*,
316 F. Supp. 2d 268 (D.S.C. 2003) 10, 12

STATUTES

Fannie Lou Hamer, Rosa Parks, and Corretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006) 12

National Voter Registration Act,
42 U.S.C. § 1973gg 10

Voting Rights Act of 1965, Pub. L. 89-110, § 5,
79 Stat. 439 .... passim

Mich. Code § 168.523 4

S.C. Code § 7-13-710 .... 1, 6, 19, 29, 30

S.C. Code § 56-1-3350 19

OTHER AUTHORITIES

Rule 37 of the Rules of the Supreme Court of
the United States 1

H. Rep. No. 109-478 (2006) 10, 12

STATEMENT OF INTEREST OF AMICI CURIAE

Senator C. Bradley Hutto, Senator Gerald Malloy, Senator John L. Scott, Jr., Representative Gilda Cobb-Hunter, and the League of Women Voters of South Carolina ("*Amici*"), all South Carolina citizens, respectfully submit this brief to demonstrate how the Voting Rights Act of 1965 ("VRA") had a powerful and beneficial effect on South Carolina's recently enacted voter photo identification law.[1]

SUMMARY OF ARGUMENT

In November 2012, after eight months of litigation and a week-long trial, a three-judge panel precleared Act R54, South Carolina's new voter photo identification law, for elections commencing in 2013. *Codified as* S.C. Code § 7-13-710. In the course of this litigation under Section 5 of the Voting

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for the Petitioner and Respondent have both consented to the *Amici*'s submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than the *Amici* make any monetary contribution intended to fund the preparation or submission of this brief.

Rights Act, Pub. L. 89-110, § 5, 79 Stat. 439, the United States and intervening South Carolina citizens and civil rights organizations ("Intervenors") articulated—through discovery, experts and judicial notice—how the law as enacted would have disproportionately burdened minority voting. Indeed, undisputed record evidence established that approximately 130,000 *registered voters* lacked an ID acceptable under Act R54, and that there was "an undisputed racial disparity of at least several percentage points" in ID possession. *South Carolina* v. *United States*, --- F. Supp. 2d ----, 2012 WL 4814094, at *8, *20 (D.D.C. Oct. 10, 2012). That racial disparity—combined with the indirect fees, time burdens and transportation costs necessary to obtain a new photo ID card—meant that the law as enacted would have almost certainly disparately impacted minority voters in violation of Section 5. *See id.* But the voter ID law that was ultimately precleared by the Court was "not the R54 enacted in May 2011." 2012 WL 4814094, at *21 (Bates, J., concurring). Instead, and to its credit, South Carolina responded to the preclearance process by substantially revising its initial interpretation of the Act and ultimately committing to apply the law in a manner designed not to disenfranchise minority voters.

Consequently, the litigation resulted in a law that accomodated both the mandates of the 15th Amendment and the State's interest in enhancing the integrity of the electoral process. This outcome would not have been possible if not for Section 5. The successful application of Section 5 to South Carolina's voter ID law demonstrates the statute's potency in protecting minority voters and the courts' flexibility and restraint in applying it to covered states, in deference to state sovereignty

Amici are mindful that Section 5 may be applied in ways that impose "substantial federalism costs" and not-insubstantial burdens on covered jurisdictions. *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 224 (2009). We respectfully submit that identifying those burdens, and determining how covered jurisdictions fare under them, is critical to adjudicating Section 5's constitutionality. South Carolina's recent experience shows that the effects of Section 5, in actual practice, are not so great or unmanageable as Petitioner claims, and are more than outweighed by the Constitution's demand that racial discrimination in voting be eradicated.

Following this Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), numerous states have enacted laws requiring voters to show one of specified forms of government-issued photographic identification at the polls (typically called "voter ID" laws). These laws range from the lenient to the restrictive, depending upon which forms of ID a particular law accepts; how the law treats voters who lack acceptable photo ID; and whether acceptable ID is available to racial minorities without substantial cost or other burdens. In Michigan, for instance, a voter without photo ID may cast a regular ballot by signing an affidavit swearing to the voter's identity.[2] At the other end of the spectrum, in Texas, voters in certain counties would have had to bear the costs of traveling as much as 200 miles round-trip to obtain the "free" ID required by the Texas voter ID law to exercise their right to vote.[3]

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[2] Mich. Code § 168.523.

In South Carolina, Section 5 contributed powerfully to a successful balancing of the State's interest in electoral integrity and minority voters' right to vote. First, Section 5 created a deterrent effect at the legislative stage, as South Carolina legislators expressed keen awareness that any change to voter eligibility requirements would require preclearance. As a direct result of Section 5, legislators and election officials closely scrutinized the realities of racial discrimination in South Carolina voting with respect to both current practices and the lingering socioeconomic effects of past state-sponsored discrimination. Legislators on both sides of the issue responded to Section 5's preclearance requirement by incorporating multiple ameliorative provisions into Act R54—most importantly, a provision allowing voters to cast a provisional ballot if they sign an affidavit stating that they suffer from a "reasonable impediment" that prevents them from obtaining an acceptable form of photo ID. S.C. Code § 7-13-710(D)(1)(b).

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[3] *Texas* v. *Holder*, --- F. Supp. 2d ----, 2012 WL 3743676, at *28 (D.D.C. Aug. 30, 2012).

Second, Section 5 created an incentive for State officials to interpret Act R54 in a manner that would avoid disenfranchising minority voters after passage of the bill, during the process of administrative review and litigation. During the course of administrative review and litigation, faced with evidence that Act R54 would still likely disenfranchise tens of thousands of African-American voters, South Carolina election officials drafted policies interpreting and implementing the "reasonable impediment" and other ameliorative provisions in an expansive manner. Similarly, during and after trial, the South Carolina Attorney General made multiple representations to the District Court concerning the State's interpretation of the Act and how it would be implemented, committing to the expansive application of these ameliorative provisions. Ultimately, such actions carried South Carolina's burden to show that R54 had neither a retrogressive effect nor a discriminatory purpose.

Throughout the litigation, the District Court took every precaution to minimize the federalism costs that the VRA may theoretically impose. Deferring to the State's obviously strong interest in resolving the litigation before the November 6, 2012 general election, the District Court set an extraordinarily expedited pretrial schedule, condensing what could have easily been a two-year litigation into five and one-half intensive months.

The District Court also construed the State's evidentiary burden in a manner that rendered the preclearance standard not only meaningful, but practicable and fair to the State. For example, the District Court accepted South Carolina's contention that Act R54's ameliorative provisions, once implemented in the manner described at the end of trial, would greatly mitigate the retrogressive effect of proven racial disparities in photo ID possession—in other words, South Carolina did not have to predict the future with unreasonable certainty.

As two panel members noted, Section 5 played a "vital function" in ensuring that South Carolina's voter ID requirement did not disenfranchise voters.

2012 WL 4814094, at *21-22 (Bates, J., concurring, with Kollar-Kotelly, J., joining). Judge Bates wrote that "[w]ithout the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive," and explained that "the history of Act R54 demonstrates the continuing utility of Section 5 . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* Judge Kavanaugh, writing for the unanimous South Carolina panel, concluded, "[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history." 2012 WL 4814094, at *2.

ARGUMENT

Under Section 5, jurisdictions with a substantial history of racial discrimination in voting must seek approval from the federal government before changing their election laws. Section 5 thus encourages covered jurisdictions to carefully consider the likely effects on minority voters of any new law concerning voting or elections. As described below, Section 5 caused South Carolina officials to consider and respond to the new ID law's impact on African-American voters during the legislative process and the ensuing litigation. Ultimately, this evolutionary process resulted in a voter ID law that serves the State's interest in preventing election fraud without unduly burdening anyone's right to vote.

I. SOUTH CAROLINA'S LEGACY OF STATE-SPONSORED DISCRIMINATION CONTINUES TODAY.

As in other covered jurisdictions, South Carolina's painful experience of state-sponsored racial discrimination continues to affect the political participation of African-Americans to this day. In addition to the ongoing effects of past discrimination, discussed below, the Court recognized that, even in 2012, "[r]acial insensitivity, racial bias, and indeed outright racism are still problems." *South Carolina*, 2012 WL 4814094, at *14; *cf. Bartlett* v. *Strickland*, 556 U.S. 1, 25 (2009) ("[R]acial discrimination . . . [is] not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes."). As record evidence before the Court confirmed, the State's recent history reveals numerous "second generation" voting changes that have diluted or suppressed the African-American vote, including the reenactment of voting changes previously rejected by the Department of Justice as retrogressive.[4] *See, e.g.*, H. Rep. No. 109-478, at 23, 39, 73 (2006) (detailing changes to at-large and partisan voting systems in South Carolina counties and school districts to dilute African-American electoral influence); *United States* v. *Charleston Cnty.*, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003) (racial intimidation and harassment at polls); (JA-DI 650-51 (ECF No. 190-1) (Rutherford Dep. Tr.); JA 2799-2800 (Senate debate on discriminatory poll challenges).) Furthermore, the trial record contained myriad examples of discriminatory behavior by local election officials, including: poll managers providing what one legislator euphemistically described as "unsolicited assistance . . . in the voter booth" (8/27/12 Tr. at 205 (ECF No. 301) (Rep. Clemmons)); poll managers denying African-American voters in-person absentee ballots and refusing to assist such voters with provisional voting (JA-DI 30-32 (ECF No. 190) (Bursey Dep. Tr.)); and election officials purposefully appointing "white poll workers with aggressive personalities" in majority African-American precincts to disrupt voting (8/30/12 Tr. at 194 (ECF No. 307) (Bloodgood).) Finally, evidence confirmed that a legislative sponsor of Act R54 responded sympathetically to a blatantly racist comment about the law's disparate effect. (08/28/12 Tr. at 19-22 (ECF No. 302) (Rep. Clemmons).)[5]

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[4] As a telling example, South Carolina openly resisted and sought to enjoin provisions of the National Voter Registration Act, 42 U.S.C. § 1973gg-5 ("NVRA"), which requires states to offer voter registration in state social services and public assistance agencies where clients are in greater proportion "poor and minority citizens" who are "less likely to be served by the DMV." *Condon* v. *Reno*, 913 F. Supp. 946, 959 (D.S.C. 1995). The District Court permanently enjoined South Carolina's non-compliance, which "ignore[d] Congress' statutory scheme and open[ed] the door to discrimination that Congress so carefully shut." *Id.* at 959, 967. Indeed, Congress explicitly cited racial discrimination in voter registration laws as a key finding justifying the NVRA. 42 U.S.C. § 1973gg(a)(3).

Notably, the Department of Justice has objected to proposed changes in voting practices or procedures in South Carolina 122 times since 1972, and eleven times since 2000. (JA 1546 (ECF No. 157-5).)

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[5] Specifically, on January 17, 2012, a supporter of the legislation wrote to Rep. Alan Clemmons that he did not "buy that garbage" about "a poor black person" being unable to obtain a photo ID. The supporter remarked that if the South Carolina legislature gave "a hundred dollar bill away if you came down with a voter ID card," poor African-Americans

Moreover, South Carolina's historical government-sponsored discrimination against African-American voters has significant impact even today. *See Charleston Cnty.*, 316 F. Supp. 2d at 286 & n.23; *Colleton Cnty. Council* v. *McConnell*, 201 F. Supp. 2d 618, 641-42 (D.S.C. 2002); *Cnty. Council of Sumter* v. *United States*, 596 F. Supp. 35, 37 (D.D.C. 1984). The now-dismantled formal institutions of racial discrimination, such as segregation in schooling and government services, continue to impede the ability of African-Americans to participate in South Carolina's democratic process, through lingering and pronounced socioeconomic disparities. *Colleton Cnty.*, 201 F. Supp. 2d at 642; *Jackson* v. *Edgefield Cnty. Sch. Dist.*, 650 F. Supp. 1176, 1180 (D.S.C. 1986); Fannie Lou Hamer, Rosa Parks, and Corretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006), § 2(b)(3); H. Rep.

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would rush to get their IDs "like a swarm of bees going after a watermelon." Although admitting at trial that this email was "offensive" and contained "a shade of racism," Rep. Clemmons originally wrote in response: "AMEN, Ed!!! Thank you for your support of voter ID." (08/28/12 Tr. at 19-22 (ECF No. 302) (Rep. Clemmons).)

No. 109-478, at 33. As of 2010, almost one-fourth (24.4%) of African-Americans in South Carolina live below the federal poverty line, more than double the 10.9% rate of whites in the state. (JA 1762-63 (ECF No. 182).) Likewise, African-Americans in South Carolina are dramatically more likely to have low levels of educational attainment—in 2010, 22.9% of African-Americans lacked a high school diploma, versus 11.8% of whites—and are four times less likely to have access to a vehicle. (JA 1263-64 (ECF No. 166-3); JA 1764 (ECF No. 182).) As expert witnesses demonstrated in the *South Carolina* litigation, such disparities in social resources increase the obstacles that a voter must overcome to vote and translate to tangible differences in voter turnout rates. For example, in the last decade white voter turnout in South Carolina's wealthiest county was 13.8% higher than African-American turnout in the five poorest counties. (JA 1114 (ECF 152-7).)

As a result, facially neutral laws may nevertheless disproportionately burden minority voting. Indeed, record evidence showed ways that Act R54—as originally enacted—would have disparately impacted African-Americans' ability to vote. To start, registered African-American voters were more than twice as likely as white voters to lack a photo ID that was acceptable under the Act. *South Carolina*, 2012 WL 4814094, at *8 ("[T]he evidence reveals an undisputed racial disparity of at least several percentage points," where the percentage of registered voters without accepted photo ID was 96% for whites but 92-94% for African-Americans.). Moreover, obtaining a new photo ID would be substantially more burdensome for African-American voters than white voters. For instance, the South Carolina Department of Motor Vehicles requires that applicants for a driver's license or non-driver photo ID provide a copy of their birth certificate. Due to historical state-sponsored segregation of hospital care, however, a large number of African-American seniors were delivered by midwives and lack birth certificates.

While obtaining a copy of a birth certificate costs $12, obtaining a "delayed" birth certificate—for those born without one—requires a petition to family court, and can cost hundreds or even thousands of dollars in court filing fees and legal representation. As a result of the income disparity noted above, African-American South Carolinians are also those less likely to be able to bear this cost.

Similarly, African-Americans in South Carolina are much less likely to have access to a private vehicle, further complicating the process of traveling to a place where IDs are available. (JA 1263-64 (ECF No. 182).) South Carolina is composed mostly of large, geographically diffuse agricultural counties with minimal or no public transit systems. In those counties, voters could be forced to travel 30 to 40 miles to the nearest county office. (*See, e.g.*, 08/27/12 Tr. at 179-180 (ECF No. 301) (Sen. Campsen) (agreeing that there is "virtually no public transportation" in counties with highest percentage of African-Americans); 8/30/12 Tr. at 105-106 (ECF No. 306) (Debose) (describing his 25-30 mile journey to all government offices); JA-DI 3866 (ECF No. 237-2) (map of South Carolina, with public transportation routes).)[6]

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[6] For instance, one Intervenor, Mr. Craig Debose, has no car and lives in a very rural area with no public transportation.

As discussed in detail below, Section 5 provided a powerful incentive for election officials and legislators to engage with and address these burdens on minority voting. Were it not for Section 5, 130,000 registered voters, who were disproportionately African-American, would have faced significant—and in many cases, prohibitive—obstacles in exercising their constitutionally guaranteed right to vote.

II. SECTION 5 INCENTIVIZED SOUTH CAROLINA TO CONFRONT AND ULTIMATELY MITIGATE LIKELY NEGATIVE EFFECTS ON MINORITY VOTING.

A. *Section 5 Influenced the Legislative Process.*

As Judge Bates emphasized, Section 5 had an important "deterrent effect" during the legislative process, influencing lawmakers to provide greater

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(8/30/12 Tr. at 103, 110 (ECF No. 306).) In order to attempt to obtain an ID, Mr. Debose would have had to travel 25 to 30 miles to the nearest town with an elections office and a Department of Motor Vehicles branch. (8/30/12 Tr. at 105-106 (ECF No. 306).) In order to reach that town, Mr. Debose would have needed to take a taxicab, pay a neighbor to drive him, or rely on the kindness and availability of friends or family. (8/30/12 Tr. at 108, 110-112 (ECF No. 306).)

protections to minority voters. *South Carolina*, 2012 WL 4814094, at *22 (Bates, J., concurring). Facts of racial socioeconomic disparities and incidents of ongoing discrimination were raised during the South Carolina General Assembly debate on Act R54. Legislators, citing the VRA and Section 5, responded by amending the bill to attempt to ameliorate the negative impact of the proposed legislation.

From the beginning of Act R54's legislative history, legislators voiced concerns that voter ID legislation would negatively impact minority voting. (8/28/12 Tr. at 186-87 (ECF No. 303) (Lt. Gov. McConnell); 8/30/12 Tr. at 279 (ECF No. 307) (Rep. Cobb-Hunter).) These concerns were exacerbated when the South Carolina State Election Commission ("SEC") distributed data to lawmakers showing that minority voters were in fact disproportionately less likely to own a photo ID acceptable under R54 (as then-drafted). (JA-DI 1998-2002 (ECF No. 190).) Concerned, several influential legislators sought to formulate a bill that could obtain preclearance under Section 5. For example, Speaker of the House Robert Harrell testified at trial: "[I] ask[ed] the staff who drafted the bill for me to please make sure that we are passing a bill that will withstand constitutional muster and get through DOJ or through this court." (8/28/12 Tr. at 105 (ECF No. 302); *see also* 8/28/12 Tr. 104 (ECF No. 302) ("I was very aware at the time that we were doing this that whatever we would have to do would have to be subject to the Voting Rights Act because that would be the basis for the Department of Justice preclearing the bill for us.")); 8/27/12 Tr. 108 (ECF No. 300) (Sen. Campsen) (stating that he was "interested in what voter ID legislation had been precleared" in drafting R54); 8/28/12 Tr. at 182 (ECF No. 303) (on Senate floor "[t]here was discussion about" how "to craft a bill that would comply" with VRA)); *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring). In the Senate in particular, then-Senator McConnell sought out the opinions and support of African-American senators, reasoning that a bill that was supported by minority lawmakers was more likely to achieve preclearance. (8/28/12 Tr. at 176, 185 (ECF No. 303) (Lt. Gov. McConnell) ("[T]hose things have to go up to Justice and I know there are witnesses, and if everybody is generally pleased, who's going to testify against it? . . . . [W]e had bipartisan support and we had biracial, philosophical, I mean, who was to complain?").)

As a result of legislators' desire to ensure that Act R54 satisfied Section 5, the South Carolina bill was amended in an effort to reduce its discriminatory effect. Lawmakers added provisions to, among other things, require the SEC to "establish an aggressive voter education program" and to "educate the public" concerning Act R54—provisions later cited by the Court in granting preclearance. *South Carolina*, 2012 WL 4814094, at *3, *8.

The beneficial impact of Section 5 is perhaps best illustrated by the process that led to the addition of two other ameliorative provisions that ultimately proved crucial to preclearance: (i) the "reasonable impediment" exception, which allows voters to vote by provisional ballot if they are prevented from obtaining ID by a "reasonable impediment," S.C. Code § 7-13-710(D)(1)(b); and (ii) a provision making available photo voter registration cards free of charge, S.C. Code § 56-1-3350(C)(2). *See*

South Carolina, 2012 WL 4814094, at *7, *9-10, *15-17 (discussing "reasonable impediment" exception); *id.* at *8, *15-17 (discussing free photo voter registration cards). When concerns about the voter ID bill were expressed during the legislative process, then-Senator McConnell convened Republican and Democratic leaders to address those issues.[7] That bipartisan meeting resulted in Amendment 8 to Act R54—a compromise package with provisions to mitigate the discriminatory effects of the photo ID law on minorities, including the reasonable impediment exception and the free ID cards. (8/28/12 Tr. at 120-122, 123-124 (ECF No. 302) (Lt. Gov. McConnell); 8/30/12 Tr. at 257, 263-264 (ECF No. 307) (Sen. Malloy); JA 664-79 (ECF No. 182).) The Senate adopted Amendment 8 unanimously. (JA 678-679 (ECF No. 182).)

From there, the positive impact of Section 5 continued. When the voter ID bill passed both the

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[7] Notably, throughout the legislative process, then-Senator McConnell repeatedly emphasized that the ID law must comply with the VRA. (8/28/12 Tr. at 140-141 (ECF No. 302) (Lt. Gov. McConnell)); JA-DI 559-560, 569 (ECF No. 190) (Lt. Gov. McConnell Dep. Tr.); JA 4923 (ECF No. 182) (Conf. Comm. Tr.).)

Senate and House, with only conference committee negotiations remaining, legislators were under "tremendous pressure" from special interest groups to accept a more restrictive version of the voter ID bill, which would have negatively impacted minority voting. (8/30/12 Tr. at 250-251 (ECF No. 307) (Sen. Malloy); *see also* 8/28/12 Tr. at 77 (ECF No. 302) (Rep. Harrell); 8/28/12 Tr. at 133 (ECF No. 302) (Lt. Gov. McConnell).) Nonetheless, on April 13, 2011, several senators published statements in the Senate Journal explaining that they would not accept a more restrictive voter ID bill because "the responsible thing to do was to fix [the bill] so that it would not fail in the courts or get tripped up by the Voting Rights Act." (JA 396-97 (ECF No. 182); *see also* 8/28/12 Tr. at 140–141 (ECF No. 302) (Lt. Gov. McConnell) (explaining that Senate version of bill "had a better chance" of obtaining preclearance).)

In sum, "key ameliorative provisions were added during [the] legislative process and were shaped by the need for pre-clearance." *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring). Section 5 played a "vital function" during the legislative process in South Carolina; it guided and encouraged legislators to enact a fairer and less discriminatory law. *Id.*

B. *Section 5 Influenced the Administrative Preclearance and Litigation Processes.*

Section 5 continued to beneficially shape the effect of South Carolina's voter ID law throughout the preclearance process—first, when the State was seeking administrative preclearance and then during litigation. As evidence mounted that various aspects of the law were likely to disenfranchise minority voters disproportionately, South Carolina clarified or reinterpreted the offending provisions. In particular, State officials ultimately embraced expansive interpretations of provisions concerning: (1) procedures for obtaining a free photo voter registration card; (2) voter education programs; and (3) the reasonable impediment exception.

1. Procedures for Obtaining a Photo Voter Registration Card

During administrative review, questions from the Department of Justice prompted the SEC to reevaluate and refine its draft procedures for issuing photo voter registration cards, which ultimately enabled voters to obtain such IDs more easily. For example, the original procedures demanded very specific information in order to receive photo registration cards. After the Department of Justice noted apparent discrepancies in the draft procedures, the SEC "recognize[d] there are other acceptable methods" to confirm one's identity for purposes of receiving a photo registration ID, such as presenting a current non-photo voter registration card or any form of ID accepted under the Help America Vote Act of 2002. The SEC then revised its draft procedures to include these additional options. (S.C. SEC Response to Dep't of Justice Information Request (ECF No. 63-1).) Similarly, the SEC revised its draft procedures to allow county voter registration offices to issue permanent photo registration cards, rather than temporary cards that would expire after thirty days. (*See id.* at 8; JA-DI 747 (ECF No. 190-1) (Whitmire I Dep. Tr.).)

2. Voter Education

During the preclearance process, it became evident that the SEC's planned voter education materials neglected to inform voters about alternatives and exceptions to Act R54's ID requirement. Those shortcomings likely would have discouraged eligible individuals from voting—for example, senior citizens, the disabled, or those without access to transportation who were entitled to utilize the reasonable impediment exception. Failures "to educate voters on the opportunity to vote absentee without photo identification" or to notify voters of the reasonable impediment exception and its requirements were the subject of several comment letters during both the administrative preclearance process and litigation. (*See, e.g.*, Dec. 7, 2011 Cmt. Ltr. (ECF No. 7-3).) Indeed, throughout the pretrial proceedings—and right up to the eve of trial—the SEC continued to revise these educational materials to encourage voters who lacked ID to vote under the alternatives provided by the law. (8/28/12 Tr. at 238 (ECF No. 303) (Andino); S.C. SEC Voter Education Plan (ECF No. 65-3).) As the SEC Executive

Director testified, these revisions came in direct response to questions raised by Intervenors, the United States, and the District Court: "[B]ecause of some questions that were asked during depositions, we went back and took another look . . . and realized we needed to make a few changes." (8/28/12 Tr. at 238-239 (ECF No. 303) (Andino).)

3. Reasonable Impediment Exception

The reasonable impediment exception is perhaps the most important ameliorative provision in Act R54 because it provides a safety net to ensure that all eligible voters are able to cast a ballot, even those unable to obtain photo ID. Accordingly, this provision was critical to the District Court's decision to preclear the Act. *South Carolina*, 2012 WL4814094, at *19 ("[K]eep in mind that Act R54 may *not* have been pre-cleared for any elections without the expansive reasonable impediment provision."). Notably, the reasonable impediment exception was initially largely undefined, and preclearance became justified only after the interpretation of the exception evolved before, during, and after trial to become more expansive. *Id.* at *4 ("[T]he initial rhetoric surrounding this case arose in part because of a key unanswered question at the time of Act R54's enactment: namely, how would the reasonable impediment provision be interpreted and enforced?").

As enacted, the Act contained no definition of a "reasonable impediment," no standard for determining what constituted one, and no information about who would make the "reasonableness" determination. (*See, e.g.*, Aug. 5, 2011 Cmt. Ltr. (ECF No. 7-2).) It was not until the administrative preclearance process began—and, more specifically, when the Department of Justice sought clarity—that South Carolina officials made their first effort to interpret this crucial provision. On August 16, 2011, in response to the Department of Justice's request for a more concrete definition, the South Carolina Attorney General provided an opinion that endeavored to construe this key provision—but was, in fact, only the first step in a longer interpretive process. (*See* S.C. Att'y Gen. Op. (ECF No. 63-2).)

Although helpful in some respects, the Attorney General opinion failed to resolve the ambiguities regarding the scope of the reasonable impediment exception and who would make a final determination of reasonableness, leaving those issues for exploration in discovery. Deposition testimony from key legislators and election officials demonstrated persistent disagreement over, for example, whether a voter who lacked transportation to a county office where free IDs were available could claim a "reasonable impediment" when seeking to vote without an acceptable photo ID. (*Compare* JA-DI 853 (ECF No. 190-1) (Andino I Dep. Tr. (lack of transportation a reasonable impediment)) *with* JA-DI 524 (ECF No. 190) (Sen. Martin Dep. Tr.) (lack of transportation *not* a reasonable impediment)) *and* JA-US 1128 (ECF No. 233) (Rep. Clemmons Dep. Tr.) (unsure about lack of transportation).) In mid-August 2012, two weeks before trial, election officials further revised poll manager guidelines and educational materials defining the reasonable impediment exception (*see* JA-DI 3470-73), due to "[s]ome of the issues that [the parties] raised in the deposition[s]." (JA-DI 3948-49 (ECF No. 249-2) (Andino IV Dep. Tr.).) The definition continued to evolve during the course of the trial, as the "responsible South Carolina officials determined, often in real time, how they would apply the broadly worded reasonable impediment provision." *South Carolina*, 2012 WL 4814094, at *4. In response to a specific inquiry from the Court at the end of the five-day trial, the State Attorney General stated that the exception encompassed any reason a voter subjectively but genuinely believed created an obstacle to obtaining photo ID. (S.C. Responses to the Court's Questions (ECF No. 263).) The Court not only adopted this view in preclearing Act R54, but expressly mandated it as a condition of preclearance. 2012 WL4814094, at *6.

A similar evolutionary process occurred during the Section 5 litigation with respect to other aspects of the reasonable impediment exception, including the grounds on which South Carolina county election boards could reject a reasonable impediment affidavit and the initial requirement that reasonable impediment affidavits be notarized. As originally interpreted by State officials, both had the potential to discourage minority turnout, result in the rejection of valid votes, and introduce illegal burdens on voters. But subsequent reinterpretations by the State mitigated these effects.

For example, the State initially left unresolved the problem that Act R54 appears to require notarization of reasonable impediment affidavits, despite the fact that polling places were not required to make notaries available.[8] Ultimately, the District Court accepted the State's representation that if election officials could not recruit notaries to work without fee at the polling places, "poll managers may witness reasonable-impediment affidavits, and county election boards will be directed to count the accompanying provisional ballots." 2012 WL4814094, at *7. Toward the end of the litigation, the SEC further issued policies prohibiting notaries from charging a fee to witness reasonable impediment affidavits. (JA-DI 3471.) Similarly, the

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[8] Act R54 requires that a voter utilizing the reasonable impediment exception complete an "affidavit," S.C. Code § 7-13-710(D)(1)(b), and South Carolina law requires that "affidavits" be notarized. *See South Carolina*, 2012 WL4814094, at *7.

State initially left unresolved the question of whether county election boards could assess the reasonableness of a stated reasonable impediment or only its factual truth, but later interpreted Act R54 to allow county boards to assess only its factual truth.[9]

Again, "one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here." 2012 WL4814094, at *21 (Bates, J., concurring). Today's Act R54 is significantly more protective of minority voters, as it features mitigating provisions that are substantially clearer and more capable of uniform, non-discriminatory implementation. Without Section 5, many minority voters almost certainly would have been disenfranchised as a result of Act R54.

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[9] Act R54 provides that reasonable impediment ballots must be counted unless the county board of elections "has grounds to believe the affidavit is false." S.C. Code § 7-13-710(D)(2). Prior to the litigation, the State provided little insight on whether county boards' discretion encompassed an assessment of reasonableness—*i.e.*, whether this provision enabled county election boards to reject ballots if they viewed the stated impediment as not being "reasonable." As a result of the VRA litigation, South Carolina confirmed that county boards could reject reasonable impediment ballots only if they determined that the affidavit was false, not if they merely deemed the impediment to be unreasonable. (S.C. Responses to the Court's Questions (ECF No. 263)); *see also* 2012 WL 4814094, at *5-6.

III. SECTION 5 WAS APPLIED IN *SOUTH CAROLINA* WITH APPROPRIATE DEFERENCE TO LEGITIMATE STATE INTERESTS.

"The historic accomplishments of the Voting Rights Act are undeniable," including the vital role that Section 5 has played in battling racial discrimination and advancing minority voting rights. *Nw. Austin*, 557 U.S. at 202. But Section 5 has the potential to "impose[] substantial 'federalism costs.'" *Id.* Cognizant of this risk, the *South Carolina* Court minimized any burden on state sovereignty throughout the litigation. South Carolina was not forced to "jump through unnecessary hoops." 2012 WL 4814094, at *22 (Bates, J., concurring). Rather, the State was given flexibility in shaping the litigation schedule and the scope of discovery as well as deference from the District Court during the evaluation of evidence. Further, as described below, the Court did everything in its power to issue a final preclearance decision before the 2012 general election. Indeed, had South Carolina not delayed (and then acknowledged that, as a result, a decision for 2012 was likely impossible), the Court would have precleared Act R54 in time for the presidential election.

A. *The Procedural Background of South Carolina v. United States.*

Flexibility, deference and speed of adjudication were recurring motifs throughout the course of the *South Carolina* litigation. The three-judge panel: (1) accommodated the State's procedural preferences, including the imposition of a drastically compressed pretrial schedule; (2) set realistic and manageable evidentiary standards; and (3) credited without question South Carolina's position, articulated by counsel, witnesses and the State's Attorney General, that the voter ID requirement was adopted in order to prevent fraud and safeguard public confidence in elections. The litigation process, detailed below, establishes that Section 5 need not impose undue burdens upon covered jurisdictions, and that the Act plays a crucial role in preventing disenfranchisement.

South Carolina passed its voter ID law in May 2011 and sought administrative preclearance in June. Because the State's initial submission was incomplete, the Department of Justice was unable to issue a decision until December—then, preclearance was denied. South Carolina waited several weeks before initiating preclearance litigation in February 2012; even then South Carolina did not request expedited treatment until a status conference in April, two months later. Thereafter, the State's repeated failures in discovery caused additional delays. *See, e.g.*, Scheduling and Procedures Order in *South Carolina* v. *United States*, 1:12-cv-00203, ECF No. 64, at 10-14 (Apr. 26, 2012) (Bates, J., concurring) ("Apr. 26 Scheduling Order") (noting that "South Carolina's own inexplicably dilatory conduct has largely created the difficult situation the Court and the parties now face").

Nevertheless, the District Court granted the State's request to proceed on an expedited basis, acknowledging South Carolina's strong interest in implementing a duly enacted election law in the November 2012 general election. *See id.* at 12. The

District Court ordered filings by Intervenors to be consolidated, and prescribed an "extremely aggressive" discovery and trial schedule geared to achieve an expedited decision. *South Carolina*, 2012 WL 4814094, at *20. For example, the schedule required the parties to serve requests for written discovery on May 4th, to serve objections on May 9th, and to complete responsive document productions by May 16th. (ECF No. 64, at 6.) The parties completed 21 fact witness depositions within a single month, and seven expert witness depositions in nine days.

In reaching its decision to preclear the South Carolina law for all elections after 2012, the District Court imposed realistic and manageable evidentiary standards upon the State consistent with congressional language and intent. The Court explained that a new ballot access law would violate Section 5 only if it "disproportionately and materially burden[ed] minority voters when measured against the pre-existing state law." *Id.* at *8 (citing *Florida* v. *United States*, --- F. Supp. 2d ----, 2012 WL 3538298, at *9 (D.D.C. Aug. 16 2012)). The Court further explained that ordinary burdens faced by voters when exercising their franchise, such as long lines, confusing paperwork, and provisional ballots—while sufficient to dissuade some voters from voting—do not alone constitute the type of injury that runs afoul of the VRA. *Id.* at *10. Similarly, the *South Carolina* panel declined to require the State to predict with undue specificity the effects of Act R54 after implementation. Instead, the District Court largely accepted South Carolina's promise that the pre-implementation racial gap in ID ownership would be diminished by voter education, free photo voter registration cards, and the reasonable impediment exception, none of which were fully functioning at the time of trial. The District Court also deferred to the State's assurance that local election officials would be adequately trained and would adhere strictly to the procedures announced by South Carolina at the end of the litigation—despite the lack of centralized State control over local election administration and evidence of past implementation problems. *See, e.g.*, *id.* at *20 (Bates, J., concurring).

Finally, the *South Carolina* panel accepted the State's evidence regarding the General Assembly's motivations in introducing and passing the law. Citing *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), the District Court concluded that "South Carolina's goals of preventing voter fraud and increasing electoral confidence are legitimate; those interests cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina." *Id.* at *13. Though "troubled" by evidence of racially charged comments involving the lead bill author, *see id.* at *14 and *supra* at 11 n.5, the District Court declined to find that the statements of one lawmaker, even a central one, tainted the entire legislative process.

Ultimately, South Carolina met its burden by addressing in good faith the objections of the Department of Justice and Intervenors, and by detailing its plans for implementation of the law, including the State's educational efforts, free ID scheme, and election official training program (all of which were the subject of ongoing revisions in response to new evidence and objections at trial).

B. *South Carolina Exemplifies the Procedural Approach Taken in Recent, Similar Cases.*

In all three of the ballot access cases tried under Section 5 in 2012, flexibility, deference and speed of adjudication were recurring motifs. Despite originating from three different states (Texas, Florida and South Carolina), involving unique facts, and resulting in varying outcomes, each case illustrates that Section 5 litigation need not pose any undue burden on covered jurisdictions.

For instance, in *Texas* and *Florida*, as in *South Carolina*, the courts set schedules to accommodate the states' goal of obtaining an expedited decision. In *Texas*, the Court strove "to ensure that Texas had every possible opportunity to show that its own voter ID law could be implemented in time for the November elections." 2012 WL 3743676, at *5. In *Florida*, which involved a direct challenge to the constitutionality of Section 5, the Court bifurcated the case and ordered prompt discovery on the preclearance issues. *See* 2012 WL 3538298, at *2 n.2, *5. The parties further accelerated the process by agreeing to forgo trial and proceed with the submission of findings of fact and conclusions of law. In all three cases, all intervening defendants were required to file consolidated submissions; in *Florida*, the Court further ordered the intervening defendants and the United States to file consolidated submissions. In each case, these procedural accommodations materially reduced the cost of litigation to the State, and at the expense of the defendants.

Similarly, as in *South Carolina*, the *Texas* and *Florida* courts set reasonable evidentiary standards. The *Texas* panel held that ordinary burdens—such as, for most voters, a one-time trip to a government agency to obtain an ID—do not undermine the "effective exercise of the electoral franchise" guaranteed by the VRA. 2012 WL 3743676, at *13; *see also id.* at *28. The Court in *Florida* refined the standard further to ask whether "the change [in voter access] imposes a burden material enough that it will likely cause some *reasonable* minority voters not to exercise the franchise." 2012 WL 3538298, at *9. Moreover, the *South Carolina*, *Texas* and *Florida* courts all agreed that covered jurisdictions necessarily have the same anti-fraud interests as all other states. Accordingly, under the Supreme Court's decision in *Crawford*, none of these covered jurisdictions had to show any evidence of past fraud in order to take proactive steps to prevent future electoral misconduct. *See Texas*, 2012 WL 3743676 at *12; *Florida*, 2012 WL 3538298 at *45. Thus, by setting reasonable standards for the state to meet, and by accepting explanations of state motives, the courts eased the evidentiary burden shouldered by states.

It is true that while South Carolina's new voter ID law was approved for future elections, neither Florida's new early voting law nor Texas' ID law were precleared. But this difference is easily explained: unlike Texas and Florida, South Carolina met its burden of proof.

As explained above, South Carolina produced detailed information about how the new law would be implemented. In contrast, the *Texas* Court found that "everything Texas has submitted as affirmative evidence is unpersuasive, invalid, or both." 2012 WL 3743676, at *32. Moreover, Texas failed to refute evidence that substantial numbers of minority voters lacked acceptable ID, and would be forced to expend money, travel vast distances, and sacrifice wage-earning hours to obtain the required ID. *See id.* at *25-33. Similarly, Florida submitted no credible record evidence about when local officials would open and close the polls for early voting. The *Florida* Court was thus forced to presume that those counties would offer just the minimum number of hours provided by law. 2012 WL 3538298, at *22. Notably, when plans to offer the maximum number of hours in Florida's covered counties were subsequently submitted to the Department of Justice, the Florida law was promptly administratively precleared. Had those plans been presented during the course of the litigation, the *Florida* Court would have approved them. *See id.* at *26-30.

In sum, "[e]ven in a case involving supremely important considerations, litigants who seek prompt equitable relief must show good cause for the request and conduct themselves accordingly. A state is not exempt from such basic requirements." Apr. 26 Scheduling Order, at 13 (Bates, J., concurring). South Carolina cooperated with the defendants and with the Court, offered credible evidence, and achieved preclearance. Texas and Florida did not.

CONCLUSION

For the reasons stated above, *Amici* request that the Court affirm the judgment of the Court of Appeals so that the administrative and judicial processes of Section 5 may continue to guide the efforts of South Carolina and other jurisdictions to guard against electoral fraud while protecting minority voters from discriminatory disenfranchisement.

Dated: February 1, 2013

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IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA
Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit**

BRIEF OF THE JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. CONGRESSIONAL ENFORCEMENT POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS ARE LIMITED AND SUBJECT TO JUDICIAL REVIEW. 3

  A. The Civil War Amendments Grant Power to Congress to Enact "Appropriate" Legislation. 3

  B. The Courts, And Not Congress, Ultimately Must Determine Whether Legislation Purporting To Enforce These Amendments is "Appropriate." 5

II. THE *BOERNE* "CONGRUENCE AND PROPORTIONALITY" TEST SHOULD BE APPLIED IN THIS CASE. 7

  A. The Congruence And Proportionality Test Enunciated In *Boerne* Is Based Upon And Consistent With Prior Jurisprudence. 7

- B. The Test of *Boerne* Has Become the Accepted Yardstick For Evaluating the Constitutionality of Enforcement Legislation. 12
- C. This Court Has Applied The *Boerne* Congruence And Proportionality Test To Require Much More Than Deferential Rational Basis Review........ 14

III. THE UNEQUAL TREATMENT OF EQUAL STATES REQUIRES PARTICULARLY EXACTING REVIEW IN THIS CASE. 22

CONCLUSION 28

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS **PAGE(S)**

U.S. Const. amend. XIV .... passim
U.S. Const. amend. XV .... passim

CASES

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 27

Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) .... passim

Bradwell v. State, 16 Wall. 130 (1873)) 19

City of Boerne v. Flores, 521 U.S. 507 (1997) .... passim

City of Pleasant Grove v. United States,
479 U.S. 462 (1987) 27

City of Rome v. United States,
446 U.S. 156 (1980) .... passim

Civil Rights Cases, 109 U.S. 3 (1893) 8

Coleman v. Court of Appeals of Maryland,
132 S. Ct. 1327 (2012) 12, 15, 16

Coyle v. Smith, 221 U.S. 559 (1911) 25

Escanaba & Lake Michigan Transp. Co.
v. City of Chicago, 107 U.S. 678 (1883) 25

Florida Prepaid 13, 17

Gaston County v. United States,
395 U.S. 285 (1969) 27

Goesaert v. Cleary, 335 U.S. 464 (1948) 19

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 7

Hoyt v. Florida, 368 U.S. 57 (1961) 19

James v. Bowman, 190 U.S. 127 (1903) 5

Katzenbach v. Morgan, 384 U.S. 641 (1966) 5

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) .... passim

Lopez v. Monterey County,
525 U.S. 266 (1999) 13, 23

Muller v. Oregon, 208 U.S. 412 (1908) 19

Nev. Dep't. of Human Res. v. Hibbs,
538 U.S. 721 (2003) .... passim

*Northwest Austin Municipal Utility District
No. One v. Holder*, 557 U.S. 193 (2009) .... passim

Perkins v. Matthews, 400 U.S. 379 (1971) 26

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 23, 29

Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 14

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .... passim

Tennessee v. Lane, 541 U.S. 509 (2004) .... passim

U.S. v. Alaska, 521 U.S. 1 (1997) 25

United States v. Bd. of Comm'rs, 435 U.S. 110 (1978) 27

STATUTES

29 U.S.C. § 621 *et seq.* 13, 17, 18
42 U.S.C. § 12101 *et seq.* .... passim
42 U.S.C. § 2000a *et seq* 7
29 U.S.C. § 2601 *et seq* .... passim
42 U.S.C. § 1973 *et seq.* .... passim

TREATISES, BOOKS, AND ARTICLES

Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 179 (2005) 28

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

Amicus curiae submits this brief regarding the standard of review to be used by the Court in deciding this case.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court distilled a century of enforcement jurisprudence into a single standard of review. It held that, with respect to the enforcement provision of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* Twelve years later, the Court considered whether this standard applied in the context of the preclearance provisions of the Voting Rights Act but declined to decide the question, holding only that the statute raised serious constitutional questions under any conceivable standard. *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 204 (2009).

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than amicus curiae, its members or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. This brief is submitted pursuant to blanket consent letters from all parties, on file with this Court.

Thus the Court has not directly addressed whether the "congruence and proportionality" standard explicitly articulated in *Boerne* applies in the context of the preclearance provisions of the Voting Rights Act ("VRA"). As discussed below however, the Court has applied the congruence and proportionality test in weighing the constitutionality of virtually every enforcement statute that it has examined in the wake of *Boerne*. Since the VRA is an enforcement statute, *Boerne's* congruence and proportionality standard is applicable.

Application of the congruence and proportionality doctrine in the VRA context is not a change in the law, but rather a reconfirmation of longstanding practice as embodied in this Court's seminal VRA decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Applied here, the *Boerne* standard requires invalidation of Section 5 of the VRA. As petitioner has demonstrated, the most recent reauthorization of the statute rested on outdated assumptions and data that no longer support the extraordinary incursion onto state sovereignty effected by the statute's broad and unequally applicable preclearance requirements. Given the limited record of recent unconstitutional deprivation of voting rights in covered jurisdictions, this Court should declare the original mission of Section 5 accomplished and invalidate its 2006 reauthorization.

ARGUMENT

I. CONGRESSIONAL ENFORCEMENT POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS ARE LIMITED AND SUBJECT TO JUDICIAL REVIEW.

A. The Civil War Amendments Grant Power to Congress to Enact "Appropriate" Legislation.

The history of the Fourteenth and the Fifteenth Amendments can be traced to the immediate aftermath of the Civil War as the spearheads of Republican efforts to empower the federal government to protect the rights of the newly emancipated slaves. The enforcement provisions of each amendment are virtually identical. The Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Fifteenth Amendment likewise states: "The Congress shall have power to enforce this article by appropriate legislation."

As this Court recounted in *Boerne*, the enforcement language of the Fourteenth Amendment was originally drafted more broadly to provide Congress

> "power to make all laws which *shall be necessary and proper* to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

Boerne, 521 U.S. at 520 (quoting Cong. Globe, 39th Cong., 1st Sess., 1034 (1866)) (emphasis added). This original language drew considerable opposition in congressional debate as granting Congress "too much legislative power at the expense of the existing constitutional structure." *Id.* The language was subsequently revised and adopted in its present form in order to address those concerns. *Id.* at 523. It is reasonable to conclude that Congress used the identical language in the Fifteenth Amendment in order to confer the same limited power of enforcement.

In light of this historical context, and given the parallel verbiage, the Court has always evaluated the nature of the Fourteenth and Fifteenth Amendments enforcement powers by the same standards. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373 (2001) (using same standards of review for the Fourteenth and Fifteenth Amendment); *id* at n.8 ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *Boerne*, 521 U.S. at 525-26 (discussing *Katzenbach*--a Fifteenth Amendment case--to outline the limits on Congress's Fourteenth Amendment powers); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *James v. Bowman*, 190 U.S. 127, 136 (1903).

B. The Courts, And Not Congress, Ultimately Must Determine Whether Legislation Purporting To Enforce These Amendments is "Appropriate."

That Congress has the power to enforce the provisions of the Fourteenth and Fifteenth Amendment is not in dispute. The issue is whether there is any limit to the scope of this enforcement power. As this Court has observed, "the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).

In *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), this Court noted that the congressional power of enforcement under § 5 was "broad" but "not unlimited." The reason is self-evident: absent defined boundaries, Congress would have *carte blanche* to enact virtually any legislation, provided only that it purported to be acting under the rubric of its enforcement power. As *Boerne* explained:

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress

> would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Id. at 519 (internal citation omitted). Moreover, it is not up to Congress to define the substance of constitutional guarantees. *Id.* at 519-24. That is the province of this Court. *Id.*

Given these respective roles, the Court stressed the necessity of distinguishing permissible from impermissible exercises of power. "[R]emedial" legislation is within congressional power. *Id.* at 519 (citing *Katzenbach*, 383 U.S. at 326) "Substantive change" is not. *Id.* at 519. While the line between the two is not always easy to discern, "the distinction exists and must be observed." *Id.* at 520. Demarcation requires a cost-benefit or tradeoff analysis: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* In order to pass muster, the more expansive and intrusive an enforcement statute is, the more closely it must hew to the constitutional guarantee at stake.

This does not mean, of course, that Congress lacks the power to enact legislation to address societal problems outside the very narrow confines of the Fourteenth and Fifteenth Amendments. It means only that in order to do so, it must ground its authority in an explicit constitutional grant. Nor is this caveat necessarily fatal. For example, this Congress enacted the landmark Civil Rights Act of

1964 under its Commerce Clause powers. This Court affirmed its ability to do so. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) ("the action of the Congress in the adoption of [Civil Rights Act]... is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years.").

II. THE *BOERNE* "CONGRUENCE AND PROPORTIONALITY" TEST SHOULD BE APPLIED IN THIS CASE.

A. The Congruence And Proportionality Test Enunciated In *Boerne* Is Based Upon And Consistent With Prior Jurisprudence.

The Court did not create a new benchmark in *City of Boerne v. Flores*; it synthesized a workable standard of review from a century of enforcement jurisprudence, including this Court's decisions enforcing constitutional prohibitions on race-based discrimination. *Boerne*'s reasoning relied upon VRA jurisprudence. *Boerne* cited to this Court's seminal decision on the VRA, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) at least 11 times. Even more tellingly, it specifically based the congruence and proportionality standard on *Katzenbach*. "The appropriateness of remedial measures must be considered in light of the evil presented. ... Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 308, 334).

In articulating the congruence and proportionality standard, this Court reasoned that its genesis stretched well beyond *Katzenbach*. The *Boerne* holding was grounded in a century of case law, drawing upon enforcement cases from a variety of contexts to articulate how the congruence and proportionality framework had developed. *See id.* at 532 ("Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'") (citing *Civil Rights Cases*, 109 U.S. 3, 13 (1893)).

Nor did *Boerne* indicate that the congruence and proportionality standard would be confined to a particular realm of equal protection jurisprudence: *Boerne* drew no distinctions between the applicable standard to evaluate the race-based voting rights statute in *Katzenbach*, and the religious liberties statute in *Boerne* itself. Both had been closely scrutinized to determine the fit with Congress's remedy for and findings of unconstitutional state behavior. *See Boerne*, 521 U.S. at 530 (finding "instructive" the comparison of the constitutional rights protected and the remedies used in both Religious Freedom Restoration Act and VRA).

Katzenbach was the prototypical application of congruence and proportionality analysis. *Katzenbach* affirmed the preclearance provisions only after a comprehensive review, observing that the record showed a clear pattern of constitutional voting rights deprivation against which a panoply of lesser measures had proved ineffective. These lesser measures included a number of Court decisions,[2] a series of incremental congressional measures,[3] and piecemeal litigation by the Justice Department and private litigants.

These lesser measures had been tried and had failed.[4] Their persistent failure led to a continuing deprivation of voting rights, necessitating more drastic remedies. *See Northwest Austin*, 557 U.S. at 221 (Thomas, J., concurring in the judgment in part and dissenting in part) ("the massive scale of disenfranchisement efforts made case-by-case enforcement of the Fifteenth Amendment impossible, if not Sisyphean.") Put another way, extreme exigencies demanded extreme action – the prototypical congruence and proportionality analysis.[5]

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[2] *Katzenbach*, 383 U.S. at 311-12 ("The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote."... and citing cases involving Grandfather clauses, procedural hurdles, white primaries, improper challenges, racial gerrymandering and discriminatory application of voting tests)

[3] *Id.* at 313 ("In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination.")

[4] *Id.* at 313-14 ("Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. ... The previous legislation has proved ineffective for a number of reasons.")

The Court in *Boerne* also relied upon its prior decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which upheld a 5-year extension of the prohibition of literacy tests for voters, but also held that Congress exceeded its enforcement powers by mandating that the minimum voting age in state and local elections be reduced from 21 to 18. *Id.* at 117-118. As Justice Black's controlling opinion in *Mitchell* observed, in contrast to the extensive record of literacy tests being used to deny voting rights on account of race, there was no legislative record to support a conclusion that "the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race." *Id.* at 130.

The Court adopted a similar approach in deciding a constitutional challenge to the 1975 extension to the VRA in *City of Rome v. United States*, 446 U.S. 156, 181 (1980). The Court identified a pattern of constitutional violations by highlighting several data points Congress had relied on. "Significant disparity persisted" between registration numbers of whites and minorities in "at least several of the covered jurisdictions." *Id.* at 180. More African-American officials had been elected, but they held minor posts. *Id.* In particular, none held a statewide position. *Id.* Moreover, African-American representation in the state legislatures "fell far short" of their proportion in the population. *Id.* at 181.

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[5] The constitutionality of the 1970 reauthorization was affirmed, without extensive discussion, in *Georgia v. United States*, 411 U.S. 526, 535 (1973). The Court summarily incorporated by reference its exhaustive congruency and proportionality analysis conducted just a few years earlier in *Katzenbach*. *See id.* ("And for the reasons stated at length in [*Katzenbach*], we reaffirm that the Act is a permissible exercise of congressional power under s 2 of the Fifteenth Amendment.")

The Court gauged the appropriateness of the remedy in light of these concerns, giving considerable weight to the historical context – *City of Rome* involved an extension only a decade after the original 1965 Act, an Act that itself had addressed a century of African-American vote suppression persistently and defiantly perpetuated by ingenious and contrived mechanisms. *Id.* at 181-82. Progress had been made, but it was judged modest and certainly tenuous. *Id.*

Of particular importance, Congress had carefully deliberated over the necessity of the continuation of the § 5 preclearance requirement, and judged it appropriate in light of submissions by the Attorney General. Given that record in its historical context, a modest 7-year extension was an appropriately measured ameliorative device: "When viewed [in historical context,] Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable." *Id.* at 182. By any measure, regardless of the terminology employed, *City of Rome* engaged in a congruence and proportionality analysis.

B. The Test of *Boerne* Has Become the Accepted Yardstick For Evaluating the Constitutionality of Enforcement Legislation.

Since *Boerne*, the Court has explicitly applied the congruence and proportionality test in every decision involving legislation enforcing the Fourteenth and Fifteenth Amendments, even when members of the Court draw different conclusions from that analysis. *See e.g.*, *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1335 (2012) (plurality opinion) ("[A]s a remedy, the provision is not congruent and proportional to any identified constitutional violations"); *id.* at 1347 (Ginsburg., J., dissenting) ("The self-care provision, I would therefore hold, is congruent and proportional to the injury to be prevented."); *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) ("Congress' chosen remedy for the pattern of exclusion and discrimination described above . . . is congruent and proportional to its object of enforcing the right of access to the courts."); *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) ("We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation,'") (citation omitted); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001) ("[Section] 5 legislation reaching beyond the scope of § l's actual guarantees must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.") (internal quotation marks omitted); *Kimel* *v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) ("Applying the ... congruence and proportionality test ... we conclude that the ADEA is not appropriate legislation under § 5 of the Fourteenth Amendment.") (internal quotation marks omitted); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999) ("[T]he legislation must... be appropriate under § 5 as that term was construed in *City of Boerne*.") (internal quotation marks omitted). Throughout its consistent application of the *Boerne* test, the Court has never noted limitations in the standard's applicability.[6]

Therefore, the *Boerne* congruence and proportionality test is the appropriate standard to apply in determining the constitutionality of measures designed to remedy the deprivation of constitutional voting rights. The Court of Appeals decision properly held as much. *Shelby Cnty. v.*

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[6] The Court did not explicitly apply the congruence and proportionality test in *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999), but its Section 5 analysis nevertheless adhered to the *Boerne* standard. *Lopez* primarily involved an issue of statutory construction, with an incidental challenge to the constitutionality of the VRA. In rejecting that challenge, the Court cited *Boerne* and relied upon its previous decisions in *Katzenbach* and *City of Rome*, which, as noted above, were perfectly consistent with a congruence and proportionality analysis. *See id.* ("Moreover, we have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States." (citing *Katzenbach*, 383 U.S. at 334-335 and *City of Rome*, at 178-183")).

Holder, 679 F.3d 848, 859 (D.C. Cir. 2012) ("Although the Supreme Court declined to resolve this issue in *Northwest Austin*, the questions the Court raised—whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem—seem to us the very questions one would ask to determine whether section 5 is 'congruen[t] and proportional[] [to] the injury to be prevented,'" citing *City of Boerne*, 521 U.S. at 520.) The District Court panel came to the same conclusion. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 507-08 (D.D.C. 2011).

C. This Court Has Applied The *Boerne* Congruence And Proportionality Test To Require Much More Than Deferential Rational Basis Review.

In evaluating the "congruence and proportionality" of a measure, the first step is to "identify with some precision the scope of the constitutional right at issue." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001). Moreover, the evil identified in the first step must concern (i) a pattern (ii) of constitutional violations by states; even multiple isolated instances, or merely undesirable acts, however reprehensible, will not suffice. *Lane*, 541 U.S. at 528; *Hibbs*, 538 U.S., at 735-37. The second step is to review the record to determine whether there is a pattern of sufficient consistency and egregiousness of violation of that right. *Garrett*, 531 U.S. at 368. The third step is to ensure that the remedy is appropriately calibrated to the nature and magnitude of the violation.

The Court's recent decision in *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) is a textbook illustration of this process. In *Coleman*, the Court concluded that Congress did not validly abrogate the states' sovereign immunity under the Fourteenth Amendment in enacting the Family Medical Leave Act's ("FMLA") self-care provision, 29 U.S.C.A. § 2612(a)(1)(D). In reaching its conclusion, the Court plurality[7] followed the *Boerne* test, by focusing on (i) whether the provision addressed conduct that violated the Fourteenth Amendment and (ii) whether there existed "congruence and proportionality between the injury to be prevented . . . and the means adopted to that end." *Id.* at 1334 (quoting *City of Boerne*, 521 U.S. 507, 520 (1997)).

The *Coleman* ruling distinguished the Court's prior decision in *Hibbs*. Crucially, *Hibbs* involved the family-care provision of the FMLA, while *Coleman* involved the self-care provision. This distinction proved decisive because of the nature of the harm addressed: "what the family-care provisions have to support them, the self-care provision lacks, *namely evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations.*" *Id.* at 1334. (emphasis added)

The Court could not accept the argument that the self-care provision addressed a pattern of sex discrimination. *Id.* at 1334-35. Considering the history of the provision, the plurality found "scant evidence" of gender-based stereotypes or discrimination in the provision of sick or disability leave by state employers. *Id.* at 1334. Accordingly, the plurality concluded that Congress sought to avoid "discrimination on the basis of illness, not sex." *Id.* at 1335. The distinction is crucial, since discrimination on the basis of illness does not generally implicate *constitutional* concerns.

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[7] Both the plurality and the dissent in *Coleman* applied the congruence and proportionality tests, albeit with different outcomes. *Id.* at 1338 (Scalia. J., concurring).

Furthermore, though the Court did not dispute that the self-care provision could potentially benefit women suffering from pregnancy-related disabilities, there were other means in place to alleviate those problems. *Id.* Therefore, the FMLA self-care provision "as a remedy" was not congruent or proportional "to any identified constitutional violations." *Id.* at 1335.

As *Coleman* illustrates, the constitutionality of enforcement statutes in the wake of *Boerne* has frequently, though not invariably hinged on the second step: whether the record shows a demonstrable and consistent pattern of egregious violations of a constitutional right. If the evidence of a pattern of constitutional deprivation is insufficient, inadequate or nonexistent, this Court has held that Congress exceeded its enforcement authority.

For instance, in *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999), the Court was faced with the question of the constitutionality of the Patent Remedy Act (PRA). The PRA had attempted to abrogate state sovereign immunity with regard to patent infringement suits, purporting to act under §

5 of the Fourteenth Amendment. *Id.* at 630. Reviewing the record, the Court noted that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 640. Moreover, Congress had made no effort to calibrate its response in proportion to the problem, for example by limiting recourse to instances where states refused to provide their own remedies, or by setting time limits. *Id.* at 647-48. This failure to calibrate could not pass the congruence and proportionality test, dooming the abrogation provision of the PRA: "[The sweep and scope of the PRA] is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Id.* at 647.

A year after *Florida Prepaid,* the Court was confronted with the constitutionality of the Age Discrimination in Employment Act (ADEA) in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). ADEA attempted to abrogate state sovereign immunity in cases involving age discrimination. *Id.* at 80. Once again, Congress enacted ADEA under § 5 of the Fourteenth Amendment. However, the Court noted that Congress had "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. The underlying record consisted "almost entirely of isolated sentences clipped from floor debates and legislative reports." *Id.* Moreover, the magnitude of the remedy, which made no exception for bona fide occupational requirements, was out of proportion with the constitutional evil to be remedied. *Id.* at 83; *see id.*

at 92 ("In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.")

Finally, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court was faced with the question of whether Congress had validly exercised its enforcement power by providing that state employees could recover damages for violations of the Americans with Disabilities Act (ADA). Once again, the Court began with the premise that "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 363 (quoting *City of Boerne*, 521 U.S. at 520). The Court noted that the "legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." *Id.* at 368. Moreover, the ADA also prohibited the use of criteria and means of administration that had a disproportionate impact on the disabled, and did so "without regard to whether such conduct has a rational basis." *Id.* at 372. The ADA made no provisions for such contingencies: the remedy was not carefully gauged to the nature and magnitude of the underlying problem. Consequently, it failed the "congruence and proportionality" test. *Id.* at 374.

Of course, the *Boerne* analysis is not invariably fatal to statutes designed to enforce the substantive provisions of the Fourteenth Amendment. Indeed, the contrast to the post-*Boerne* cases upholding enforcement statutes is instructive, both as to the identification of a pattern of constitutional violations, and the calibration of the responsive measure.

In the first case, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003), the Court upheld the Family and Medical Leave Act ("FMLA") as "narrowly targeted". It found sufficient evidence of the "[s]tates' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Id.* at 742. The Court found evidence of a pattern of constitutional violations in a Bureau of Labor Statistics (BLS) study in the FMLA legislative record, testimony in congressional hearings, documentation of unequal leave policies, analysis of the policies themselves, state laws and ironically, in the Court's own previous decisions. [8] *Id.* at 729-35. "[E]ven where state laws . . . were not facially discriminatory, they were applied in discriminatory ways." *Id.* at 732. In light of this evidence, the Court determined that "[i]n sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 736.

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[8] *See id.* at 729 (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), *Muller v. Oregon*, 208 U.S. 412, 419, n. 1 (1908), *Bradwell v. State*, 16 Wall. 130 (1873)).

Having established the constitutional violation, the Court evaluated the remedy. Perhaps most critical was the fact that the "FMLA is narrowly targeted at the fault line between work and family." *Id.* at 738. This was the crucial distinction between the FMLA and the statutes in *Boerne*, *Kimel*, and *Garrett* which "applied broadly to every aspect of state employers' operations[.]" *Id.* In addition, the FMLA itself was narrowly drawn to exclude senior, elected, and policy making officials and their staffs, applied only to unpaid leave, limited damages to actual monetary losses and capped the accrual of backpay. *Id.* at 739-40.

Juxtaposing the well documented record of a pattern of widespread constitutional violations against a carefully crafted remedy, the Court had little difficulty in concluding that the FMLA was "congruent and proportional to the targeted violation." *Id.* at 737 (citing *Garrett*, 531 U.S. at 374).

A similar analysis yielded a similar result in *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane*, the Court upheld Title II of the Americans with Disabilities Act ("ADA"), holding that the ADA's abrogation of state sovereign immunity was a valid exercise of the enforcement power to the extent that it remedied state discrimination against disabled individuals in the "fundamental right" of access to courthouses. *Id.* at 533-34.

In evaluating the pervasiveness of the unconstitutional harm that Title II was "designed to address," the Court examined the record which showed that Congress had acted against "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. In addition, the Court viewed an extensive record of state laws denying disabled individuals the right to vote, marry, or serve on a jury. *Id.* It cited the Court's own experience with unconstitutional treatment of disabled persons by state agents, including unjustified commitment, abuse and neglect in state mental health facilities, and irrational discrimination in zoning decisions. *Id.* It also highlighted the fact that "decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting." Given the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," it had little difficulty concluding that a problem of constitutional deprivation had been established. *Id.* at 528.

The Court then turned to the pivotal question of whether the remedy fit the ailment, or congruence and proportionality. Once again, it was critical that Title II only required "'reasonable modifications' that would not fundamentally alter the nature of the service provided." *Id.* at 532. States were not required to "employ any and all means to make judicial services accessible to persons with disabilities." *Id.* at 531-32. Nor were they required to "compromise their essential eligibility criteria for public programs." *Id.* at 532. Moreover, Title II permitted utilization of lesser measures, such as the relocation of services and the provision of aides, with expensive structural enhancements being a last resort. *Id.* In light of this, Title II met the *Boerne* test: "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 531.

Thus, the "congruence and proportionality" standard has been the explicit measure for determining whether a challenged statute is a valid exercise of Congressional enforcement power under the Fourteenth Amendment since *Boerne*. This standard has been applied in a variety of cases with differing outcomes, but always in a careful and rigorous fashion. There has never been a suggestion that the congruence and proportionality test can be satisfied by deferential consideration of whether Congress could have had a rational basis for its action.

III. THE UNEQUAL TREATMENT OF EQUAL STATES REQUIRES PARTICULARLY EXACTING REVIEW IN THIS CASE.

The *Boerne* "congruence and proportionality" standard turns on two key issues: first, the demonstrated existence of a pattern of constitutional deprivation. The second is how closely tailored the congressional remedy is to rectifying the identified problem. Both points are analyzed extensively and ably in other briefs. Rather than repeat those arguments here, JEP will focus on one aspect of the VRA's "congruence and proportionality" as it concerns the evils of minority vote suppression.

As this Court has acknowledged, Section 5 of the VRA represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992). In the words of Justice Black, "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Opinion of Black, J.). Section 5 exacts significant federalism costs by targeting a function of governance that the Constitution has explicitly preserved for the states: the regulation of state and local elections. That the statute requires advance blessing by the federal government of even the most minor of changes to state voting laws and procedures – for even the smallest of subdivisions of covered jurisdictions – only amplifies the intrusiveness of the statute.

The concern for the toll on federalism has been a recurring motif in VRA jurisprudence. For instance, in *Lopez v. Monterey County*, 525 U.S. 266, 282, (1999) the Court acknowledged that "the [VRA], which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.'" Similarly, in *City of Rome v. U. S.*, 446 U.S. 156, 179 (1980), the Court acknowledged that "principles of federalism" are "necessarily overridden" by the enforcement power.

Federalism is a significant consideration in any congruence and proportionality analysis. But the concerns in this area are further compounded by the inequitable application of the law. The singling out of ostensibly equal states[9] for separate treatment has long been a particularly troubling aspect of the Voting Rights Act. It is axiomatic that the States of the union are equal, such equality being inherent in the very ideal of a union:

> 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress . . . .

Coyle v. Smith, 221 U.S. 559, 567 (1911). *See also Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. 678, 689 (1883) ("Equality of constitutional right and power is the condition of all the states of the Union, old and new.") *C.f. U.S. v. Alaska*, 521 U.S. 1, 5 (1997) (observing that "new States are admitted to the Union on an 'equal footing' with the original 13 Colonies.") (internal citations omitted). The equality of states is such a fundamental bedrock principle that when circumstances necessitated deviation from the ideal, such as proportional representation in the House of Representatives, or a federal income tax, specific constitutional provisions were introduced to handle the exigency.

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[9] *See South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966) (referring to the "doctrine of the equality of States[.]")

Against these norms, § 5 marks a virtually unprecedented departure from the fundamental constitutional compact. Apart from the VRA, there is a complete absence of post-Reconstruction legislation in which particular states or groups of states have been singled out for punitive measures. No party appears to have briefed authority that sets a precedent for such treatment. The consequent inference is that the principle of equal treatment and dignity is so sacrosanct to the nation's constitutional psyche that any conceived deviation has been unthinkable.

The VRA is the sole exception from this ideal, and this unequal treatment has raised concerns from the very outset. In the Act's very first constitutional challenge, the Court acknowledged that the preclearance requirements constituted an "uncommon exercise of congressional power," but accepted it as a temporary expedient in light of "exceptional conditions", which justified "legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). In other words, *Katzenbach* was prepared to countenance – for five years – what was even then an extreme remedy only to tackle a virtually intractable problem which had defied lesser measures.

Notwithstanding these caveats, the treatment of the covered states still provoked concern, with some members of the Court sounding the alarm at the very outset. Justice Black felt compelled to partially dissent in *Katzenbach* on this very point:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

South Carolina v. Katzenbach, 383 U.S. 301, 358-60 (1966) (Black, J., dissenting).[10] Echoes of his

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[10] Justice Black later maintained that his fears in *Katzenbach* had been realized. *See Perkins v. Matthews*, 400 U.S. 379, 401 (1971) (Black, J., dissenting) (arguing that in holding that town could not change polling places without federal approval, "[t]he fears which precipitated my dissent in *Katzenbach* have been fully realized"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 595 (1969) (Black, J., dissenting) (arguing about Section 5 generally, "[T]his is reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did."); *Gaston County v. United States*, 395 U.S. 285, 297 (1969) (Black, J., dissenting) (dissenting for "substantially the same reasons he stated" in *Katzenbach*).

"conquered provinces" warning have resonated through the years in subsequent dissents by other members of this Court. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 472-80 (1987) (Powell, J., dissenting); *City of Rome v. United States*, 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 140 (1978) (Stevens, J., dissenting).

Of course, there is no absolute prohibition on the separate treatment of equal states. Indeed, this Court has acknowledged that distinctions are sometimes justifiable and do not prohibit "remedies for local evils which have subsequently appeared." *Northwest Austin* at 203 (quoting *Katzenbach* 383 U.S. at 328-29). However, as demonstrated in petitioner's brief, the evils the Act is aimed to address are no longer particularly local. In the absence of a close nexus between the designated problem and the solution, the specter of preclearance measures as a quasi-punitive measure – the "conquered provinces" problem – must inevitably haunt this analysis.

The sins of history are no basis for modern policy. This has been dubbed the "Bull Connor is Dead" problem: "Today, Congress would be hard-pressed to find widespread evidence of [1965-like] discrimination."[11] *See Northwest Austin*, 557 U.S. at

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[11] Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 179 (2005) (noting that "[m]ost of the original racist elected officials are out of

(Continued ...)

226 ("The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.") (Thomas, J., concurring in part in the judgment and dissenting in part). The 2006 renewal of the VRA "imposes current burdens and must be justified by current needs." *Id.*, 557 U.S. at 203 (majority op.).

More fundamentally however, it is hard to envision how a *sui generis* treatment of once-disfavored but currently compliant states demonstrates the necessary "congruence and proportionality" that the respondents need to establish. The record – to the extent there was a record at all when Congress reenacted the statute in 2006 – no longer supports disparate treatment of equal sovereigns. This Court signaled as much only two years ago in *Northwest Austin,* when it observed that "[t]he [VRA] differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.' ... But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203.

CONCLUSION

No one doubts that Congress has the power to protect the voting rights of any racial group. The question is whether the extraordinary remedy

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power," and the remainder have been effectively stymied in any efforts to obstruct minority voting rights).

Congress has enacted here continues to be appropriate legislation to enforce the Fifteenth Amendment.

Such "an extraordinary departure from the traditional course of relations between the States and the Federal Government" can only be constitutionally justified as a last resort. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992). This Court has previously countenanced Section 5 only as an "uncommon exercise of congressional power" rendered "appropriate" only because of the "exceptional conditions" and "unique circumstances" that had proved stubbornly resistant to lesser measures at the time. *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966)

Whatever else it may be, a process whose applicability hinges on electoral practices occurring more than half a century ago and statistics from the 1964, 1968 and 1972 presidential elections is not justified as a response to exigent circumstances. No longer a temporary measure, this law has now been extended till 2031. That congressional response is neither congruent not proportional to "current needs." *Northwest Austin*, 557 U.S. at 203.

Section 5 was enacted for a five year term in 1965 to address the conditions that prevailed at the time. It has ably served that purpose. It was congruent and proportional at the time; it is no longer so. Its work done, the time has come to praise its considerable accomplishments, and declare that its extraordinary requirements are no longer appropriate means to enforce the Fifteenth Amendment.

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No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

BRIEF OF *AMICI CURIAE* JURISDICTIONS THAT HAVE BAILED OUT IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

- I. The History of Bailouts under the Voting Rights Act Demonstrates the Careful Tailoring of the Act 5
  - A. Throughout the History of the Voting Rights Act, Bailout Has Helped Ensure That the Coverage Formula Reflected Changing Needs 6
  - B. Petitioner's Attempts to Refute the "Nexus" Between Bailout and the Coverage Formula Are Unavailing 17
- II. The Specific Bailout Experiences of *Amici* Confirm the Viability of the Bailout Mechanism.. 21
  - A. The Bailout Process Is Both Administratively Feasible and Readily Achievable 21
  - B. The Bailout Process Is Affordable and Cost-Effective 25
- III. *Amici* Supporting Petitioner Have Made Incorrect Factual Assertions Regarding the Bailout Provisions 27

CONCLUSION... 33

TABLE OF CONTENTS – Continued

Page

APPENDIX A Jurisdictions Bailed Out of Section 5 Coverage After August 5, 1984........App. 1

TABLE OF AUTHORITIES

Page

CASES:

Adarand Constructors, Inc. v. Staples, 228 F.3d 1147 (10th Cir. 2000) 19

Apache Cnty. v. United States, 256 F. Supp. 903 (D.D.C. 1966) 7

City of Boerne v. Flores, 521 U.S. 507 (1997) 3

City of Rome v. United States, 446 U.S. 156 (1980) 9

Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) 19

Gaston Cnty. v. United States, 288 F. Supp. 678 (D.D.C. 1968) 7

Gonzales v. Raich, 545 U.S. 1 (2005) 19

New York v. United States, 65 F.R.D. 10 (D.D.C. 1974), *aff'd on other grounds sub. nom. NAACP v. New York*, 413 U.S. 345 (1973) 8

Northwest Austin Mun. Util. Dist. No. One v. Holder, 573 F. Supp. 2d 221 (D.D.C. 2008) 13

Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) .... *passim*

Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 14

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Page

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Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974) 8

United States v. Stevens, 130 S. Ct. 1577 (2010).......21

CONSENT DECREES, COURT FILINGS AND ONGOING LITIGATION:

Consent Judgment and Decree (proposed), *Browns Valley Irrigation District v. Holder*, No. 12-01597 (D.D.C. Jan. 2, 2013)........................14

New Hampshire v. Holder, No. 12-01854 (D.D.C. filed Nov. 15, 2012) 15

Consent Judgment and Decree (proposed), *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Dec. 21, 2012)..15, 31

Status Rpt., *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Jan. 22, 2013)..................................15

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Page

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STATUTES:

Act of Aug. 6, 1975, Pub. L. No. 94-73, Tit. I, 89 Stat. 400 ....7, 10

§ 201, 89 Stat. 400..9

§ 203, 89 Stat. 401-402 8

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 9

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 2

§ 3(c), 79 Stat. 437..6

§ 4(a), 79 Stat. 438 ....2, 6, 32

§ 4(b), 79 Stat. 438 ....2, 19

§ 5, 79 Stat. 439.......................................*passim*

Page

Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* 1, 2

42 U.S.C. § 1973b(a) 3

42 U.S.C. § 1973b(a)(1) 10, 20

42 U.S.C. § 1973b(a)(1)(A) 20

42 U.S.C. § 1973b(a)(1)(F) 11

42 U.S.C. § 1973b(a)(1)(F)(iii) 20

42 U.S.C. § 1973b(a)(2) 20

42 U.S.C. § 1973b(a)(4) 15, 24

42 U.S.C. § 1973b(a)(9) 22, 32

42 U.S.C. § 1973b(b) 3

42 U.S.C. § 1973c 2

Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314 .... 7, 15

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 .... 9, 10, 12, 13, 14

§ 2, 96 Stat. 131-32 10

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36 Fed. Reg. 5,809 (Mar. 27, 1971) 7

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Page

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Page

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J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power (Ana Henderson ed., 2007) 24

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Page

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STATEMENT OF INTEREST[1]

Amici curiae are several jurisdictions[2] (hereafter "*Amici* Bailed Out Jurisdictions") that over the last decade have bailed out from coverage under Section 5 of the Voting Rights Act of 1965 ("Act"), 42 U.S.C. §§ 1973, *et seq*. *Amici* Bailed Out Jurisdictions have a special interest in the bailout issues raised in this case and a unique perspective on these issues. Each jurisdiction has gone through the bailout process, each has been found eligible to bail out by the United States Department of Justice and the D.C. courts, and each has secured a bailout judgment.

Amici Bailed Out Jurisdictions believe that their views about the bailout process and how it actually works will inform the Court in a way none of the existing parties can do. Indeed, except for Respondents Holder, *et al.*, and *amicus curiae* Merced County, California, none of the other parties or *amici* has ever been a party to a bailout lawsuit or has sought a bailout since the most recent amendments to the bailout process in 1982. *Amici* speak from the standpoint of jurisdictions that, for roughly 45 years, have made preclearance submissions under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and have successfully availed themselves of the bailout option. *Amici* therefore can offer a unique perspective on the operation of the bailout provisions and the actual procedures and costs associated with the process.

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[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief. Correspondence from counsel of record for Petitioner and Respondents consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] *Amici curiae* herein are the City of Kings Mountain, North Carolina; Washington County, Virginia; and Larnie M. Flannagan, General Registrar of Voters, Essex County, Virginia.

◆

SUMMARY OF ARGUMENT

Congress enacted the Voting Rights Act of 1965 ("1965 Act"), Pub. L. No. 89-110, 79 Stat. 437, codified as amended at 42 U.S.C. §§ 1973, *et seq.*, to remedy "the blight of racial discrimination in voting" that had taken root in the country's electoral process. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). To this end, Congress crafted provisions requiring certain jurisdictions to "preclear" changes to their voting practices and procedures, 1965 Act § 5, 79 Stat. 439, and then "reverse-engineered" the coverage formula so that the preclearance requirements would cover those jurisdictions where there was evidence of voting discrimination. *Id.* § 4(b), 79 Stat. 438. Congress understood, however, that application of the objective criteria in the coverage formula had the potential to capture areas that had not engaged in discriminatory voting procedures. The bailout mechanism was designed to address this possible overbreadth by allowing jurisdictions to terminate their coverage by demonstrating that they had not used a test or device for a discriminatory purpose. *Id.*, § 4(a), 79 Stat. 438.

Although the bailout provisions have undergone revision and significant liberalization in subsequent amendments to the Act, their fundamental objective remains the same: to ensure that the Act is tailored to impose current burdens only where there are current needs. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (*NAMUDNO*). The bailout mechanism adds a dynamic element to the Act's coverage, allowing the geographic scope of Section 5 to be modified on an ongoing basis, according to the real-time submissions of covered jurisdictions. Bailout is thus an integral part of the coverage formula and, as this Court has recognized, provides further assurance that "Congress' means are proportionate to [its] ends." *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Petitioner denies that there is a "nexus" between bailout under the current Act and the coverage formula, but this claim is contradicted by the structure and history of the bailout provisions. Pet. Br. at 57. The current requirements of the bailout provisions reflect the criteria of the coverage formula: both inquire as to the use of discriminatory "tests or devices," and look to voter registration rates and voter turnout. 42 U.S.C. § 1973b(a), (b). *See* Section I.B. *infra*. Furthermore, throughout the history of the Act, jurisdictions in different states of varying sizes, political compositions and demographics have successfully bailed out of Section 5, belying Petitioner's contention that bailout serves to tailor the scope of the coverage formula "only at the margin." Pet. Br. at 54-55. *See* Section I.A. *infra*.

Petitioners also claim that the bailout option is in fact illusory, and too burdensome and expensive for most jurisdictions to achieve. Pet. Br. at 54. But this is decidedly not the experience of *amici*.

Amici Bailed Out Jurisdictions found the bailout process both administratively feasible and cost-effective. *Amici* simply had to gather the necessary information and data supporting bailout from records we maintained in the ordinary course of business, submit these materials to the U.S. Department of Justice, and publicize the bailout in our community media and post offices. After we were notified by the Department of Justice that our jurisdiction had met the bailout requirements, our legal counsel filed suit and the necessary bailout papers in court. As for expense, our experience is that the total cost of obtaining a bailout was approximately $5,000, which includes staff time gathering the relevant data and the filing of bailout documents in court. *See* Section II *infra*.

Further, contrary to Petitioner's suggestion, bailout is also achievable even if a jurisdiction discovers during the bailout process that one or more of its political subunits is not in full compliance with the Act. In the course of the bailout process, numerous jurisdictions have discovered that some of their political subunits had inadvertently failed to timely submit minor voting changes for Section 5 review, but were able to resolve this issue with a prompt preclearance submission of the changes to the Department of Justice. *See* Section III *infra*.

In any event, even if petitioners had raised valid objections to the bailout mechanism, any argument that specific criteria are unduly burdensome should be brought in an as-applied challenge, where specific facts can be developed, rather than a facial challenge to the statute as a whole.

For all these reasons, this Court should again uphold Section 5 and the Act's coverage formula.

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ARGUMENT

I. THE HISTORY OF BAILOUTS UNDER THE VOTING RIGHTS ACT DEMONSTRATES THE CAREFUL TAILORING OF THE ACT.

When Congress first enacted the 1965 Act, it understood that the coverage formula might capture areas that had not engaged in racially discriminatory voting procedures. *See* H.R. Rep. No. 89-439, at 15 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445. The ability of jurisdictions to bail out was meant to address that potential overbreadth by affording any jurisdiction "an opportunity to exempt itself" from the coverage formula. *Id.*[3] The bailout provision has thus

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[3] The potential for under-inclusivity of the coverage formula was tackled by the so-called "pocket trigger," which allows for additional jurisdictions to be subjected to the preclearance

(Continued on following page)

always been central to the Act's tailoring and Petitioner has acknowledged this. Pet. Br. at 3.

A. Throughout the History of the Voting Rights Act, Bailout Has Helped Ensure That the Coverage Formula Reflected Changing Needs.

Underscoring the connection between bailout and the Act's tailoring, bailout was originally conceived as the means by which the preclearance requirements would expire for covered jurisdictions.

The bailout provision of the Voting Rights Act of 1965 provided that an exemption would be granted upon a decision by a three-judge panel of the U.S. District Court for the District of Columbia that the jurisdiction had not used a voting test or device for the purpose or with the effect of discriminating on the basis of race for the preceding five years. 1965 Act § 4(a), 79 Stat. 438. There was no automatic expiration for Section 5 in the original enactment. Because the Act suspended the use of *any* voting test or device in the covered jurisdictions – regardless of racially discriminatory intent or effect – once five years passed after enactment, the covered jurisdictions would

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requirements upon a finding of Fifteenth Amendment violations by a federal court. 1965 Act, § 3(c), 79 Stat. 437; *see also* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L. J. 1992, 2006-09 (2010).

automatically meet the bailout requirements. Thus, when Congress enacted the Act in 1965, it assumed that jurisdictions would be able to bail out at the conclusion of five years. The required five-year non-discrimination showing was subsequently extended to 10 years in the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, and then to 17 years in the 1975 Amendments, Act of Aug. 6, 1975 (1975 Amendments), Pub. L. No. 94-73, Tit. I, 89 Stat. 400.

In the first two years of the Act's existence, three counties in Arizona, one county in North Carolina and one in Idaho, and the State of Alaska all bailed out. *See Apache Cnty. v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966) (Arizona); *Gaston Cnty. v. United States*, 288 F. Supp. 678, 694-95 (D.D.C. 1968) (referencing the bailouts of Wake County, North Carolina; Elmore County, Idaho; and the State of Alaska). Each was able to show that the test or device that had led to coverage under Section 5 in 1965 either was no longer in use or had been applied without a racially discriminatory purpose and effect.

The changes to the coverage formula in 1970 brought the three counties in Arizona, the one in Idaho, and four jurisdictions in Alaska back under the Act's preclearance requirements, and newly covered an additional five counties in Arizona, two counties in California, three counties in New York and one in Wyoming, and towns in Connecticut, Massachusetts, Maine, and New Hampshire. *See* 36 Fed. Reg. 5,809 (Mar. 27, 1971); 39 Fed. Reg. 16,912 (May 10, 1974);

see also Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. L. J. 379, 395-96 (1985). Shortly thereafter, Alaska and New York bailed out the jurisdictions within their boundaries. *New York v. United States*, 65 F.R.D. 10, 11 (D.D.C. 1974) (discussing Bronx, Kings and New York Counties), *aff'd on other grounds sub. nom. NAACP v. New York*, 413 U.S. 345 (1973). New York's success, however, was short-lived. After a federal court in New York found that the once-covered counties had discriminated against Puerto Rican voters, *see Torres v. Sachs*, 381 F. Supp. 309, 312-13 (S.D.N.Y. 1974), the counties were recovered and have remained subject to the preclearance requirements ever since.

In 1975, the coverage formula under Section 4 of the Act was revised to include and protect language minority groups. 1975 Amendments, § 203, 89 Stat. 401-402. As a result, counties in California, Colorado, Florida, Arizona, New Mexico, North Carolina, Oklahoma, and South Dakota, townships in Michigan, and the entire states of Texas, Arizona, and Alaska became subject to Section 5's requirements. *See* 40 Fed. Reg. 43,746 (Sept. 23, 1975) (Arizona was covered statewide because of the prevalence of Spanish language minorities and at the county level to protect American Indian language minorities); 41 Fed. Reg. 34,329 (Aug. 13, 1976); 40 Fed. Reg. 49,422 (Oct. 22, 1975); 41 Fed. Reg. 783 (Jan. 5, 1976). For those jurisdictions, bailout required a showing that for the last 10 years, they had not conducted English-only elections for the purpose or with the effect of discriminating against voters based on race, color or membership in a language minority group. 1975 Amendments, § 201, 89 Stat. 400. The newly covered counties in New Mexico and Oklahoma quickly bailed out, since they were able to show that their language minority populations were also fluent in English. *City of Rome v. United States*, 446 U.S. 156, 198 n.8 (1980) (referencing bailout actions brought by New Mexico and Oklahoma); *see also* Hancock & Tredway, *supra*, at 403. Successful bailouts in the late 1970s and early 1980s also retailored the amended coverage formula by exempting the covered jurisdictions in Maine, Wyoming, Massachusetts, and Connecticut from the preclearance requirements. Hancock & Tredway, *supra*, at 403. Each jurisdiction proved that for 17 years before the bailout lawsuit, it had not employed a voting test or device for the purpose or with the effect of discriminating on the basis of race.

The 1982 Amendments to the Voting Rights Act strengthened the relationship between the bailout provisions and the coverage formula's tailoring. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. The 2006 reauthorization of the Act retained the bailout provisions as amended in 1982 and they remain in place today. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

Since 1982, bailout has not been tied to the duration of the preclearance provisions. Moreover, the bailout option is no longer limited to only those jurisdictions that have never engaged in racially discriminatory voting practices in the first place. Instead, the 1982 Amendments established bailout as the means by which once-bad actors could show that they had taken action to eliminate discriminatory voting practices and procedures, and had taken affirmative steps to afford equal opportunity for all voters in their jurisdiction. Thus, the bailout provisions specifically address the discriminatory conditions that had led to coverage in the first place.

The 1982 Amendments also shortened to 10 years (from 17 years in the 1975 Amendments) the time frame for states and political subdivisions to show that they no longer engaged in discriminatory voting practices and afforded equal opportunities for all persons to register and to vote. 1982 Amendments, § 2, 96 Stat. 131-32. This reduction dramatically expanded the number of jurisdictions potentially eligible for bailout.[4] The revised bailout standard provided additional incentives for jurisdictions to comply with the Act and to take "positive steps to increase the opportunity for full minority participation in the political process." S. Rep. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.[5] It also expanded the jurisdictions that could seek bailout by allowing counties or cities with voter registration responsibilities within a covered state to seek bailout on their own. *Id.*

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[4] Showing non-discrimination in voting required that for 10 years prior to filing a bailout lawsuit, the jurisdiction and all political subunits of government within its boundaries had not used a test or device for the purpose or with the effect of denying or abridging the right to vote on account of race, color, or membership in a minority language group; had not been subject to a final judgment or entered into a settlement that resulted in the jurisdiction abandoning the use of a voting practice challenged on grounds of racial discrimination; and had not received an objection to or denial of preclearance for a submitted voting change. *See* 42 U.S.C. § 1973b(a)(1).

When the Act was amended in 1982 to permit local governments to bail out, the Congress rightly believed that "[a] substantial number of counties may be eligible to bail out when the new procedure goes into effect." *Id.* at 60, 1982 U.S.C.C.A.N. at 238. Indeed, one voting rights expert "presented a chart compiled by the Joint Center for Political Studies . . . show[ing] a reasonable projection of 25 percent of the counties in the major covered states being eligible to file for bailout on the basis of their compliance with the objective criteria in the compromise bill." *Id.* And the Assistant Attorney General for the Civil Rights Division at the time, William Bradford Reynolds, testified to the same effect; his projected number of jurisdictions eligible to bail out in 1982 was "virtually identical to those in the Joint Center's estimate." *Id.*

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[5] Specifically, jurisdictions seeking bailout must show that they have eliminated voting procedures and methods of election that "inhibit or dilute equal access to the electoral process"; have "engaged in constructive efforts to eliminate intimidation and harassment" of voters; and have engaged in other efforts such as expanding voter registration opportunities and appointing minority election officials. 42 U.S.C. § 1973b(a)(1)(F).

Despite these projections, not a single jurisdiction sought to bail out in the 13 years after the 1982 Amendments took effect on August 5, 1984. From *Amici* Bailed Out Jurisdictions' own experiences, the explanation for this is two-fold. First, most covered jurisdictions were unaware of bailout and many remain so. Second, those few jurisdictions that were aware of the bailout option perceived it as too costly and too cumbersome (neither of which is true, as we explain below).

In 1997, the City of Fairfax, Virginia, became the first covered jurisdiction to bail out under the criteria set forth in the 1982 Amendments. Between 1997 and 2009, another 69 jurisdictions, all in Virginia, likewise bailed out.[6]

In 2009, this Court decided *NAMUDNO*, interpreting the Act's bailout provisions to permit any and all political subdivisions subject to preclearance to seek a bailout. 557 U.S. at 211. Prior to 2009, it was believed that only those covered jurisdictions that registered voters (i.e., counties and cities[7]) could seek a bailout. *See, e.g.*, *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 231-35 (D.D.C. 2008); Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provision*, 62 Wash. U. L. Q. 1, 40 (1984).

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[6] The 69 jurisdictions (not including NAMUDNO) that bailed out between 1984 and 2009 under the 1982 bailout provisions are listed on the website of the Respondent. *See* U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Jan. 31, 2013). While the decision in *NAMUDNO* referred to just 17 bailed out jurisdictions between 1982 and 2009, *see* 557 U.S. at 211, that figure represented only the cities and counties that registered voters which had bailed out under the 1982 criteria, and failed to include all the political subdivisions within those 17 counties and cities that had bailed out with them. *Id.*

Since this Court's decision in *NAMUDNO*, the number and rate of jurisdictions seeking and obtaining a bailout has increased dramatically in several respects. *See* Appendix A.[8] First, since 2009, including NAMUDNO, almost twice as many political subdivisions have bailed out (127) than in the entire period from 1982 to 2009 (69). *See id.*; *see also* http://www.justice.gov/crt/about/vot/misc/sec_4.php. Second, the pace of bailouts has increased substantially since the 2009 *NAMUDNO* decision, as more political subunits are now bailout eligible and there is greater public knowledge of bailout availability due to the decision. Indeed, in addition to those jurisdictions that have bailed out since 2009 listed in Appendix A, more than a dozen jurisdictions are presently pursuing a bailout in the U.S. District Court for the District of Columbia or in a pre-filing process with the Department of

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[7] Virginia is the only one of the 16 covered states in which cities register voters. In the remaining states, registration is conducted at the county level.

[8] For the Court's convenience, *amici* have prepared a chart listing all of the bailouts since the 1982 Amendments to the Voting Rights Act went into effect.

Justice.[9] Third, the geographic range of jurisdictions seeking or obtaining a bailout has expanded from just one state before 2009 (Virginia) to jurisdictions in six states since 2009 (Alabama, California, Georgia, North Carolina, Texas, and Virginia). *See* Appendix A. Since the amended bailout standard took effect in 1984, not a single eligible jurisdiction seeking bailout has been rejected. *See, e.g.*, *Shelby Cnty. v. Holder*, 679 F.3d 848, 882 (D.C. Cir. 2012).[10]

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[9] The following California jurisdictions have bailout lawsuits pending in the U.S. District Court for the District of Columbia: Browns Valley Irrigation District and City of Wheatland. *See* Consent Judgment and Decree (proposed), *Browns Valley Irrigation District v. Holder*, No. 12-01597 (D.D.C. Jan. 2, 2013), and *City of Wheatland v. Holder*, No. 13-54 (D.D.C. filed Jan. 14, 2013). *Amici* herein are aware of the following additional jurisdictions currently seeking bailout and in negotiations with the Department of Justice: Yuba County (CA) Water Agency; Linda County (CA) Water District; Olivehurst (CA) Public Utility District; North Yuba County (CA) Water Agency; Isle of Wight County, VA; Hanover County, VA; City of Falls Church, VA.

[10] Shelby County also makes the argument that even if a covered jurisdiction can satisfy the bailout criteria, "it remains subject to Section 5's 'clawback' provision, which essentially requires a jurisdiction to continue to satisfy the statutory criteria for bailout for an additional ten-year period before becoming fully non-covered." Pet. Br. at 56 (internal citations omitted). It is worth noting that there has not been a single instance of the "clawback" provision being invoked since the 1982 Amendments went into effect. *See Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, at 2864, 109th Cong. (Mar. 8, 2006) (Hebert).

Equally impressive is the fact that, since this Court's 2009 decision in *NAMUDNO*, jurisdictions of all sizes and varying racial compositions have bailed out. For example, for the first time since the 1982 Amendments went into effect, a State has now sought a bailout on behalf of its covered towns and townships. On November 15, 2012, the State of New Hampshire, sought a bailout for its covered political subunits. *See New Hampshire v. Holder*, No. 12-01854 (D.D.C. filed Nov. 15, 2012) (three-judge court).[11] If the State succeeds, less than twenty percent of jurisdictions covered by the 1970 Amendments to the Act will remain subject to the preclearance requirement. Of the remaining covered jurisdictions, three bailed out but were recovered because of a subsequent finding of racial discrimination in a related case, and all but four have received objections from the Attorney General to proposed voting changes submitted for preclearance. J. Gerald Hebert & Renata E. B. Strause, *The Future of the Voting Rights Act*, 64 Rutgers L. Rev. 953, 969 (2012).

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[11] New Hampshire filed its bailout lawsuit in the D.C. district court on November 15, 2012. On December 21, 2012, the State and the United States Attorney General filed a joint motion to approve a consent judgment and decree granting New Hampshire and its covered towns with a bailout. Consent Judgment and Decree (proposed), *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Dec. 21, 2012). The parties asked the three-judge court to wait thirty days to enter the consent judgment and decree, during which time New Hampshire and its covered towns could publicize the bailout settlement, as required by 42 U.S.C. § 1973b(a)(4). New Hampshire and its covered towns and townships publicized the settlement and filed a report with the Court on January 22, 2013, advising the Court that it had publicized the bailout settlement as required by the Act. Status Rpt., *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Jan. 22, 2013).

In 2012, Merced County, California, successfully obtained a bailout for itself and 84 political subunits in the County, making it the jurisdiction with the most political subdivisions to bail out in one action.[12] Thus, in that one bailout action, Merced County achieved a bailout for itself and more political subunits (84) than had bailed out in the 27 years prior to this Court's 2009 decision in *NAMUDNO*.

Jurisdictions with sizeable minority populations also have bailed out since 2009, including at least two majority-minority political subdivisions: the City of Manassas Park, Virginia, which bailed out in 2011; and Prince William County, Virginia, which bailed out in 2012.[13] Fourth, a jurisdiction with one of the

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[12] Merced County has filed a brief *amicus curiae* in this case explaining its unique experience with the bailout provisions. *See* Brief of Merced County, California As *Amicus Curiae* In Support of No Party at 36-37 (Jan. 2, 2013).

[13] According to the consent decree granting Manassas Park a bailout, the City's population as reported in the 2010 census was 32.5% Hispanic, 13.5% black and 9.9% Asian. *See* Consent Judgment and Decree, *City of Manassas Park v. Holder*, C.A. No. 11-749 (D.D.C. Aug. 3, 2011), *available at* http://www.justice.gov/crt/about/vot/misc/manassas_pk_cd.pdf. The consent decree granting Prince William County's bailout describes the County's population, as reported in the 2010 census, as 20.3% Hispanic, 20.6% black, 8.6% Asian, and 0.5% Native American. *See* Consent Judgment and Decree, *Prince William Cnty. v.*

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largest populations of any of the counties subject to the Act's preclearance requirements of (Prince William County) has now bailed out. According to its bailout agreement, the County's population exceeded 400,000 persons. *See* Consent Judgment and Decree, *Prince William Cnty. v. Holder*, No. 12-14 (D.D.C. Apr. 10, 2012), *available at* http://www.justice.gov/crt/about/vot/misc/prince_wm_cd.pdf.

As the foregoing history attests, numerous jurisdictions in multiple states have availed themselves of the bailout option, and the process has been achievable for jurisdictions with varying sizes, political subdivisions and racial compositions. Bailout has thus not only benefitted the individual jurisdictions that can show a record of non-discrimination, but it has also provided an effective mechanism for tailoring the statute to impose current burdens only where there are current needs.

B. Petitioner's Attempts to Refute the "Nexus" Between Bailout and the Coverage Formula Are Unavailing.

Petitioner first argues that the bailouts that have occurred since *NAMUDNO* "cannot support the validity of Congress's judgment" in the 2006 reauthorization because they were not part of the legislative record. Petition for Writ of Certiorari at 34-45 & n.5;

Holder, No. 12-14 (D.D.C. Apr. 10, 2012), *available at* http://www.justice.gov/crt/about/vot/misc/prince_wm_cd.pdf.

see also Pet. Br. at 53 ("The statute's constitutionality must be measured against the legislative record alone."). Shelby County misses two key points. First and foremost, all of the bailouts that have occurred subsequent to 2006 – both before and after the *NAMUDNO* decision – are the predictable and intended result of the 1982 bailout provisions retained by the 2006 Reauthorization. This evidence is clearly relevant to this Court's review of the coverage formula. Congress has always intended for the bailout provision to be linked to the coverage formula. Because the bailout mechanism is the means by which the coverage formula is tailored and updated on an ongoing basis, its operation is critical to an evaluation of Congress's tailoring of the Act. Second, in avoiding the constitutional question in *NAMUDNO*, the Court interpreted the Act to allow smaller subunits to bail out. Although Congress did not consider the bailout of those particular types of jurisdictions as part of the tailoring mechanism in 1965 or 1982, by making bailout available to smaller jurisdictions, the Court lessened the *current burdens* imposed by the Act. In making a determination about Section 5's constitutionality, this Court should reject the arguments of those, like Petitioner, urging the Court to ignore the impact of its *NAMUDNO* decision expanding bailouts in assessing the constitutional validity of the Voting Rights Act.[14] Ultimately, the Court will

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[14] Since Congress factored the *prospective* availability of bailout into its decision to reauthorize the Act in 2006, it is

(Continued on following page)

have to evaluate whether its interpretation of the bailout provisions in *NAMUDNO* is working – which *amici* here contend it is – and should remain in place. Both the post-2006 and post-*NAMUDNO* bailouts, therefore, are relevant in making that assessment.

Petitioner also incorrectly casts the bailout process as unrelated to Congress's decision to subject the covered jurisdictions to Section 5 preclearance requirements in the first place. *See* Pet. Br. at 22. But the bailout criteria are directly tied to the coverage formula in fundamental ways. The original coverage formula focused on jurisdictions with discriminatory "tests or devices" as a prerequisite to registering to vote, along with depressed voter registration rates and voter turnout. *See* 1965 Act, § 4(b), 79 Stat. 438. The current bailout criteria specifically require a showing that there has been no test or device applied by the covered jurisdiction "for the purpose or with the effect of denying or abridging the right to vote on account of race or color[,]" and contain other

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misleading to characterize information about post-2006 bailouts as "post-enactment evidence" – but either way, the lower court was right to consider it. To determine the scope of Congress's authority under its Fourteenth Amendment enforcement powers, this Court has considered post-enactment evidence, as have multiple circuit courts. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 524-25 & nn.6-8, 11, 13-14 (2004); *cf. Gonzales v. Raich*, 545 U.S. 1, 19 n.28, 21 n.31 (2005). *See also Adarand Constructors, Inc. v. Staples*, 228 F.3d 1147, 1166 (10th Cir. 2000); *Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993).

provisions requiring the jurisdiction seeking bailout to show that it has "expanded opportunity for convenient registration and voting for every person of voting age" and to "present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation." 42 U.S.C. 42 U.S.C. §§ 1973b(a)(1)(A), (1)(F)(iii), (2). Thus, the key to obtaining a bailout is to present a ten-year record of non-discriminatory voting practices and procedures, based on an objective set of facts prescribed in the bailout statute. A covered jurisdiction that has a clean record of non-discriminatory voting procedures over a ten-year period will likely also be able to produce, as *amici* here have done, facts that show "expanded opportunity for registration and voting" and be quite likely bailout eligible. Thus, it is incorrect to say that the bailout provisions are unrelated to the coverage formula.

Finally, Petitioner claims that the bailout criteria are improper, subjective and onerous. As we note *infra*, that has not been the experience of jurisdictions like ours that have undergone the bailout process. Equally important, arguments about specific applications of the bailout criteria should be made in an as-applied challenge, not in the facial challenge that Petitioner has mounted here. Petitioner has not limited its constitutional attack to the factual circumstances in

Shelby County, but rather asks this Court to strike down Section 5 in all its applications.[15] This Court has made clear that "[t]o succeed in a typical facial attack, [a challenger] would have to establish 'that no set of circumstances exists under which [the challenged law] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal citations omitted). Petitioner's arguments regarding the difficulty of the bailout process or its burdens on the County are more properly the subject of an as-applied challenge rather than the facial one it brings here.

II. THE SPECIFIC BAILOUT EXPERIENCES OF *AMICI* CONFIRM THE VIABILITY OF THE BAILOUT MECHANISM.

A. The Bailout Process Is Both Administratively Feasible And Readily Achievable.

As we explain below, the process of obtaining a bailout is neither administratively difficult nor burdensome.

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[15] In view of recent decisions in the U.S. District Court for the District of Columbia finding that covered jurisdictions recently engaged in purposeful discrimination with respect to their statewide redistricting plans, *see e.g.*, *Texas v. United States*, No. 11-1303, ___ F. Supp. 2d ___, 2012 WL 3671924, at *76 ¶150 (D.D.C. Aug. 28, 2012) (three-judge court) (concluding that "the record demonstrates purposeful discrimination in the re-drawing of [Senate District] 10"), *appeal pending*, No. 12-496 (S. Ct.) (filed Oct. 19, 2012), it is difficult to see how Section 5 could be found unconstitutional in *all* of its applications.

Once *amici* herein decided to explore bailout under the Voting Rights Act, the first step was to assemble data and information from our offices to determine if we met the bailout criteria set forth in the Act. Because the Act permits the Attorney General to "consent[ ] to an entry of judgment . . . upon a showing of objective and compelling evidence," 42 U.S.C. § 1973b(a)(9), *amici* provided the Attorney General with the voting and election data we had assembled.

The data and information we gathered included documents that we maintain in the ordinary course of business or that was easily obtainable, such as the number of voters in each voting precinct, the number of voters who turned out at the polls in past elections, and the number of minority persons who have worked at the voter registration office, electoral board, or served as poll officials. We also gathered past election results, particularly for those elections that involved minority candidates. Finally, we assembled information on the various ways people in our communities may register to vote. Often, voter registration procedures and other information relating to voting and elections in *amici*'s possession are set forth on our governmental websites and thus instantly accessible.

We also regularly maintain in our files correspondence we have sent to and received from the United States Department of Justice regarding Section 5 preclearance. These preclearance letters were a useful starting point to showing we have complied in a timely fashion with the preclearance requirements under the Act.

The final data we collected and provided to the U.S. Attorney General to support our bailout request was information tending to show that all persons within our jurisdictions enjoy an equal opportunity to participate effectively in the political process. To do this, *amici* simply gathered publicly available census data available on the Internet; the method of election (e.g., at-large or from districts) for our jurisdiction and for all elective bodies within our borders; and the location and convenience of voter registration sites and polling place locations for our voters. Other relevant data we assembled that shed light on the level of minority participation included identification of minority candidates who ran in recent elections, election results showing how minority candidates fared in elections, and the number of minority group members who have worked either in the voter registration office or served as poll workers.

Attorneys in the U.S. Department of Justice then conducted an independent investigation of *amici*'s compliance with the bailout criteria. The Justice Department attorneys visited *amici*'s offices, reviewed our voting and elections records, and conducted interviews of local leaders within minority communities.

As required by the Act, *amici* informed the public of our intentions to seek bailout. The statute's formal notice requirement is minimal; jurisdictions must publicize their intentions to file a bailout lawsuit in the local media and post offices. *See* 42 U.S.C. § 1973b(a)(4).

After the community had been notified of the jurisdiction's intent to seek a bailout, we filed our bailout lawsuits in the U.S. District Court for the District of Columbia. Although prior agreement by the Justice Department to a jurisdiction's eligibility is *not* required before filing, it significantly reduces the cost of the bailout suit compared to more typically adversarial litigation. *See* J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 268 (Ana Henderson ed., 2007). The bailout process is thus transparent, workable and straightforward.

Petitioner here argues that the requirements of the bailout process are too difficult to meet. Our experience, and the experiences of other jurisdictions that have successfully bailed out, clearly shows the Petitioner's understanding of the bailout process is incorrect. *See, e.g.*, Brief of *Amici Curiae* Jurisdictions That Have Bailed Out Under the Voting Rights Act in Support of Appellees, *NAMUDNO v. Holder*, 557 U.S. 193 (2009), 2009 WL 815227.

Moreover, as noted *supra*, any challenge to specific criteria as too onerous would be properly brought on an as-applied challenge, where specific facts can be developed, rather than a facial challenge to the statute as a whole.

B. The Bailout Process is Affordable and Cost-Effective.

Further reducing the cost of bailout is the simple rule that when a county or a city bails out, all political subunits within the jurisdiction are bailed out at the same time. Thus, the one-time cost of a bailout for a county – estimated at less than $5,000 for most counties – and all its political subunits is affordable and cost-effective in the long run. The cost is even lower for smaller jurisdictions such as towns and municipal utility districts – often as low as $2,500. *See Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong. 106 (2005) (statement of J. Gerald Hebert, former Acting Chief, Civil Rights Division, U.S. Dep't of Justice) (explaining the typical cost of a bailout), *available at* https://bulk.resource.org/gpo.gov/hearings/109h/24034.pdf; *see also* Duncan Adams, *Localities Seek Voting Rights Act Bailout*, Roanoke Times, Jan. 16, 2011, http://www.roanoke.com/news/roanoke/wb/273946 (noting combined $5,000 cost of bailout for two jurisdictions).

Moreover, multiple counties have been permitted to bail out despite the existence of previously implemented, but unsubmitted voting changes, which ensures that the opportunity to bail out is still available to non-discriminatory subunits that have been somewhat less than exact in their prior administrative upkeep. *See, e.g.*, Brief of *Amici Curiae* Jurisdictions

That Have Bailed Out, *NAMUDNO*, 2009 WL 815227 at *17-*18; *see also* Consent Judgment and Decree ¶ 36, *Prince William Cnty. v. Holder*, No. 12-14 (D.D.C. Apr. 10, 2012) (indicating bailout despite late submission of changes for preclearance).

The experience of Prince William County, Virginia, shows that even relatively large counties can bail out successfully at low cost and without dedicating significant administrative resources to the process. To date, the County is the largest jurisdiction in population ever to bail out (over 400,000 persons). *See* Corey Dade, *Communities Find Relief From Voting Rights Act*, NPR News (Aug. 11, 2012), http://m.npr.org/news/front/158381541?singlePage=true ("Prince William County, Va. . . . [with] 419,000 population. . . . became the largest jurisdiction in the nation to bail out."); *see also* U.S. Census Bureau, 2010 Demographic Profile: Prince William County, Va., http://www.census.gov/popfinder/?fl=51153.

Despite its large size, Prince William County was not required to hire any additional staff to gather the necessary information and the County's Voter Registrar reported that, although the bailout "process took a little over a year" from start to finish, she "only worked intensely on the project for a two-week period." *See Virginia County Successfully 'Bails Out' of Voting Rights Act Preclearance Requirements*, RedistrictingOnline.org (Apr. 12, 2012), http://redistrictingonline.org/VApwcbailout041212.html (noting the statement of the County Registrar of Voters that no additional staff was hired to complete the bailout).

"Local officials may mistakenly believe that bailing out is not cost-effective or is administratively difficult." J. Gerald Hebert, *Bailout Under the Voting Rights Act*, *in* America Votes! 319, 326 (Benjamin E. Griffith ed., 2008). As for costs, when a local government jurisdiction seeking a bailout is willing to gather the data on its own rather than pay outside counsel to do so, "the legal fees for the entire process of obtaining a bailout are less than $5000." *Id.* Total costs for a bailout are even smaller if the local government seeking bailout does not contain any other political subunits. But even for large bailed out jurisdictions, like the State of New Hampshire, the financial cost of the bailout is both affordable and cost-effective, since it eliminates the administrative and legal costs of making preclearance submissions.

III. *AMICI* SUPPORTING PETITIONER HAVE MADE INCORRECT FACTUAL ASSERTIONS REGARDING THE BAILOUT PROVISIONS.

Petitioner and several of the *amici* supporting Petitioner have made arguments that are factually incorrect with respect to bailout.

For example, *Amicus Curiae* Cato Institute claims that the Respondent Attorney General has treated Shelby County differently than the State of New Hampshire. *See* Brief of *Amicus Curiae* Cato Institute In Support of Petitioner at 15-16 (Jan. 2, 2013). Cato asserts that Respondent has not permitted Shelby County to bail out because it failed to submit one voting change for preclearance, while permitting New Hampshire to bail out even though the State or its towns implemented a number of changes without preclearance. *Id.* This is incorrect in several respects.

First, Shelby County has never sought a bailout. The County appears ineligible, however, not because it failed to *submit* one voting change, but because a jurisdiction within its borders (the City of Calera) was the subject of a Section 5 *objection* within the last 10 years for a blatant violation of the Voting Rights Act. The City of Calera had submitted 177 annexations along with a proposed redistricting plan for preclearance. But these annexations had occurred in the 13 years prior to the submission of the redistricting plan, and the City had failed to submit any for preclearance. Furthermore, as the Attorney General found, the proposed redistricting plan "would eliminate the city's sole majority African-American district." *See* U.S. Dept. of Justice, Civil Rights Division, Letter to Dan Head, Esq. (Aug. 25, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_082508.php. Other findings made by the Attorney General in the Calera objection letter strongly suggest the presence of a racially discriminatory intent. *Id.* Attempts to equate the situations of Shelby County and the State of New Hampshire are thus simply not credible.

Second, Petitioner claims that "[b]ailout eligibility requires not only that a covered jurisdiction have a ten-year record of perfect compliance with statutory bailout criteria, but also that all of its subjurisdictions have the same spotless record." Pet. Br. at 54. This argument is apparently made to show that covered jurisdictions cannot obtain a bailout if just one of its political subdivisions fails to make a timely submission over a ten-year period. This is wrong. Jurisdictions seeking a bailout have, for decades, been permitted by the Attorney General to bail out even if they have implemented unprecleared voting changes, provided they make the requisite submission before bailout and provided the failure to make the timely preclearance submission was due to oversight or inadvertence. Examples of covered jurisdictions that have bailed out despite having a number of unprecleared changes (that were submitted and precleared before bailout) are listed in the *amicus curiae* brief filed in this case by Merced County, California. *See* Brief of Merced County at 36-37.

Similarly, the argument that a State or a County is unable to obtain a bailout because they lack the ability to bring non-compliant political subunits within their borders into compliance with Section 5 is also wrong and shows a fundamental misunderstanding of how the bailout process actually works. Though it may be "challeng[ing]," a large jurisdiction can obtain a bailout even if there are dozens of subjurisdictions within it and those political subunits are independent of the larger jurisdiction. *See* Brief of Merced County at 20.

First, in all of our experiences with bailout, we easily gathered data that we felt supported a bailout for all covered political subdivisions within our borders. We then notified the Justice Department that we wanted to bail out and the Department then conducted its own investigation to verify our bailout eligibility. Sometimes, in gathering data on our own and upon independent investigation by the Justice Department, we discovered that a political subunit within our jurisdiction had inadvertently failed to make a timely preclearance submission of a voting change. In every instance when that happened, the voting change was promptly submitted and precleared, and the bailout process proceeded to a successful conclusion. The opportunity to bail out following submission of these previously unsubmitted voting changes gave the bailed out jurisdictions the opportunity to show that the failure to make a Section 5 submission was an oversight or due to inadvertence, and not a desire to evade compliance with the preclearance provisions or hide discriminatory voting procedures from federal authorities.

For example, in New Hampshire, the State and a number of covered towns, townships or unincorporated places within the state had failed to make timely submission of a number of voting changes. When these voting changes were identified by the State, the State promptly submitted them and obtained the requisite preclearance. During the course of reviewing the records of the covered political subunits in New Hampshire, Justice Department attorneys also identified changes relating to voting and these changes were promptly submitted for preclearance. In all instances, the changes were minor and had not been submitted due to inadvertence and oversight. These events did not disqualify New Hampshire from proceeding with its bailout, nor did such unprecleared past voting changes stop the Respondent Attorney General from consenting to the bailout application in the D.C. district court. *See* Consent Judgment and Decree (proposed), *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Dec. 21, 2012).

Respondent Attorney General applied the same standards to New Hampshire that it has applied for decades to other jurisdictions that have bailed out. In Shenandoah County, Virginia, for example, which bailed out in 1999, it was discovered during the course of gathering information for the bailout that the County itself and a number of towns within the County had failed to submit voting changes for preclearance review. *See* Consent Judgment and Decree, *Shenandoah Cnty. v. Reno*, No. 99-992 (D.D.C. Oct. 15, 1999), *available at* http://www.justice.gov/crt/about/vot/misc/shenandoah_cd.pdf. The County had failed to submit one special election for preclearance review, and four towns within the County had failed to submit over 30 annexations for Section 5 review. But Shenandoah County encountered no difficulty in bringing the political subunits into compliance with Section 5 of the Voting Rights Act by making submissions for their political subunits *nunc pro tunc*. Merced County, California, also obtained a bailout in 2012, despite the presence of previously unprecleared voting changes. *See* Brief of Merced County at 14 (stating there were thirteen previously unsubmitted voting changes). Upon preclearance of these previously unsubmitted changes by the Attorney General, and on the basis of other information supplied by Shenandoah County and Merced County demonstrating compliance with the Act, the Attorney General consented to those bailouts and the D.C. district court entered consent judgments granting each county a bailout.

The Attorney General's approach to processing bailout applications is consistent with the statute and congressional intent. Congress has made clear in Section 4 of the Voting Rights Act that "[n]othing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section." 42 U.S.C. § 1973b(a)(9).

As our own bailouts prove, showing the lack of a preclearance objection over a ten-year period is not a problem for the vast majority of jurisdictions subject to preclearance under the Act. Many covered jurisdictions within the 16 fully- or partially-covered states have not had a single objection over the last 10 years, have not been involved in any voting rights litigation during that time period, and could well be bailout eligible today. These potentially bailout-eligible jurisdictions include big cities in the Deep South with a long history of discrimination, such as Birmingham, Alabama; Jackson, Mississippi; New Orleans, Louisiana; and Richmond, Virginia, to name just a few.

Existing alongside the preclearance requirements of Section 5, the bailout process – as expanded by the Court in *NAMUDNO* – will continue to exempt non-discriminatory jurisdictions from the Act's special provisions, constantly tailoring the coverage formula so that current burdens meet current needs.

◆

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

Jurisdictions Bailed Out of Section 5 Coverage After August 5, 1984

Jurisdiction	State	Type	Bailout Filed Date	Bailout Granted Date	Number of Elected Governmental Units Fully Within Jurisdiction	Number of Unprecleared Changes
Fairfax City	VA	Indep. City	Sept. 25, 1997	Oct. 21, 1997	2	0
Frederick County	VA	County	Apr. 19, 1999	Sept. 10, 1999	5	1
Shenandoah County	VA	County	Apr. 21, 1999	Oct. 15, 1999	10	31
Roanoke County	VA	County	Aug. 11, 2000	Jan. 24, 2001	3	8
Winchester City	VA	Indep. City	Dec. 22, 2000	June 1, 2001	1	1
Harrisonburg City	VA	Indep. City	Feb. 14, 2002	Apr. 17, 2002	2	0
Rockingham County	VA	County	Mar. 28, 2002	May 24, 2002	9	1
Warren County	VA	County	Aug. 30, 2002	Nov. 26, 2002	3	7
Greene County	VA	County	Sept. 8, 2003	Jan. 19, 2004	3	1
Pulaski County	VA	County	June 22, 2005	Sept. 27, 2005	4	14
Augusta County	VA	County	Sept. 30, 2005	Nov. 30, 2005	3	3
Salem City	VA	Indep. City	May 25, 2006	July 27, 2006	1	0
Botetourt County	VA	County	June 8, 2006	Aug. 28, 2006	5	0
Essex County	VA	County	Sept. 21, 2006	Jan. 31, 2007	3	0
Middlesex County	VA	County	Aug. 17, 2007	Jan. 7, 2008	3	0
Amherst County	VA	County	May 6, 2008	Aug. 13, 2008	2	0
Page County	VA	County	June 27, 2008	Sept. 15, 2008	5	0
Washington County	VA	County	June 27, 2008	Sept. 23, 2008	5	0
Northwest Austin Municipal Utility District Number One	TX	Special District	Aug. 4, 2006	Nov. 3, 2009	1	

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Jurisdictions Bailed Out of Section 5 Coverage After August 5, 1984

Jurisdiction	State	Type	Bailout Filed Date	Bailout Granted Date	Number of Elected Governmental Units Fully Within Jurisdiction	Number of Unprecleared Changes
Fairfax City	VA	Indep. City	Sept. 25, 1997	Oct. 21, 1997	2	0
Frederick County	VA	County	Apr. 19, 1999	Sept. 10, 1999	5	1
Shenandoah County	VA	County	Apr. 21, 1999	Oct. 15, 1999	10	31
Roanoke County	VA	County	Aug. 11, 2000	Jan. 24, 2001	3	8
Winchester City	VA	Indep. City	Dec. 22, 2000	June 1, 2001	1	1
Harrisonburg City	VA	Indep. City	Feb. 14, 2002	Apr. 17, 2002	2	0
Rockingham County	VA	County	Mar. 28, 2002	May 24, 2002	9	1
Warren County	VA	County	Aug. 30, 2002	Nov. 26, 2002	3	7
Greene County	VA	County	Sept. 8, 2003	Jan. 19, 2004	3	1
Pulaski County	VA	County	June 22, 2005	Sept. 27, 2005	4	14
Augusta County	VA	County	Sept. 30, 2005	Nov. 30, 2005	3	3
Salem City	VA	Indep. City	May 25, 2006	July 27, 2006	1	0
Botetourt County	VA	County	June 8, 2006	Aug. 28, 2006	5	0
Essex County	VA	County	Sept. 21, 2006	Jan. 31, 2007	3	0
Middlesex County	VA	County	Aug. 17, 2007	Jan. 7, 2008	3	0
Amherst County	VA	County	May 6, 2008	Aug. 13, 2008	2	0
Page County	VA	County	June 27, 2008	Sept. 15, 2008	5	0
Washington County	VA	County	June 27, 2008	Sept. 23, 2008	5	0
Northwest Austin Municipal Utility District Number One	TX	Special District	Aug. 4, 2006	Nov. 3, 2009	1	

Jurisdiction	State	Type	Bailout Filed Date	Bailout Granted Date	Number of Elected Governmental Units Fully Within Jurisdiction	Number of Unprecleared Changes
City of Kings Mountain	NC	City	July 8, 2010	Oct. 22, 2010	1	2
City of Sandy Springs	GA	City	Sept. 7, 2010	Oct. 26, 2010	1	0
Jefferson County Drainage District Number Seven	TX	Special District	Mar. 2, 2011	June 6, 2011	1	2
Alta Irrigation District	CA	Special District	Apr. 20, 2011	July 15, 2011	1	3
City of Manassas Park	VA	Indep. City	Apr. 19, 2011	Aug. 3, 2011	1	0
Rappahannock County	VA	County	June 17, 2011	Aug. 9, 2011	3	0
Bedford County	VA	County	Mar. 8, 2011	Aug. 30, 2011	2	0
City of Bedford	VA	Indep. City	Mar. 4, 2011	Aug. 31, 2011	1	0
Culpeper County	VA	County	Aug. 16, 2011	Oct. 3, 2011	3	3
James City County	VA	County	Aug. 5, 2011	Nov. 9, 2011	1	0
City of Williamsburg	VA	City	Aug. 4, 2011	Nov. 28, 2011	2	0
King George County	VA	County	Dec. 7, 2011	Apr. 5, 2012	2	2
Prince William County	VA	County	Jan. 6, 2012	Apr. 10, 2012	6	6
City of Pinson	AL	City	Feb. 15, 2012	Apr. 20, 2012	1	4
Wythe County	VA	County	May 3, 2012	June 18, 2012	4	0
Grayson County	VA	County	May 3, 2012	July 20, 2012	5	0
Merced County	CA	County	Mar. 6, 2012	Aug. 31, 2012	85	13
Craig County	VA	County	July 18, 2012	Nov. 29, 2012	3	0
Carroll County	VA	County	July 17, 2012	Nov. 30, 2012	3	0
State of New Hampshire	NH	State	Nov. 15, 2012	Pending	18	n/a
Browns Valley Irrigation District	CA	Special District	Sept. 26, 2012	Pending	1	n/a
City of Wheatland	CA	City	Jan. 14, 2013	Pending	1	n/a

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

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FILED
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No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. CONGRESS HAS EXCEEDED THE SCOPE OF POWERS GRANTED BY THE FOURTEENTH AND FIFTEENTH AMENDMENTS. 2

  A. The Voting Rights Act Was An Exercise Of Extraordinary Power To Address The Extreme Evils Of Racial Discrimination. . . . 3

  B. Congress Has Stretched Its Extraordinary Powers To The Breaking Point. 5

    1. The Original 5-Year Plan Has Been Stretched To 66 Years. 6

    2. The Scope Of Congressional Power Has Vastly Expanded—Stretching The Constitutional Elastic Too Far. 7

II. THE VOTING RIGHTS ACT NOW THREATENS AMERICA'S FUNDAMENTAL SYSTEM OF GOVERNMENT. 8

  A. VRA § 5 Threatens Individual Liberty To Participate In The Political Process. 9

B. VRA Threatens The Division Of Power Between The Federal Government And The States. 12

  1. The Reconstruction Amendments Grant Congress The Power To Enact Legislation At The Federal Level—Not The Power To Veto Legislation At The State Level. . . . 13

  2. The Constitution Established A System Of Dual Sovereignty. 14

  3. The Constitution Grants The States Primary Authority To Regulate Elections. 15

  4. The Preclearance Mandate Violates The Equal Sovereignty Of The States. 17

C. VRA Threatens The Separation Of Powers Among Co-Equal Branches Of Government. 19

  1. Courts Should Respect State Legislative Judgments And Policies. 20

  2. The "Congruence And Proportionality" Test Should Be Reexamined And Refined. 22

D. VRA Threatens To Conflict With The Fourteenth Amendment. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Abrams v. Johnson,
521 U.S. 74 (1997) 22

Alden v. Maine,
527 U.S. 706 (1999) 10

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 3

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 10

Bartlett v. Strickland,
556 U.S. 1 (2009) 7

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 25

Blodgett v. Holden,
275 U.S. 142 (1927) 20

Bond v. United States,
131 S. Ct. 2355 (2011) 10, 12, 13

Burns v. Richardson,
384 U.S. 73 (1966) 15

Bush v. Gore,
531 U.S. 98 (2000) 21

Carrington v. Rash,
380 U.S. 89 (1965) 15

Chapman v. Meier,
420 U.S. 1 (1975) 16

City of Boerne v. Flores,
521 U.S. 507 (1997) . . . . *passim*

City of Rome v. United States,
446 U.S. 156 (1980) 12, 18, 19, 20

Cnty. of Lane v. Oregon,
74 U.S. 71 (1869) 9

Coleman v. Court of Appeals of Md.,
132 S. Ct. 1327 (2012) 22

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008) 5

Ex parte Virginia,
100 U.S. 339 (1880) 3, 20

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 4, 18

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,
527 U.S. 627 (1999) 24

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 10

Georgia v. Ashcroft,
539 U.S. 461 (2003) 7, 28

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 17

Gregory v. Ashcroft,
501 U.S. 452 (1991) . . . . *passim*

Growe v. Emison,
507 U.S. 25 (1993) 16

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 24

League of United Latin Am. Citizens v. Perry,
548 U.S. 349 (2006) 16, 17

Lessee of Pollard v. Hagan,
44 U.S. 212, 3 How. 212 (1845) 17

Lopez v. Monterey Cnty.,
525 U.S. 266 (1999) 18

McCulloch v. Maryland,
17 U.S. 316 (1819) 13, 14

Miller v. Johnson,
515 U.S. 900 (1995) 18, 21, 27, 28

Mobile v. Bolden,
446 U.S. 55 (1980) 7

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 10, 13

Nev. Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 4

New York v. United States,
505 U. S. 144 (1992) 10, 15, 19

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) . . . . *passim*

Oregon v. Mitchell,
400 U.S. 112 (1970) 3, 16

Perry v. Perez,
132 S. Ct. 934 (2012) 16, 19, 21, 22

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 23

Presley v. Etowah Cnty. Comm'n,
502 U.S. 491 (1992) 4

Printz v. United States,
521 U.S. 898 (1997) 11, 14, 15, 19

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) 7, 25

Reynolds v. Sims,
377 U.S. 533 (1964) 8

Shelby v. Holder,
679 F.3d 848 (D.C. Cir. 2012) . . . . *passim*

Smiley v. Holm,
285 U.S. 355 (1932) 16

South Carolina v. Katzenbach,
383 U.S. 301 (1966) . . . . *passim*

Storer v. Brown,
415 U.S. 724 (1974) 16

Sugarman v. Dougall,
413 U.S. 634 (1973) 17

Tafflin v. Levitt,
493 U.S. 455 (1990) 14

Tennessee v. Lane,
541 U.S. 509 (2004) . . . . *passim*

Texas v. White,
74 U.S. 700 (1869) 9, 14, 17

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 15

United States v. Cruikshank,
92 U.S. 542 (1876) 15

United States v. Louisiana,
363 U.S. 1 (1960) 17

United States v. Morrison,
529 U.S. 598 (2000) 24

United States v. Sheffield Bd. of Comm'rs,
435 U.S. 110 (1978) 18

Upham v. Seamon,
456 U.S. 37 (1982) 22

White v. Weiser,
412 U.S. 783 (1973) 15, 21

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 4

Constitutional Provisions

U.S. Const. art. I, § 2 (Enumeration Clause) 16

U.S. Const. art. I, § 4 (Elections Clause) 16

U.S. Const. art. I, § 8, cl. 18 (Necessary and Proper Clause) 2, 15

U.S. Const. art. II, § 1, cl. 2 (Presidential Vote) . . 21

U.S. Const. art. III, § 2 (Judicial Power Clause) . . 14

U.S. Const. art. IV, § 3 (Claims) 14

U.S. Const. art. IV, § 4 (Privileges and Immunities Clause) 14

U.S. Const. art. V (Amendments) 14

U.S. Const. amend. X (Reserved Powers of the States) 15

U.S. Const. amend. XIV . . . . *passim*

U.S. Const. amend. XV (Suffrage – Race) . . . *passim*

Statutes

42 U.S.C.S. § 1973c (Voting Rights Act of 1965 – Section 5) . . . . *passim*

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Cong. Globe, 39th Cong., 1st Sess. (1866) 11

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The Federalist No. 28 11

The Federalist No. 39 14

INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully urges this Court to reverse the decision of the D.C. Circuit.

Justice and Freedom Fund ("JFF") is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In order to enact the Voting Rights Act of 1965 ("VRA"), Congress exercised the extraordinary enforcement powers granted by the Fourteenth and Fifteenth Amendments. Those powers were necessary to address the extraordinary evils of racial discrimination. But there is an inherent friction between these added congressional powers and other provisions of the Constitution.

---

[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Both Congress and this Court have acknowledged the vast improvement in minority voting practices since VRA was enacted in 1965—reducing the need to continue its extreme measures and highlighting the substantial federalism costs that many Justices of this Court have observed. The time has come to reconsider the constitutionality of VRA's § 5 preclearance requirements (42 U.S.C.S. § 1973c) and celebrate the success the Act has achieved:

> Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 226 (2009) (Thomas, J., concurring and dissenting) ("*NAMUD*").

ARGUMENT

I. CONGRESS HAS EXCEEDED THE SCOPE OF POWERS GRANTED BY THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

This Court once explained the broad sweep of the Reconstruction Amendments in terms similar to the Necessary and Proper Clause (Art. I, § 8, cl. 18):

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments

> have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-346 (1880). But—"as broad as the congressional enforcement power is, it is not unlimited." *City of Boerne,* 521 U.S. 507, 518-519 (1997), quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). The time has come for this Court to define the outer limits of that power.

A. The Voting Rights Act Was An Exercise Of Extraordinary Power To Address The Extreme Evils Of Racial Discrimination.

The people of this country had to amend the Constitution in order to grant Congress the sweeping powers underlying the VRA. Section 5 sweeps so broadly that it imposes onerous preclearance requirements for every election law change, no matter how minor or innocuous. *NAMUD*, 557 U.S. at 202; *Shelby v. Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012). This Court has consistently acknowledged the extraordinary nature of these powers:

- *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 334 (1966) ("uncommon exercise of congressional power")

- *Allen v. State Bd. of Elections,* 393 U.S. 544, 566 (1969) ("The legislative history on the whole supports the view that Congress intended to reach any state enactment, which altered the election law of a covered State in even a minor way.")

- *Presley v. Etowah Cnty. Comm'n,* 502 U.S. 491, 500-501 (1992) (describing § 5 as "an extraordinary departure from the traditional course of relations between the States and the Federal Government")

- *Shelby v. Holder*, 679 F.3d at 886 (Williams, J., dissenting) (VRA "governs many laws that likely could never "deny or abridge" a "minority group's opportunity to vote")

In order to deter unconstitutional conduct, Congress can even prohibit facially constitutional conduct. *Tennessee v. Lane,* 541 U.S. 509, 520 n. 4 (2004), citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976); *see also Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 727-728 (2003), *City of Boerne v. Flores,* 521 U.S. at 518. Moreover, the ability to prevent a state from enacting a law far exceeds the power to invalidate an existing law. *South Carolina v. Katzenbach,* 383 U.S. at 361 (Black, J., concurring and dissenting).

This unusual departure from America's governmental structure has been warranted by the "insidious and pervasive evil" of racial discrimination in voting (*id.*, at 309)—"one of the gravest evils that Congress can seek to redress." *Shelby v. Holder*, 679 F.3d at 860, citing *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) ("[The right to vote] is regarded as a fundamental political right, because preservative of all rights."). Although originally justified by "voluminous legislative history" (*Katzenbach*, 383 U.S. at 309), the most recent extension rests on outmoded data and exceeds the outer bounds of constitutionality.

B. Congress Has Stretched Its Extraordinary Powers To The Breaking Point.

Over the years, Congress has expanded the reach of VRA in terms of both time and power. A five-year "temporary" plan now spans over six decades. Statutes that originally tracked the Constitution now cut deeply into state authority. The DOJ has refused to preclear voter identification laws in Texas and South Carolina, contrary to this Court's holding in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Cert. Pet. 19-20. Changes to early voting in Florida require preclearance, although many states do not even offer opportunities for early voting. Cert. Pet. 20.

In connection with the Senate Judiciary Committee's recent hearing about voter identification laws, Senator Charles Grassley (R-Iowa) expressed concerns that reflect the policy issues underlying this litigation:

> It seems today that in any election or in any discussion of voting rights, the terms "suppression" and "disenfranchisement" are thrown about, sometimes in a cavalier fashion. That approach is not helpful to protecting voting rights.... Comparing common-sense voter ID requirements, which enjoy the support of three-quarters of the electorate and a majority of Democrats, to poll taxes or worse, trivializes the

> sufferings of millions of Americans who were denied the right to vote.

Statement of Ranking Member Chuck Grassley to Senate Judiciary Committee, December 19, 2012.[2] But under the current VRA, Shelby County and other jurisdictions must seek federal approval to enact even the most "common sense" voting requirements. This procedure indeed trivializes the experience of racial minorities who were truly disenfranchised in past decades.

1. The Original 5-Year Plan Has Been Stretched To 66 Years.

Congress originally intended §§ 4(b) and 5 of the VRA as a temporary five-year program. Cert. Pet. 8, citing H.R. Rep. No. 91-397 (1969). That was nearly fifty years ago. Extensions in 1970 (five years), 1975 (seven years), 1982 (twenty-five years), and 2006 (twenty-five years) have vastly expanded the time frame—from five years to sixty-six years. This Court sustained the constitutionality of the 1970, 1975, and 1982 extensions. *Shelby v. Holder*, 679 F.3d at 855-856 (citing cases). But the most recent (2006) extension continues to rely on data from 1972—forty years ago—to trigger the onerous § 5 preclearance requirements. *NAMUD*, 557 U.S. at 200. What began as a short-term plan now stretches across decades. It is no longer temporary.

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[2] http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=43669# (last visited 12/27/12).

2. The Scope Of Congressional Power Has Vastly Expanded—Stretching The Constitutional Elastic Too Far.

Key portions of VRA originally tracked constitutional language:

> In *Mobile v. Bolden,* 446 U.S. 55, 60-61 (1980), this Court held that § 2, as it then read, "no more than elaborates upon . . . the Fifteenth Amendment" and was "intended to have an effect no different from that of the Fifteenth Amendment itself."

Bartlett v. Strickland, 556 U.S. 1, 10 (2009). But after the 1982 amendments—extending the preclearance mandate another 25 years—"[t]he amended version of § 2 requires consideration of effects, as it prohibits practices 'imposed or applied . . . in a manner which results in a denial or abridgment' of the right to vote. 96 Stat. 134, 42 U.S.C. § 1973(a) (2000 ed.)." *Id*. In 2006, Congress engineered an even greater expansion of its power, overruling two of this Court's key holdings about VRA—*Georgia v. Ashcroft,* 539 U.S. 461, 479-80 (2003) and *Reno v. Bossier Parish School Board,* 528 U.S. 320, 328 (2000)—decisions that eased VRA's federalism concerns by giving the states more flexibility to maintain or even expand minority influence in the political process. *Shelby v. Holder*, 679 F.3d at 886 (Williams, J., dissenting); *see also* Brief of Former Department of Justice Officials as Amicus Curiae, Supporting Petitioner, 6-14.

II. THE VOTING RIGHTS ACT NOW THREATENS AMERICA'S FUNDAMENTAL SYSTEM OF GOVERNMENT.

The architects of the Constitution created a federal government "powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence." *Shelby v. Holder*, 679 F.3d at 853. "[A] group of formerly independent states bound themselves together under one national government," delegating some of their powers—but not all—to the newly formed federal administration. *Reynolds v. Sims,* 377 U.S. 533, 574 (1964). Power is divided vertically, between the federal and state governments, and horizontally, among the three co-equal branches at each level. This Court has long recognized the critical need to preserve this structure:

> "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," . . . "Without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its

> provisions, looks to an indestructible Union, composed of indestructible States.

Texas v. White, 74 U.S. 700, 725 (1869), quoting *County of Lane v. Oregon,* 74 U.S. 71, 76 (1869).

After the Civil War, the Reconstruction Amendments carved out an exception to America's balance of federal and state powers because "states too could threaten individual liberty." *Shelby v. Holder*, 679 F.3d at 853. These Amendments are the source of congressional authority to enact the VRA. But VRA's federalism costs—particularly the § 5 preclearance mandate—has led Members of this Court to express serious reservations. *NAMUD,* 557 U.S. at 202 (collecting cases). The Constitution "establishes a system of dual sovereignty between the States and the Federal Government" (*Gregory v. Ashcroft,* 501 U.S. 452, 567 (1991)), yet "the preclearance requirements in one State would be unconstitutional in another." *NAMUD*, 557 U.S. at 203 (*Gregory v. Ashcroft,* 501 U.S. at 491-492 (Kennedy, J., concurring)).

VRA's preclearance requirements endanger key elements of American government: the separation of powers, the sovereignty of the states, and ultimately the liberty of individuals—*the people*.

A. VRA § 5 Threatens Individual Liberty To Participate In The Political Process.

The Reconstruction Amendments were designed to protect individual liberties, including equal protection and the right to vote. Federalism also safeguards individual liberty, allowing states to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States,* 131 S. Ct. 2355 (2011). It may seem counterintuitive, but "'freedom is enhanced by the creation of two governments, not one.' *Alden v. Maine,* 527 U.S. 706, 758 (1999)." *Id*. at 2364. As this Court recently affirmed, "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power. *New York v. United States,* 505 U. S. 144, 181 (1992)." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012). "'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.' *Bond v. United States,* 131 S. Ct. 2355, 2364 (2011))." *Id*. at 2578. This observation is not new:

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

Gregory v. Ashcroft, 501 U.S. at 458-459. The "double security" of American federalism is deeply rooted in the nation's history:

- "In the compound republic of America, the power surrendered by the people is first

> divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323.

Gregory v. Ashcroft, 501 U.S. at 458-459 (quoting James Madison); *see also Printz v. United States,* 521 U.S. 898, 922 (1997).

- "If their rights are invaded by either [government], [the people] can make use of the other as the instrument of redress." The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961).

Gregory v. Ashcroft, 501 U.S. at 458-459 (quoting Alexander Hamilton).

Federalism questions arose and generated heated debate when Congress debated the original Fourteenth Amendment test. Concerns arose that "[t]he proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure." *City of Boerne v. Flores,* 521 U.S. at 520, citing Cong. Globe, 39th Cong., 1st Sess., 1063-1065 (1866) (statement of Rep. Hale). The Amendment passed after its language was revised to grant Congress only remedial power, rather than broad authority over life, liberty, and property that would oust state jurisdiction. *Id.* at 521.

Members of this Court have echoed the same type of apprehension in various Fourteenth Amendment cases, including some of the challenges to VRA. The "federalist structure of joint sovereigns...increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft,* 501 U.S. at 458. The preclearance mandate decreases those opportunities—and its interference with a community's control over its democratic process "also operates at an individual level to diminish the voting rights of residents of covered areas." *City of Rome v. United States,* 446 U.S. 156, 202 (1980) (Powell, J., dissenting).

In short, "[t]he preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act." *Id.* at 200.

B. VRA Threatens The Division Of Power Between The Federal Government And The States.

The preclearance mandate holds Shelby County and other covered jurisdictions to a higher standard than the rest of the nation, jeopardizing not only citizen participation in the local political process—but also the equal sovereignty of the States.

"The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 131 S. Ct. at 2364. This Court recently reinforced the importance of maintaining "the status of the States as independent sovereigns in our federal system...[o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2602. In spite of VRA's importance in securing the right of all races to vote, there is a need to curb the growing power of Congress in this arena so that American federalism does not collapse.

1. The Reconstruction Amendments Grant Congress The Power To Enact Legislation At The Federal Level—Not The Power To Veto Legislation At The State Level.

In one of the earliest challenges to VRA, Justice Black sounded an alarm about the dangers of § 5's preclearance mandate:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.

South Carolina v. Katzenbach, 383 U.S. at 358-359 (Black, J., concurring and dissenting). According to Justice Black, Congress adopted "means that conflict with the most basic principles of the Constitution." *Id.* Congress strayed from the classic standard enunciated in *McCulloch*: "...all means which are not prohibited, but consist with the letter and spirit of the constitution." *McCulloch v. Maryland,* 17 U.S. 316, 421 (1819). The power to require federal permission for the enactment of state laws clashes with the Guaranty Clause, "approach[ing] dangerously close to wiping the States out as useful and effective units in the government of our country." *South Carolina v. Katzenbach,* 383 U.S. at 359 (Black, J., concurring and dissenting). The preclearance procedure "is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies," including "the King's practice of holding legislative and judicial proceedings in inconvenient and distant places." *Id.* at 360 n. 2. Moreover, proceedings of the original Constitutional Convention "show beyond all doubt" that Congress was denied veto power over state laws, because such broad authority would render the States "helpless to function as effective governments." *Id.* at 360-361.

2. The Constitution Established A System Of Dual Sovereignty.

"It is incontestible that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991); *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990)." *Printz v. United States*, 521 U.S. at 918. The States were to "remain independent and autonomous within their proper sphere of authority." *Id.* at 928; see *Texas v. White,* 74 U.S. at 725. As this Court observed in *Printz*, the States' "residual and inviolable sovereignty" (The Federalist No. 39, at 245 (James Madison)) permeates the text of the Constitution, including Art. IV, § 3 (state territory), Art. III, § 2 (Judicial Power Clause), Art. IV, § 4 (Privileges and Immunities Clause), and Art. V

(Amendments). *Id.* at 919. In addition to these and other provisions, residual sovereignty is implicit in Art. I, § 8 (delegating enumerated powers to the federal government) and explicit in the Tenth Amendment (reserving all other powers to the States and people). *Id.* at 919; *see also United States v. Cruikshank,* 92 U.S. 542, 551 (1876); *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

Moreover, "state legislatures are *not* subject to federal direction. *New York v. United States,* 505 U.S. 144 (1992)." *Printz*, 521 U.S. at 912. The Framers crafted a system where federal and state governments would "exercise concurrent authority over the people"—"reject[ing] the concept of a central government that would act upon and through the States." *Id.* at 919-920. VRA's preclearance scheme subjects the States to federal direction. That is contrary to this Court's direction, particularly in light of the undeniable progress achieved over the past few decades.

3. The Constitution Grants The States Primary Authority To Regulate Elections.

The States "have broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash,* 380 U.S. 89, 91 (1965). *See also White v. Weiser,* 412 U.S. 783, 795 (1973); *Burns v. Richardson,* 384 U.S. 73, 84-85 (1966). The Framers reserved this important power to the States. *Gregory v. Ashcroft*, 501 U.S. at 461-462.

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Oregon v. Mitchell, 400 U.S. at 125.

The States determine the times, places, and manner of holding elections for Senators and Representative. Art. I, § 4, cl. 1. In today's world, that is a complex matter—"the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections." *Storer v. Brown*, 415 U.S. 724, 729-730 (1974). Preclearance is especially burdensome in today's world of increasingly complicated election law.

Redistricting is also "primarily the duty and responsibility of the State." *Perry v. Perez*, 132 S. Ct. 934, 940 (2012), quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975). Apportionment of federal congressional districts implicates state powers under Art. I, §§ 2, 4. *League of United Latin American Citizens v. Perry*, 548 U.S. 349, 414-415 (2006), citing *Growe v. Emison,* 507 U.S. 25, 34 (1993) and *Smiley v. Holm,* 285 U.S. 355, 366-367 (1932). Placing primary responsibility at the state level—and granting only secondary duties to Congress—facilitates and protects citizen participation in the political process:

> [D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process.

LULAC, 548 U.S. at 416 (expressing preference for districts drawn by the state and federal elected branches rather than the courts).

The reserved powers of the States should never be used to circumvent federally protected rights—when that happens, federal judicial review is warranted. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). But the Fourteenth Amendment does not supersede all principles of federalism: "[T]his Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers." *Gregory v. Ashcroft*, 501 U.S. at 468. On the contrary, this Court applies a less demanding standard when dealing with matters normally within the States' discretion. *Id.* at 469, citing *Sugarman v. Dougall,* 413 U.S. 634, 648 (1973). One such matter is the regulation of elections.

4. The Preclearance Mandate Violates The Equal Sovereignty Of The States.

America's "historic tradition is that the States enjoy 'equal sovereignty.' *United States v. Louisiana,* 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan,* 44 U.S. 212, 3 How. 212, 223 (1845)); see also *Texas v. White,* 74 U.S. 700, 7 Wall. 700, 725-726 (1869)."

NAMUD, 557 U.S. at 203. VRA's preclearance mandate admittedly "differentiates between the States" despite that tradition. *Shelby v. Holder*, 679 F.3d at 858.

The Fourteenth Amendment's history reveals initial criticism that it would give Congress "too much legislative power at the expense of the existing constitutional structure...a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." *City of Boerne v. Flores,* 521 U.S. at 520-521. The Reconstruction Amendments all "by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez v. Monterey Cnty.,* 525 U.S. 266, 282-283 (1999), citing *City of Rome v. United States,* 446 U.S. at 179; *see also Fitzpatrick v. Bitzer,* 427 U.S. at 455-456; *Miller v. Johnson,* 515 U.S. 900, 926 (1995). The invasion of state power is so sweeping that it even allows Congress to prohibit conduct which is not itself unconstitutional—in order to remedy or deter constitutional violations. *Lopez v. Monterey Cnty.,* 525 U.S. at 282-283; *City of Boerne v. Flores,* 521 U.S. at 518.

VRA's preclearance requirement is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies.... [I]ts encroachment on state sovereignty is significant and undeniable." *NAMUD,* 557 U.S. at 224 (Thomas, J., dissenting in part), quoting *United States v. Sheffield Bd. of Comm'rs,* 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). As Justice Powell warned, this "encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity." *City of Rome,* 521 U.S. at 201 (Powell, J., dissenting). Such a departure from the nation's commitment to equal state sovereignty requires strong justification. *NAMUD*, 557 U.S. at 203. Just months ago, this Court noted *NAMUD's* constitutional concerns and concluded that "[t]hose concerns would only be exacerbated if § 5 required a district court to wholly ignore the State's policies in drawing maps that will govern a State's elections, without any reason to believe those state policies are unlawful." *Perry v. Perez*, 132 S. Ct. at 941.

C. VRA Threatens The Separation Of Powers Among Co-Equal Branches Of Government.

In addition to intruding on state sovereignty, the preclearance mandate threatens the horizontal division of power among the branches of government. The "congruence and proportionality" test highlights that danger. This test is more stringent than the "rational means" standard (*South Carolina v. Katzenbach*, 383 U.S. at 324) and has served well in the context of racial discrimination. But even in that context, the time has come to re-examine its costs to the separation of powers doctrine and refine it in light of current conditions.

"Much of the Constitution is concerned with setting forth the form of our government...[it] divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz v. United States*, 521 U.S. at 933, quoting *New York,* 505 U.S. 144, 187 (1992).

In light of the division of powers among coequal branches, judicial deference to Congress is the norm. Indeed, judging the constitutionality of an act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *NAMUD*, 557 U.S. at 205, quoting *Blodgett v. Holden,* 275 U.S. 142, 147-148 (1927) (Holmes, J., concurring). And the Fifteenth Amendment expressly enlarges federal power, authorizing Congress to enforce its decrees by appropriate legislation. *South Carolina v. Katzenbach,* 383 U.S. at 325-326. "Some legislation is contemplated to make the [Civil War] amendments fully effective." *Id.*, quoting *Ex parte Virginia,* 100 U.S. at 345. Deference to Congress has been appropriate in the past challenges to VRA. In upholding the 1975 extension, this Court declined to overrule Congress' judgment that "at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination." *City of Rome v. United States,* 446 U.S. at 182.

1. Courts Should Respect State Legislative Judgments And Policies.

The District Court observed the normal rule that "Congress's laws are entitled to a 'presumption of validity.' *City of Boerne,* 521 U.S. at 535." *Shelby v. Holder,* 679 F.3d at 861. But while the separation-of-powers doctrine would normally warrant this Court's deference to Congress, cases challenging VRA are more complex because of the intrusion into the balance of federal and state powers. Courts should also consider the policy judgments of representatives the people have elected at the state level.

The lower court acknowledged that "given the heavy federalism costs that section 5 imposes, our job is to ensure that Congress's judgment is reasonable and rests on substantial probative evidence." *Id.* at 873. But in light of those "heavy federalism costs," courts should extend some deference to legislative judgment at the *state* level. This Court's precedents support that approach.

In *Bush v. Gore*, then Chief Justice Rehnquist cautioned this Court about deference to the role of state legislatures in selecting Presidential electors:

> [W]ith respect to a Presidential election, the court must be both mindful of the [state] legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring). Although Art. II, § 1, cl. 2 explicitly commits the electoral task to state legislatures—whereas the Fourteenth and Fifteenth Amendments expressly grant power to Congress—it is nonetheless vital to consider the normal responsibilities of the States and not snub their policy judgments. Redistricting, for example, "ordinarily involves criteria and standards that have been weighed and evaluated by the [state] elected branches in the exercise of their political judgment. See, *e.g.*, *Miller v. Johnson,* 515 U.S. 900, 915-916 (1995); *White v. Weiser,* 412 U.S. 783, 795-796 (1973)." *Perry v. Perez*, 132 S. Ct. at 941. In *Perry v. Perez*, the District Court erred when it “substituted its own concept of ‘the collective public good’ for the Texas Legislature’s determination of which policies serve ‘the interests of the citizens of Texas.’” *Id.* at 943. This Court cautioned lower courts, when redrawing district lines, to “be guided by the legislative policies underlying a state plan—even one that was itself unenforceable—‘to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.’” *Id.* at 941, quoting *Abrams v. Johnson,* 521 U.S. 74, 79 (1997). The state plan “serves as a starting point for the district court.” *Id.* In *Upham v. Seamon*, 456 U.S. 37 (1982), this Court ordered the lower court to “defer to the unobjectionable aspects of a state’s plan,” even where preclearance had been denied. *Id.* at 942.

2. The “Congruence And Proportionality” Test Should Be Reexamined And Refined.

“Congruence and proportionality” is a “flabby test...’a standing invitation to judicial arbitrariness and policy-driven decisionmaking.’ *Tennessee v. Lane,* 541 U.S. 509, 557-558 (2004) (Scalia, J., dissenting).” *Coleman v. Court of Appeals of Md.,* 132 S. Ct. 1327, 1338 (2012) (Scalia, J., concurring). The test has “no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.” *Tennessee v. Lane,* 541 U.S. at 557-558 (Scalia, J., dissenting). It is, moreover, a “grading of Congress’s homework...a task [this Court] [is] ill suited to perform and ill advised to undertake.” *Coleman v. Court of Appeals of Md.,* 132 S. Ct. at 1338 (Scalia, J., concurring).

This Court formulated the congruence-proportionality test in response to "Congress's inevitable expansion of the Fourteenth Amendment...beyond the field of racial discrimination." *Tennessee v. Lane,* 541 U.S. at 555 (Scalia, J., dissenting). By requiring evidence of a history of constitutional violations, the test was designed to reign in "the effective power [of Congress] to rewrite the Bill of Rights through the medium of § 5." *Id.* at 556. But it tends to bring this Court into "constant conflict with a coequal branch of Government" (*id.*) where "low walls and vague distinctions will not be judicially defensible" (*id.*, quoting ***Plaut v. Spendthrift Farm, Inc.,*** 514 U.S. 211, 239 (1995)). In this tug-of-war, separation-of-powers issues quickly emerge.

There are differences between the Fourteenth and Fifteenth Amendments. Unlike the Fifteenth Amendment, the Fourteenth Amendment is not limited either to denial of the franchise or denial of other rights on the basis of race. But both Amendments were drafted with an eye to combating racial discrimination, the "principal evil against which the Equal Protection Clause was directed." ***Tennessee v. Lane,*** 541 U.S. at 563 (Scalia, J., dissenting). Where racial discrimination is implicated, it is reasonable to grant Congress broader authority. But even in that context, it is time to place Congress on a shorter leash and apply "congruence and proportionality" with greater precision.

1. Outdated Data. VRA's most recent extension (2006) relies on severely outdated data from "conditions in November 1972—34 years before Congress extended the Act for another 25 years." *Shelby v. Holder*, 679

F.3d at 884-885 (Williams, J., dissenting). *See also NAMUD*, 557 U.S. at 203 ("The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.") Shelby County thus "contends that section 5's remedy is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure." *Shelby v. Holder*, 679 F.3d at 858. The necessity for a clear historical record has been underscored in several of this Court's decisions:

- *City of Boerne v. Flores,* 521 U.S. at 530 (no history within past 40 years of generally applicable laws enacted because of religious bigotry);

- *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 648-648 (1999) (noting the virtually complete absence of a history of unconstitutional patent infringement by the States);

- *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) ("the substantive requirements the [Age Discrimination in Employment Act] imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act");

- *United States v. Morrison,* 529 U.S. 598, 626 (2000) (Violence Against Women Act not aimed at proscribing unlawful discrimination by state officials);

- *Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 372 (2001) (Americans with Disabilities Act of 1990 suffered from same concerns as *City of Boerne*).

4. Improvements. This Court and Congress have both observed the significant progress in implementing minority voting rights:

- *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. at 341 (Thomas, J., concurring) ("Ironically, while this litigation was pending, three blacks were elected from majority-white districts to serve on the Bossier Parish School Board.")

- *NAMUD,* 557 U.S. at 201, citing H. R. Rep. No. 109-478, p. 12 (2006) ("Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites.")

- H. R. Rep. No. 109-478, p 12 (2006) ("The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated"). *See NAMUD,* 557 U.S. at 227 (Thomas, J., concurring) ("Indeed, when reenacting § 5 in 2006, Congress evidently understood that the emergency conditions which prompted § 5's original enactment no longer exist.")

"In part due to the success of that legislation [the Voting Rights Act], we are now a very different Nation." *NAMUD,* 557 U.S. at 211. That difference justifies reexamination of the applicable standard.

3. Expanded Time Frames. As this Court noted in *Boerne*, "[w]here...a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind [termination dates and geographic restrictions] tend to ensure Congress' means are proportionate to ends legitimate under § 5." *City of Boerne v. Flores,* 521 U.S. at 533. The original 5-year plan enacted in 1965 has now been subjected to a second 25-year extension. Congress's power is beginning to appear unlimited.

4. Expanded Scope of Federal Power. "'[I]n 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution.' R. Berger, Government By Judiciary 147 (2d ed. 1997)." *Tennessee v. Lane*, 541 U.S. at 559 (Scalia, J., dissenting). Citizens prejudiced by racially discriminatory laws had no remedy. The Civil War Amendments gave Congress the power to create a cause of action—and they have. But requiring particular states to obtain federal permission for *any* election law change, no matter how minor, goes far beyond crafting an appropriate remedy.

Section 5 of the Fourteenth Amendment grants Congress the power to *enforce* the Amendment's other provisions. Earlier decisions have stretched the word "enforce" so that it now "'embraces any measure appropriate to effectuating the performance of the state's constitutional duty.' Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 110-111 (1966)." *Tennessee v. Lane*, 541 U.S. at 560 (Scalia, J., dissenting). But "one does not, within any normal meaning of the term, 'enforce' a prohibition by issuing a still broader prohibition directed to the same end." *Id.* at 558 (Scalia, J., dissenting). Here, VRA's preclearance requirement "pushes the outer boundaries of Congress' Fifteenth Amendment enforcement authority" because it "sweeps more broadly than the substantive command of the Fifteenth Amendment." *NAMUD*, 557 U.S. at 224 (Thomas, J., concurring and dissenting). Congress has gone well beyond "enforcement."

D. VRA Threatens To Conflict With The Fourteenth Amendment.

The preclearance mandate clashes with a broad array of basic constitutional principles, including individual liberty (Section IIA), state sovereignty (IIB), and the separation-of-powers doctrine (IIC). But as recent cases attest, there is yet another constitutional flaw, one that sets VRA on a collision course with the Fourteenth Amendment.

Amazingly, VRA § 5 at times requires the very race-conscious, discriminatory decision-making process that the Act and Reconstruction Amendments were intended to combat. In *Miller v. Johnson*, this Court affirmed a District Court ruling that Georgia's redistricting plan was racially motivated and could not be justified by VRA's preclearance demands. Note the constitutional friction:

> [T]he Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, *Katzenbach, supra,* at 327, 337, into tension with the Fourteenth Amendment.

Miller v. Johnson, 515 U.S. at 927. Justice Kennedy echoed the warning:

> [C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.... There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive.

Georgia v. Ashcroft, 539 U.S. at 491 (Kennedy, J., concurring); *see also NAMUD*, 557 U.S. at 203 ("Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere.") VRA, along with the Fourteenth and Fifteenth Amendments, was intended to prevent discrimination—not perpetuate it—and "to foster our transformation to a society that is no longer fixated on race" (*Georgia v. Ashcroft*, 539 U.S. at 490).

CONCLUSION

"The historic accomplishments of the Voting Rights Act are undeniable." *NAMUD*, 557 U.S. at 201. The time has come to celebrate those accomplishments and restrain the growing power of Congress, in order to protect American federalism and individual liberty. The District Court's decision should be reversed.

Respectfully Submitted,

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CURIAE
BRIEF

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ELLEN D. KATZ AND THE VOTING RIGHTS INITIATIVE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

- I. THE VRI STUDY AND DATABASE REINFORCE THE CONTINUING NEED FOR SECTION 5 IN THE COVERED JURISDICTIONS 6
  - A. Section 2 Litigation Outcomes and Judicial Findings Are Relevant to the Constitutionality of Reauthorized Section 5 7
  - B. Section 2 Litigation Outcomes and Judicial Findings Support the Continued Need for Section 5 Preclearance 12
    - 1. There Are Proportionately Many More Successful Section 2 Outcomes in Covered than in Non-Covered Jurisdictions 12
    - 2. The "Senate Factors" Findings Collected in the VRI Study and Database Reinforce the Continued Need for Section 5 Preclearance 15
- II. PETITIONER, ITS *AMICI*, AND THE DISSENT BELOW MISCONSTRUE THE VRI STUDY AND DATABASE 21

TABLE OF CONTENTS—Continued

Page

CONCLUSION 32

APPENDICES

APPENDIX A Total Lawsuits and Success in Voting Rights Act Section 2 Litigation, 1982–2005 .... 1a

APPENDIX B Senate Factor Findings in Post–1982 Section 2 Litigation, of All Suits Considering Factors 2a

APPENDIX C Local v. State Government Challenges Under Section 2, 1982–2005..... 3a

TABLE OF AUTHORITIES

CASES Page(s)

Brown v. Board of School Comm'rs,
706 F.2d 1103 (11th Cir. 1983) 25

Brown v. Moore,
428 F. Supp. 1123 (S.D. Ala. 1976) 25

Escanaba Cnty. v. McMillan,
466 U.S. 48 (1984) 23

Fayetteville, Cumberland Cty. Black Dem. Caucus v. Cumberland Cty.,
No. 90-2029, 1991 WL 23590 (4th Cir. Feb. 28, 1991) 25

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 23

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 3, 11

Rogers v. Lodge,
458 U.S. 613 (1982) 7, 19, 23

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 30

South Carolina v. United States,
No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) 11

Thornburg v. Gingles,
478 U.S. 30 (1986) 16

Wesch v. Hunt,
785 F. Supp. 1491 (S.D. Ala. 1992) 26

Page(s)

White v. Alabama,
74 F.3d 1058 (11th Cir. 1996) 26

White v. Alabama,
922 F. Supp. 552 (M.D. Ala. 1996) 26

CONSTITUTION, STATUTES, AND LEGISLATIVE HISTORY

U.S. Const. amend. XIV 23

U.S. Const. amend. XV ....*passim*

Voting Rights Act of 1965:

42 U.S.C. § 1973(a)-(b) ("Section 2")........*passim*

42 U.S.C. § 1973c ("Section 5")................*passim*

Voting Rights Act Amendments of 1982,
Pub. L. No. 97-205, 96 Stat. 131 16

Fannie Lou Hamer, Rosa Parks, and
Coretta Scott King Voting Rights Act
Reauthorization and Amendments Act
of 2006,
Pub. L. No. 109-246,
120 Stat. 577 ....2, 10, 20, 32

S. Rep. No. 97-417 (1982)........................ 16-17, 20

S. Rep. No. 109-295 (2006)..........................2, 6, 11

H.R. Rep. No. 109-478 (2006).......................2, 6, 11

To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong.,
2d Sess. (2005) 2

Page(s)

An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. (2006) 2

The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. (2006) 2

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Adam B. Cox & Thomas J. Miles, *Judging The Voting Rights Act*, 108 Colum. L. Rev. 1 (2008) 26

Ellen D. Katz & Anna Baldwin, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 Colum. L. Rev. Sidebar 23 (2008). 14, 27-29

Ellen D. Katz, *Mission Accomplished?*, 117 Yale L.J. Pocket Part 142 (2007)..10, 21, 28

Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power 183 (A. Henderson ed., 2007) ....*passim*

Page(s)

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Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion To Scuttle Section 5 of the Voting Rights Act*, 84 Neb. L. Rev. 605 (2005) 13

U.S. Census Bureau, *2007 Census of Governments*, http://www.census.gov/govs/cog/............... 9

U.S. Census Bureau, *Vintage 2007: State Tables*, http://www.census.gov/popest/data/historical/2000s/vintage_2007/index.html 9

VRI Database Master List (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls...................................... 1

INTEREST OF *AMICI CURIAE*[1]

The Voting Rights Initiative ("VRI") at the University of Michigan Law School is a faculty-student collaborative research venture under the direction of Professor Ellen D. Katz. In 2005, VRI undertook a comprehensive analysis of all cases involving claims brought under Section 2 of the Voting Rights Act since 1982 that resulted in one or more decisions published in a federal reporter or available on Westlaw or Lexis—a total of 763 decisions in 331 lawsuits. Each case was evaluated and catalogued based on a variety of factors, including whether it involved a jurisdiction "covered" under Section 5, the substantive outcome, the specific challenged practices, and any relevant judicial findings under the so-called "Senate Factors" analysis.

VRI published a final report of its findings and analysis in 2006 (the "VRI Study" or "Katz Study"), and made its entire database available on line in a searchable form (the "VRI database").[2] "The aim of th[e] report and the accompanying website [was] to contribute to a critical understanding of current opportunities for effective political participation on the part of those minorities the Voting Rights Act seeks to protect." VRI Study at 645.

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[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* Ellen Katz, with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, & Anna Weisbrodt, ***Documenting Discrimination In Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School***, 39 Mich. J.L. Reform 643 (2006) ["VRI Study"]; VRI Database Master List (2006), *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls ["VRI database"]. The research design and methodology are summarized in the VRI Study at 652-54.

The VRI Study (in draft form) and database were part of a 15,000-page evidentiary record that Congress considered when it reauthorized Section 5 of the Voting Rights Act in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ["2006 Act"]; *see also* Pet. App. 265a-66a. The study was cited in the House and Senate Reports, and discussed in various committee hearings.[3] Both the District Court and the Court of Appeals below relied on the VRI Study and database in upholding the constitutionality of the 2006 reauthorization of Section 5's preclearance requirement in the covered jurisdictions. *See* Pet. App. 130a, 232a-40a; *id.* at 49a (describing the VRI Study as "the most concrete evidence comparing covered and non-covered jurisdictions in the legislative record"); *id.* at 36a-38a, 49a-51a, 54a-60a.

Petitioner Shelby County, some of its supporting *amici*, and the dissent below, on the other hand, have either criticized aspects of the VRI Study, denied its relevance, or relied on it as purported evidence that Section 5 preclearance is no longer justified in at least some covered jurisdictions. *Id.* at 90a-97a (Williams, J., dissenting); Pet. Br. 36, 46-52; *see also* n.9 *infra*.

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[3] *See, e.g.*, H.R. Rep. No. 109-478, at 53 (2006); S. Rep. No. 109-295, at 13, 65 (2006); *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 964-1124 (2005) (reprinting full draft of VRI Study); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 29, 43-45, 159-60, 212 & n.14 (2006); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 48-52 (2006).

Amici curiae Professor Katz and VRI have an interest in ensuring an accurate description and interpretation of their study's findings and underlying data. Based on their familiarity with the relevant Section 2 data, *amici* respectfully offer their views on those data and the implications of those data for the constitutionality of reauthorized Section 5.

SUMMARY OF THE ARGUMENT

I. This Court has identified two questions about Section 5's continued constitutionality—whether the "current burdens" it imposes are "justified by current needs," and whether its "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). The VRI Study and database shed important light on both questions.

First, the VRI Study and database demonstrate that Section 2 claims have been more likely to succeed in covered than in non-covered jurisdictions. As the Court of Appeals emphasized, "although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982." Pet. App. 49a. The per capita Section 2 success rate in covered jurisdictions is "nearly four times the rate in non-covered jurisdictions." *Id.* at 49a-50a. These disparities are even greater in Section 2 challenges to local voting requirements and procedures. The disparities have endured over time, and persist at both the trial and appellate levels.

Second, courts have been much more likely in covered than in non-covered jurisdictions to make factual findings documenting certain conditions that are frequently associated with voting discrimination. Courts in covered jurisdictions have made more of these so-called "Senate Factor" findings (and have been more likely to make such findings) with respect to *eight out of the nine Senate Factors*. These factors are "virtually identical" to those considered in determining whether discrimination is "intentional." *Id.* at 37a. "[T]he differences in judicial findings in Section 2 lawsuits in covered and non-covered jurisdictions suggest real differences operating on the ground," showing that many of the evils Congress set out to address through Section 5 preclearance remain disproportionately concentrated in covered jurisdictions. VRI Study at 734.

As the Court of Appeals emphasized, these results are "particularly dramatic given that Attorney General objections block discriminatory laws before they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions." Pet. App. 38a. Hundreds of proposed election changes in covered jurisdictions have been blocked by U.S. Department of Justice ("DOJ") objections; hundreds more have been withdrawn or modified in the course of Section 5 review; many others have been rejected in Section 5 litigation; and countless others were never even proposed given Section 5's deterrent effects. In a counterfactual world in which Section 5 had never existed, at least some of these election changes would have gone into effect and ripened into Section 2 violations. Section 5 therefore has blocked and deterred many Section 2 violations from ever taking place in covered jurisdictions.

Nevertheless, covered jurisdictions have produced a disproportionate share of Section 2 violations, even after nearly a half-century of federal preclearance review, objections, and enforcement actions. Far from evidence that Section 5 is no longer needed, this discrepancy is strong evidence of Section 5's continued importance in the effort to secure voting rights in the covered jurisdictions.

II. Petitioner, its *amici*, and the dissent below have misconstrued and misapplied the VRI Study and database. Their methodological arguments are either wrong or irrelevant. And their argument that many "covered jurisdictions appear indistinguishable from their uncovered peers," *id.* at 93a (Williams, J., dissenting), overlooks that these "covered states appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary," *id.* at 59a-60a. As the Court of Appeals observed, "had section 5 not been in effect, one would expect significantly more discrimination in [covered jurisdictions] than in the non-covered states with the worst records." *Id.* at 60a. And in any event, none of the criticisms leveled against the VRI Study call into question its fundamental insight that, on a per capita basis, successful reported Section 2 suits are much more concentrated in the covered jurisdictions.

ARGUMENT

I. THE VRI STUDY AND DATABASE REINFORCE THE CONTINUING NEED FOR SECTION 5 IN THE COVERED JURISDICTIONS.

The VRI Study and database were simply one part of a massive evidentiary record that was before Congress when it reauthorized Section 5 in 2006.[4] Moreover, VRI used "conservative[]" methodology that *understates* the continuing disparities between covered and non-covered jurisdictions in opportunities for racial and language minorities to participate equally in the political process and elect candidates of their choice. VRI Study at 655; *see* Pet. App. 54a ("the Katz data on published cases is necessarily underinclusive" of all Section 2 litigation).

Nevertheless, the VRI Study and database provide powerful evidence in support of Congress's reauthorization of Section 5. An analysis of Section 2 litigation outcomes, and of the factual findings that support those outcomes, suggests that minority voters have continued to be more likely to confront obstacles to political participation in covered jurisdictions than elsewhere.

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[4] During the 2006 reauthorization and amendment process, Congress held 22 hearings, heard testimony from 92 witnesses, and "amassed a 15,000-page legislative record." Pet. App. 266a. That record "consisted of thousands of pages of testimony, reports, and data regarding racial disparities in voter registration, voter turnout, and electoral success; the nature and number of section 5 objections; judicial preclearance suits and section 5 enforcement actions; successful section 2 litigation; the use of 'more information requests' and federal election observers; racially polarized voting; and section 5's deterrent effect." *Id.* at. 12a; *see also* H.R. Rep. No. 109-478, at 5, 11-12 (summarizing the legislative history); S. Rep. No. 109-295, at 2-4 (same).

A. Section 2 Litigation Outcomes and Judicial Findings Are Relevant to the Constitutionality of Reauthorized Section 5.

Section 2 of the Voting Rights Act prohibits, on a nationwide and permanent basis, the imposition or application of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [language minority status]." 42 U.S.C. § 1973(a). A violation of Section 2 occurs when the challenged requirement or procedure objectively results in minority voters having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). As the Court of Appeals observed, this "results test" is relevant here because, among other reasons, it "requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence." Pet. App. 37a (citing *Rogers v. Lodge*, 458 U.S. 613, 623-27 (1982)).

If, in some parallel universe, there were no longer any geographic disparities in voting rights discrimination against racial and language minorities—if the repeatedly reaffirmed need for Section 5 preclearance in certain covered jurisdictions had simply "gone away"—one would expect Section 2 litigation outcomes to be roughly uniform throughout the country. If pockets of voting discrimination were no longer concentrated in certain jurisdictions, one would expect the volume and results of Section 2 litigation to be roughly the same in covered and non-covered jurisdictions. In this counterfactual world, a Section 2 plaintiff would be no more likely to prevail in Alabama than in any other State. Judicial findings of continued voting discrimination against racial and language minorities would be spread fairly evenly, not concentrated in certain portions of the country.

Indeed, for several reasons, one would expect the absolute number of Section 2 violations in this hypothetical world to be much *greater* in non-covered jurisdictions than in covered ones. Since less than a quarter of Americans live in covered jurisdictions, we would expect a much larger number of successful Section 2 outcomes in non-covered jurisdictions, which contain three-quarters of our population, including most African Americans, Latinos, and Native Americans. *See* Pet. App. 49a; Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2, in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power 183, 211 & n.138 (A. Henderson ed., 2007) [Katz, *Not Like the South?*].

The disparities become even more pronounced when one considers the relative number of political subdivisions in covered and non-covered jurisdictions. By a lopsided margin, covered jurisdictions contain far fewer local governmental units—*e.g.*, county governments, townships, and independent school districts—than the non-covered ones.[5] Assuming those units regulate voting and election practices with similar intensity, this disparity suggests that the covered jurisdictions should be the source of far *fewer* practices that could become the basis for a Section 2 lawsuit. Thus, whether examined in light of differences in population or the number of local governmental units, one would expect a much higher number of Section 2 violations in the non-covered jurisdictions if, in a counterfactual world, there were no longer geographic disparities in voting rights discrimination against racial and language minorities.

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[5] As of 2007, the covered jurisdictions accounted for just 13.3% of the political subdivisions in the United States, while non-covered jurisdictions contained 86.7% of such subdivisions. Thus, despite having roughly a quarter of the nation's popula-

In addition, any effort to compare covered with non-covered jurisdictions must consider Section 5's role as an *operational* statute, one that has actively been blocking and deterring retrogressive or otherwise discriminatory voting changes for the past two generations. Although Sections 2 and 5 are not coextensive, they outlaw many of the same practices and conduct. "Where they overlap, preclearance should block implementation of the offensive practice and eliminate the need for plaintiffs to challenge it under section 2. . . . [I]f [covered] jurisdictions have been 'cured,' they should account for fewer successful

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tion, covered jurisdictions had less than a sixth of its local governmental units. *See* U.S. Census Bureau, *2007 Census of Governments*, http://www.census.gov/govs/cog/ (last visited Jan. 29, 2013); U.S. Census Bureau, *Vintage 2007: State Tables*, http://www.census.gov/popest/data/historical/2000s/vintage_2007/index.html (last visited Jan. 29, 2013). These figures do not include the covered townships in Michigan and New Hampshire because of the difficulty in determining which local governmental units serve those jurisdictions. As of 2007, fully covered States accounted for just 12.3% of the total local governmental units nationwide. U.S. Census Bureau, *2007 Census of Governments*, http://www.census.gov/govs/cog/ (last visited Jan. 29, 2013).

section 2 lawsuits than noncovered ones, where section 5 does not operate." Ellen D. Katz, *Mission Accomplished?*, 117 Yale L.J. Pocket Part 142, 145-46 (2007) [Katz, *Mission Accomplished?*]; *see also* Katz, *Not Like the South?*, at 211.

Although it is impossible to pinpoint how an alternative world would have looked in the absence of Section 5, there can be no genuine dispute that preclearance has dramatically reduced the number of potential Section 2 violations in covered jurisdictions. Congress found in the 2006 Act that, pursuant to Section 5 and related provisions, there have been hundreds of federal objections "interposed" against attempted election changes in covered jurisdictions; hundreds more requests for additional information (so-called "MIRs") "followed by voting changes withdrawn from consideration by [covered] jurisdictions"; numerous DOJ enforcement actions that "prevented election practices . . . from being enacted to dilute minority voting strength"; many failed attempts by covered jurisdictions to obtain declaratory judgments preclearing proposed voting changes; and "tens of thousands of Federal observers" monitoring election practices in covered jurisdictions. 2006 Act § 2(b)(4)-(5), (8); *see* Pet. App. 31a-46a, 131a-32a, 206a-31a, 240a-45a (all cataloguing the extensive Section 5 enforcement efforts in covered jurisdictions since 1982). These enforcement measures blocked or mitigated many voting practices that otherwise would have resulted in even more Section 2 litigation in the covered jurisdictions.

The impacts of Section 5 preclearance cannot be measured in the numbers of federal objections, MIRs, or enforcement actions alone. As the House Judiciary Committee emphasized, Section 5 has deterred covered jurisdictions "from even attempting to enact discriminatory voting changes" because officials understand that "'submitting discriminatory changes is a waste of taxpayer time and money.'" H.R. Rep. No. 109-478, at 24 (citation omitted).

> "Section 5's reach in preventing discrimination is broad. Its strength lies not only in the number of discriminatory voting changes it has thwarted, but can also be measured by the submissions that have been withdrawn from consideration, the submissions that have been altered by jurisdictions in order to comply with the [Voting Rights Act], or in the discriminatory voting changes that have never materialized." *Id.* at 36.

See also S. Rep. No. 109-295, at 11, 14 (describing Section 5's deterrent effect); *Nw. Austin*, 557 U.S. at 205 (quoting district court finding that the legislative record "demonstrat[ed] that section 5 prevents discriminatory voting changes" by "quietly but effectively deterring discriminatory changes") (citation and internal quotation marks omitted); *South Carolina v. United States*, No. 12-203, 2012 WL 4814094, at *21 (D.D.C. Oct. 10, 2012) (Bates, J., concurring) (discussing the "vital function" that Section 5 preclearance review played in causing South Carolina to make its proposed voter photo ID law less restrictive through the addition of "key ameliorative provisions," changes that "were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act").

If these targeted federal enforcement measures were operating in a world in which "governmental officials in each jurisdiction ha[d] equal propensity to engage in conduct prohibited by Section 2," one would expect to find far more Section 2 cases and violations in *non-covered* jurisdictions, "where, by definition, preclearance does not operate." Katz, *Not Like the South?*, at 211. And given the differences in population and numbers of political subdivisions between covered and non-covered jurisdictions, *see* pp. 8-9 *supra*, one would expect this disparity in Section 2 outcomes to be even greater.

As next shown, just the opposite is true—Section 2 claims have been much more likely to succeed in *covered* jurisdictions, and eight of the nine "Senate Factors" associated with voting discrimination have been more likely to be found in covered than in non-covered jurisdictions.

B. Section 2 Litigation Outcomes and Judicial Findings Support the Continued Need for Section 5 Preclearance.

1. There Are Proportionately Many More Successful Section 2 Outcomes in Covered than in Non-Covered Jurisdictions.

The Court of Appeals pointed to "two key findings" in the VRI Study "suggesting that racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'" Pet. App. 49a (citing *Nw. Austin*, 557 U.S. at 203):

- "[A]lthough covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982." *Id.* When the data are adjusted to reflect population differences, "the rate of successful section 2 cases in covered jurisdictions (.94 per million residents) is *nearly four times* the rate in non-covered jurisdictions (.25 per million residents)." *Id.* at 49a-50a (emphasis added).

- "[T]he study found higher success rates in covered jurisdictions than in non-covered jurisdictions"—42.5% versus 32.2%. *Id.* at 51a; *see* VRI Study at 656.

These disparities in litigation success rates are even more pronounced in challenges to local (especially county) voting requirements and procedures—*e.g.*, a plaintiff success rate of 55.3% in covered counties versus only 36.4% in non-covered counties. *See* App. C *infra*. The number of proposed changes submitted by local governments "far outpaces the number of submissions from state governments," and federal objections to proposed local changes "far outnumber" objections to state changes.[6] "Even in this context, where preclearance operates most vigorously to block electoral changes, covered jurisdictions still are the subject of more successful Section 2 challenges than are noncovered jurisdictions, where preclearance is not screening out any of the challenges to local practices." Katz, *Not Like the South?*, at 211-12.

These disparities in Section 2 outcomes between covered and non-covered jurisdictions persist at both the trial and appellate levels. The appellate disparity is particularly striking:

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[6] Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion To Scuttle Section 5 of the Voting Rights Act*, 84 Neb. L. Rev. 605, 612-13 (2005). It has been argued that Section 5 "has had its greatest impact, success, and necessity" at the local level, and that "protection of minority voting rights in local government represents section 5's most important modern-day function." *Id.* at 610, 612.

> "Appellate courts in covered jurisdictions were both more likely to reverse denials of liability and less likely to reverse violations than were courts in non-covered regions. In other words, defendants were more likely to win on appeal in non-covered regions, while plaintiff-appeals were more likely to succeed in covered regions. This suggests that trial judges in covered jurisdictions, if anything, appear to have read section 2 too restrictively, and that the violations identified in covered regions are more clear and less vulnerable to challenge than those found elsewhere." Ellen D. Katz & Anna Baldwin, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 Colum. L. Rev. Sidebar 23, 26 (2008) [Katz & Baldwin, *Why Counting Votes Doesn't Add Up*].

As the Court of Appeals emphasized, this statistically significant and continuing disparity between successful Section 2 outcomes in covered and non-covered jurisdictions is "particularly dramatic given that Attorney General objections block discriminatory laws before they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions." Pet. App. 38a. Though the precise impact of Section 5 preclearance cannot be quantified, consider that, while Georgia had only three successful published Section 2 cases between 1982 and 2004, the State and its subdivisions during this same period were the subject of 83 Section 5 objections, 17 successful DOJ enforcement actions, and numerous MIRs that resulted in the withdrawal of 90 proposed voting changes. *Id.* at 58a-59a. Likewise, South Carolina had only three successful published Section 2 cases during this time but was the subject of 74 Section 5 objections, 10 successful DOJ enforcement actions, and numerous MIRs resulting in the withdrawal or abandonment of 77 proposed voting changes. *Id.* at 59a.

Though not all of these blocked changes would have ripened into constitutional or Section 2 violations if allowed to proceed, surely some would have sparked additional Section 2 litigation. It is not difficult to imagine far more than merely three successful published Section 2 cases in Georgia and another three in South Carolina if the federal government had not blocked and narrowed hundreds of proposed voting changes in those States. As the Court of Appeals recognized, that is what makes the evidence in the VRI Study and database "particularly dramatic"—a disproportionate share of Section 2 violations have occurred in covered jurisdictions, even as federal preclearance reviews, objections, and enforcement actions have continued to prevent voting rights violations that otherwise would have been addressed in Section 2 litigation. This is a testament to the tenacity of voting discrimination in covered jurisdictions, not evidence that Section 5 is no longer needed.

2. The "Senate Factors" Findings Collected in the VRI Study and Database Reinforce the Continued Need for Section 5 Preclearance.

Looking beyond litigation outcomes to the findings of fact made by judges in Section 2 litigation, the VRI Study shows that courts in covered jurisdictions have been much more likely to document certain conditions linked to voting discrimination than courts in non-covered jurisdictions. The so-called "Senate

Factors" analysis spelled out in the 1982 Senate Report provides courts with a structured but non-exhaustive checklist of nine factors to consider in determining whether a challenged practice results in racial and language minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see* S. Rep. No. 97-417, at 28-29 (1982); *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (pointing to the 1982 Senate Report as "the authoritative source for legislative intent" of the 1982 amendments); 478 U.S. at 43-46.[7]

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[7] The non-exhaustive factors spelled out in the 1982 Senate Report include (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process"; (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized"; (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group"; (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process"; (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process"; (6) "whether political campaigns have been characterized by overt or subtle racial appeals"; (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction"; (8) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"; and (9) "whether the policy underlying the state or political subdivision's use of

As shown in Appendix B to this brief, courts in covered jurisdictions made more affirmative "Senate Factor" findings (and were more likely to make such findings) with respect to *eight out of the nine Senate Factors.* That is a striking disparity if, as Shelby County insists (Pet. Br. 46), there are no longer any meaningful differences in minority voting opportunities between covered and non-covered jurisdictions. Specifically:

- "Courts in covered jurisdictions have both found and been more likely to find at levels that are statistically significant: acts of official discrimination that compromise voting rights, the use of devices that 'enhance[]' opportunities for discrimination against minority voters, and a lack of success by minority candidates." Katz, *Not Like the South?*, at 187 (footnote omitted).
- "Courts in covered jurisdictions have also found and been more likely to find a lower level of minority voter registration and turnout, contemporary voting opportunities shaped by the continuing effects of discrimination in various socio-economic realms, racial appeals in campaigns, and tenuous justifications underlying challenged practices, although these differences between covered and noncovered jurisdictions are not statistically significant." *Id.*
- "In roughly equal numbers and proportions, courts in covered and noncovered jurisdictions have found racially exclusive slating processes

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such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep. No. 97-417, at 28-29.

> and nonresponsive elected officials. Courts in both types of jurisdictions also found legally significant racial bloc voting in a roughly equal number of lawsuits, but courts in covered jurisdictions documented voting patterns that were more extremely polarized by race at a rate that is statistically significant." *Id.* at 187-88.

Some of the measured disparities in the VRI database are not statistically significant, though several are. Yet even where the numbers are roughly equivalent, that *itself* is significant evidence supporting the continued need for Section 5 preclearance review. In the counterfactual world posited by Shelby County, the particularized "Senate Factors" findings should be overwhelmingly concentrated in *non-covered* jurisdictions given that (1) those jurisdictions contain more than three-quarters of the country's population, including the majority of its racial and language minorities; (2) they also contain over five-sixths of the country's local governmental units; and (3) non-covered jurisdictions, by definition, have not been subjected to two generations of federal preclearance review, objections, MIRs, enforcement litigation, and federal monitoring. Given these considerations, one would expect to find many more instances of the Senate Factors in non-covered jurisdictions than in covered jurisdictions. But just the opposite is true with respect to eight out of nine Senate Factors (all but Factor 4, candidate slating processes).

The VRI Study and database also show that, in several instances, courts in covered jurisdictions were more likely, at statistically significant levels, to make findings of serious racial and language discrimination in voting.

Senate Factor 1 (acts of official discrimination). Courts in covered jurisdictions identified evidence of a "history of official discrimination" touching the right to vote in 58.1% of their Section 2 cases that considered at least one of the Senate Factors. By contrast, courts in non-covered jurisdictions identified such a history in only 38.2% of opinions identifying at least one Senate Factor. Katz, *Not Like the South?*, at 194 n.40; VRI Study at 675-97. The findings document a broad and troubling range of official efforts to harass, intimidate, and interfere with voting rights in covered jurisdictions. VRI Study at 678-85. Note that Senate Factor 1 is not met simply by a history of official discrimination; that discrimination must "touch[]" the contemporary, "present-day ability of [minority voters] to participate in the political process." *Id.* at 676, 696. Thus it is especially significant that most findings of official discrimination were concentrated in covered jurisdictions.

Senate Factor 2 (racially polarized voting). Evidence of racially polarized voting "bear[s] heavily on the issue of purposeful discrimination," because such polarization "allows those elected to ignore [minority] interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." *Rogers v. Lodge*, 458 U.S. at 623. Courts in covered and non-covered jurisdictions have found evidence of legally significant racially polarized voting in roughly the same number of lawsuits. Katz, *Not Like the South?*, at 195-96. But "courts in covered jurisdictions have documented racial polarization in specific elections that was more extreme than have courts in noncovered ones, and have done so at rates that are statistically significant." *Id.* at

196. ("Extreme" polarization is defined as white bloc voting of 80% or more in minority-white elections.) Although 40.9% of the elections documented in *non-covered* jurisdictions found extreme white bloc voting, fully 80.7% of the elections documented in *covered* jurisdictions involved this extreme degree of racial polarization. *See id.* at 196-97. Congress in its statement of "Congressional Purpose and Findings" emphasized that the "continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection" of Section 5. 2006 Act § 2(b)(3).

Senate Factor 3 (use of discrimination-enhancing practices). This factor considers the "extent to which the state or political subdivision has used . . . voting practices or procedures that may enhance the opportunity for discrimination" against racial and language minorities. S. Rep. No. 97-417, at 29. The VRI Study found that 63.5% of the cases finding Senate Factor 3 arose in covered jurisdictions, as opposed to only 36.5% in non-covered jurisdictions. VRI Study at 698. Courts in covered jurisdictions were thus nearly *twice* as likely to make this kind of finding as courts in non-covered jurisdictions. *See id.*; Katz, *Not Like the South?*, at 197.

Senate Factor 7 (lack of minority candidate success). Courts in covered jurisdictions also have been more likely to document a longstanding lack of success by minority candidates—56.7% of cases making this finding involved covered jurisdictions while only 43.3% involved non-covered jurisdictions. VRI Study at 718. "Nearly one in two courts in covered jurisdictions found a lack of candidate success, compared to less than one in three courts in noncovered jurisdictions." Katz, *Not Like the South?*, at 202; *see* VRI Study at 717-22.

These disparities in key Senate Factors findings are all the more remarkable given that covered jurisdictions during this period were subject to ongoing federal preclearance, objections, MIRs, enforcement proceedings, and monitoring, while non-covered jurisdictions were not. If opportunities for minority political participation were uniform nationwide, one would have expected to find many more Section 2 violations and many more Senate Factor findings documenting voting discrimination in non-covered than in covered jurisdictions. The only fair prediction is that, if Section 5 preclearance were eliminated, the disparities between covered and non-covered jurisdictions documented in the VRI Study would become even more pronounced.

II. PETITIONER, ITS *AMICI*, AND THE DISSENT BELOW MISCONSTRUE THE VRI STUDY AND DATABASE.

The authors of the VRI Study consistently have acknowledged that it "of course" evaluates "only a portion of the Section 2 claims filed or decided since 1982"—many claims having been either dropped, settled, or decided without any decision ever being published in a federal reporter or on Westlaw or Lexis. VRI Study at 654. The study is thus "conservative[]" in its documentation of Section 2 violations. *Id.* at 655. As Professor Katz has emphasized, the available data "suggest[] that a fuller accounting of section 2 litigation would reveal an even greater proportion and number of successful plaintiff outcomes in covered jurisdictions than in noncovered ones." Katz, *Mission Accomplished?*, at 146.

That is precisely the conclusion reached by the Court of Appeals below. Based on its analysis of Section 2 cases that involved both published and unpublished decisions, the court emphasized that covered jurisdictions "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." Pet. App. 59a; *see also id.* at 54a-55a (unpublished Section 2 decisions "provide[] helpful additional evidence that corroborates the disparities in the level of discrimination between covered and non-covered jurisdictions revealed by the [VRI Study's] published data").

Although the methodology and conclusions of the VRI Study are conservative and "necessarily under-inclusive," *id.* at 54a, the dissenting judge below, petitioner Shelby County, and several *amici* raise various objections to the study. None is well taken.

Relevance objections. Shelby County argues that, "[o]f the data in the Katz Study, intentional-discrimination findings should be the only relevant statistic[.]" Pet. Br. 48 n.10. It parses these findings and declares that they demonstrate *more* "intentional discrimination" now exists in non-covered jurisdictions than in covered ones. *Id.* at 47-48.

This argument fails for many reasons. Because Section 2 uses a "results test" that does not require proof of discriminatory intent, it tends to understate the true extent of intentional discrimination. "[C]ourts have no need to find discriminatory intent once they find discriminatory effect." Pet. App. 37a. Indeed, courts have a duty to *avoid* addressing constitutional issues where they can resolve the case on narrower statutory grounds, which further "explains why the legislative record contains so few published section 2 cases with judicial findings of discriminatory intent." *Id.*; *see Escanaba Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (declining to decide whether evidence of discriminatory intent was sufficient to establish a Fourteenth Amendment violation where challenged system also violated Section 2); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (deciding case under Section 2 while noting that the challenged practice "bears the mark of intentional discrimination").

Moreover, Section 2's results test "requires consideration of factors very similar"—the Court of Appeals termed them "virtually identical"—"to those used to establish discriminatory intent based on circumstantial evidence." Pet. App. 37a; *see also Rogers v. Lodge*, 458 U.S. at 622-27 (upholding finding of intentional discrimination based on satisfaction of precursors to the Senate Factors).[8] The Senate Factors findings are thus highly relevant to the Section 5 inquiry. And notwithstanding the focus on *results* rather than *intent*, many reported Section 2 decisions have included "judicial findings of intentional or unconstitutional voting discrimination by covered jurisdictions since 1982," including in petitioner's home state of Alabama. Pet. App. 235a; *see id.* at 235a-40a; VRI Study at 683-85.

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[8] In upholding a finding of intentional voting discrimination, this Court in *Rogers* pointed to evidence of "bloc voting along racial lines"; the absence of minority electoral success; "the impact of past discrimination on the ability of blacks to participate effectively in the political process"; practices that "had prevented blacks from effectively participating in Democratic Party affairs and in primary elections"; the "unresponsive[ness] and insensitiv[ity]" of elected officials "to the needs of the black community"; "the depressed socio-economic status" of the minority community; the "sheer geographic size" of the electoral district; and the use of a "majority vote requirement." 458 U.S. at 626-27. These considerations that helped to establish intentional discrimination in *Rogers* are the same as Senate Factors 1-5 and 7-8. *See* n.7 *supra*.

Here again, the Section 2 numbers would be much worse in covered jurisdictions in the absence of Section 5 preclearance review. "[B]ecause most intentionally discriminatory voting practices are blocked by Section 5 prior to their implementation, they are unlikely to be the subject of a subsequent Section 2 challenge." Pet. App. 233a. As the Court of Appeals concluded, the continuing volume of successful Section 2 claims in covered jurisdictions is "particularly dramatic" given the ongoing vigorous enforcement of Section 5 preclearance review. Pet. App. 38a. The absence of even more extensive voting discrimination in covered jurisdictions does not suggest that the need for Section 5 preclearance review has passed, but that Section 5 "is fulfilling its most basic mission." Katz, *Not Like the South?*, at 210. "A record of pervasive unconstitutional conduct should not be expected since the legislation at issue was put in place to remedy precisely such conduct. Indeed, to require such a record would mean that only ineffective statutes are entitled to reauthorization." *Id.* at 185.

Methodological objections. The Court of Appeals believed the VRI Study is *underinclusive*, and that covered jurisdictions "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." Pet. App. 59a. Shelby County, several of its supporting *amici*, and the dissent below disagree. They argue that the VRI Study is *overinclusive*, that it misclassifies some Section 2 litigation outcomes, and that it relies on the wrong data.

Collectively, these critics quibble with VRI's characterization of a grand total of four decisions out of the 763 it analyzed. These objections to about one-half of one percent of the decisions analyzed hardly undermine confidence in the VRI Study or its conclusions. Neither petitioner, its *amici*, nor the dissent below explain how any revised classification of these four decisions would meaningfully change the conclusions of the study in any way. And in any event, *amici* respectfully submit that at least three—if not all four—of the challenged decisions were properly classified in the original study.[9]

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[9] The dissent below cited *Brown v. Board of School Comm'rs*, 706 F.2d 1103 (11th Cir. 1983), as a case that did not involve *modern-day* "discriminatory intent." Pet. App. 97a (Williams, J., dissenting). With respect, although the challenged at-large system had first been enacted in 1876, the district court found "a *present* purpose to dilute the black vote . . . through intentional state legislative *inaction*." *Brown v. Moore*, 428 F. Supp. 1123, 1139 (S.D. Ala. 1976) (emphasis added); *see also id.* at 1133-34 (discussing modern Board's "lack of cooperation and dilatory practices"). The Eleventh Circuit affirmed without qualification the district court's conclusion that "the at-large election system had been adopted *and maintained* for the purpose of diluting black voting strength." 706 F.2d at 1104, 1107 (emphasis added).

Petitioner chides the VRI Study for having included as a "successful" Section 2 case the decision in *Fayetteville, Cumberland Cty. Black Dem. Caucus v. Cumberland Cty.*, No. 90-2029, 1991 WL 23590 (4th Cir. Feb 28, 1991) (per curiam); *see* Pet. Br. 36 n.8. *Amici* believe the outcome in this case was correctly scored as a "success." Plaintiffs challenged the use of five-member, at-large elections for county commissioners. During the course of the litigation, the county abandoned the challenged system, adopted a new seven-member, single-district

The State of Texas in its *amicus* brief criticizes the Court of Appeals' decision for *"refus[ing]* to acknowledge or cite" a particular academic article that, according to Texas, "dismantled" the VRI Study. *See* Texas *Amicus* Br. at 22-23 (emphasis added) (citing Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum. L. Rev. 1 (2008)). Texas itself fails to "acknowledge or cite" a published

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commissioner system, and obtained Section 5 preclearance from the DOJ. Plaintiffs nevertheless pursued their challenge, and the Fourth Circuit language quoted by petitioner concerns plaintiffs' remaining claims against the new, precleared system. Given the evident causal link between plaintiffs' Section 2 claim and the defendant's abandonment of the challenged system and adoption of a new, precleared system, VRI believes this case is properly scored as a "successful" Section 2 outcome.

Amicus American Unity Legal Defense Fund also splits hairs with VRI's interpretations of *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), and *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996). *See* AULDF *Amicus* Br. at 21 n.8 and 27 n.16. AULDF concedes that *Wesch* "may represent a successful § 2 challenge," *id.* at 21 n.8, and rightly so: In response to the Section 2 claim, the State of Alabama "agree[d] that a significant African American Congressional district should be created" pursuant to a plan the Court found would "provide[] African-Americans a reasonable opportunity to elect a candidate of their choice." 785 F. Supp. at 1498-99. VRI thus fairly scored this decision as a Section 2 "success."

White presents a closer question. There, the Eleventh Circuit vacated a stipulated final judgment that would have changed Alabama's system for electing state appellate judges. But the Eleventh Circuit did not reject the *substance* of the Section 2 claim, simply the specific remedy the parties proposed—a federal court order that Alabama increase the size of its appellate courts. 74 F.3d at 1072-73. The Eleventh Circuit remanded to the three-judge district court for further proceedings. *Id.* at 1075; *see White v. Alabama*, 922 F. Supp. 552, 555 (M.D. Ala. 1996) (noting subsequent March 18, 1996 federal preclearance of state expansion of its appellate courts).

response to this article that detailed the many errors in the Cox and Miles objections. *See* Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 23.

Texas argues that the Cox and Miles article "show[s] that there has been a distinct downward trend in the rate of successful claims brought by section 2 plaintiffs since 1982." Texas *Amicus* Br. at 22-23. This is hardly news; the VRI Study itself emphasized that "[c]ourts identified violations of Section 2 more frequently between 1982 and 1992 than in the years since." VRI Study at 656. Of the total violations identified in the VRI database, "courts found 46.7% of them during the 1980s, 38% during the 1990s, and 15.2% since then." *Id.* at 656; *see also* App. A *infra*.

Yet despite this decline, Section 2 plaintiffs in covered jurisdictions continued to win lawsuits at a greater rate than their counterparts in non-covered jurisdictions. In the first half of the study, for example, plaintiffs in covered jurisdictions won 54% of their cases, while plaintiffs in non-covered jurisdictions won in 46%. In the second half, plaintiffs in covered jurisdictions won 28% of their cases, while plaintiffs in non-covered jurisdictions won in 22%. Although the 2000-05 data were more equivocal, suggesting a rough equivalence of outcomes, those data must be adjusted to reflect (1) the population disparities between covered and non-covered jurisdictions; (2) the disparities in relative numbers of political subdivisions; and (3) the blocking and deterrence effects of Section 5 preclearance review in covered jurisdictions. These combined factors should have reduced the number of successful Section 2 outcomes in covered jurisdictions. Thus, even if the disparity in comparative success rates had narrowed in recent years, a rough equivalence of outcomes between jurisdictions would still be evidence of the continued need for, not obsolescence of, Section 5. *See* pp. 8-12 *supra.*[10]

Texas also points to the Cox and Miles article in arguing that "[t]he higher rate of claimant success in covered jurisdictions appears only at the trial level," and that "section 2 claimants in covered jurisdictions are *less successful at the appellate level* than claimants in non-covered jurisdictions." Texas *Amicus* Br. at 23 (emphasis added). Just the opposite is true. As discussed above, the appellate courts included in the VRI database were "both more likely to reverse denials of liability and less likely to reverse violations than were courts in non-covered jurisdictions"; plaintiffs fared much better on appeal in covered than in non-covered areas. Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 26. "This suggests that . . . violations identified in covered regions are more clear and less vulnerable to challenge than those found elsewhere." *Id.*; *see* pp. 13-14 *supra*.

The Cox and Miles article is off base because it measured individual judges' votes, not individual case outcomes. That methodology tells us virtually nothing: a single-judge district court judgment "might represent a violation so patent that appeal would have been futile, and yet it yields but one vote compared with the four produced by a closer case affirmed on appeal [by a three-judge panel]." Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 24-25. The VRI database contains many such unappealed single-judge decisions; "[t]hat these appeals did not materialize hardly suggests that covered jurisdictions have fewer voting rights problems than non-covered ones." *Id.* at 26; *see id.* at 26 n.10 ("Our claim has consistently been that these judgments, and the findings that support them, matter far more than the number of times individual judges happen to cast liability votes in the course of a section 2 lawsuit."). Counting individual judges rather than case outcomes also skews the analysis because "three-judge trial panels decided more than four times as many section 2 cases in non-covered jurisdictions than in covered ones." *Id.* at 27.[11] "Judge-counting," in short, adds nothing to the analysis other than error and confusion.

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[10] In addition, "the pace of litigation following post-census redistricting suggests that data from partial decades, and indeed, the early part of any decade may not be representative of the decade as a whole." Katz, *Mission Accomplished?*, at 144 n.14.

Disaggregation objections. The dissent below argued that, when the VRI data are "disaggregate[d] by state," some of the covered jurisdictions "appear undistinguishable from their uncovered peers" in terms of successful, reported Section 2 cases. Pet. App. 91a-93a (Williams, J., dissenting). Shelby County echoes this theme: "the nine fully-covered States are only 5 of the top 10" States in "adjudicated Section 2 violations," "non-covered Illinois had more Section 2 lawsuits filed since 1982 than all but three fully-covered States," and so forth. Pet. Br. 47.

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[11] Such panels are convened to hear challenges to statewide and congressional redistricting plans. Many more such challenges were filed in non-covered jurisdictions, "precisely because section 5 does not operate in these regions." Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 27. In covered jurisdictions, "section 5 objections and adjustments made in anticipation of such objections vastly reduced the likelihood that separate section 2 challenges would follow. No such screening occurred in non-covered jurisdictions; hence many more three-judge trial panels were convened." *Id.*

These arguments fail for many reasons. To begin, this Court has emphasized that "[i]t is irrelevant" to the constitutional issues that "there is evidence of voting discrimination" in some non-covered jurisdictions. *South Carolina v. Katzenbach*, 383 U.S. 301, 330-31 (1966). "Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Id.* at 331.

In addition, petitioner is located in a State that consistently ranks near the top of all States in Section 2 violations—whether measured in terms of total filings, successful filings, successful filings per capita, successful filings per local governmental unit, successful filings per million minority members, or other metrics. Even if some covered jurisdictions might be entitled to an exemption from preclearance on the theory that their compliance track records "appear indistinguishable from their uncovered peers," Pet. App. 93a (Williams, J., dissenting), Shelby County, Alabama is not one of those jurisdictions. Under any metric of voting discrimination, petitioner is readily "[]distinguishable from [its] uncovered peers." *Id.*

Indeed, the disaggregated data confirm that the top tier of States in Section 2 violations (under any metric) is consistently dominated by covered jurisdictions. There is a core of covered jurisdictions—especially Alabama, Mississippi, and Louisiana—that nearly always rank among the top five violators in all categories. Even the dissent conceded that it "might be defensible" to continue Section 5 preclearance in these three States, "and possibly the covered portions of South Dakota and North Carolina" as well. Pet. App. 93a (Williams, J., dissenting).

Covered States like South Dakota, Texas, North Carolina, and Virginia often join the top tier of Section 2 violators depending on the choice of metric (South Dakota has the most successful Section 2 outcomes per million people, Texas is Number 4 in successful Section 2 cases, and so forth). Under some metrics—such as number of filings and successful suits per local governmental unit—the top tier is especially dominated by covered jurisdictions. Beyond this, disaggregation reveals a situation in which covered jurisdictions always dominate the top tier of Section 2 violators; are almost always concentrated in the bottom third of compliant States; and almost never appear in the top half of compliant States under any metric.

Moreover, even where "covered jurisdictions appear indistinguishable from their uncovered peers" in terms of some Section 2 metrics—where "the middle-range covered states appear comparable to some non-covered jurisdictions," Pet. App. 59a—that does not mean the need for Section 5 has now gone away. To the contrary, as the Court of Appeals emphasized, Section 5 itself explains why there now is an apparent equivalence among some covered and non-covered States in terms of Section 2 outcomes:

> "[A]s Congress found, the mere existence of section 5 deters unconstitutional behavior in the covered jurisdictions. That is, the middle-range covered states appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary. Had section 5 not been in effect, one would expect significantly more discrimination in North Carolina, South Carolina,

Virginia, Texas, and Georgia, all covered by section 5, than in the non-covered states with the worst records." *Id.* at 59a-60a.

CONCLUSION

The VRI Study and database demonstrate that, in the nearly quarter of a century leading up to the 2006 reauthorization of Section 5, Section 2 plaintiffs were substantially more likely to succeed in covered than in non-covered jurisdictions, and were significantly more likely to encounter practices and conditions associated with voting discrimination. These disparities would have been even worse in the absence of Section 5's ongoing role in blocking and deterring potential constitutional and Section 2 violations in covered jurisdictions. Congress reasonably relied on this and other evidence in finding that, "[d]espite the progress made by minorities" since 1965, "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Act § 2(b)(7). The decision below accordingly should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Total Lawsuits and Success in Voting Rights Act Section 2 Litigation, 1982–2005

Covered Jurisdictions

Year Decided	Total Lawsuits	Success	% Success
1980s	59	35	59.3%
1990s	72	27	37.5%
2000s	29	6	20.7%
Grand Total	160	68	42.5%

Noncovered Jurisdictions

Year Decided	Total Lawsuits	Success	% Success
1980s	41	21	51.2%
1990s	84	23	27.4%
2000s	46	11	23.9%
Grand Total	171	55	32.2%

Overall[*]

Year Decided	Total Lawsuits	Success	% Success
1980s	100	56	56.0%
1990s	156	50	32.1%
2000s	75	17	22.7%
Grand Total	331	123	37.2%

[*] The chi-square value analyzing the contingency table with covered/noncovered jurisdictions versus successful/unsuccessful grand total is 3.782 (df = 1, p = 0.052).

Source: Reproduced from Table 8.1 in Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2, in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power 215 (A. Henderson ed. 2007); *see also* VRI Database Master List (2006), available at http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

APPENDIX B

Senate Factor Findings in Post–1982 Section 2 Litigation, of All Suits Considering Factors

	Covered Jurisdictions		Noncovered Jurisdictions		
Total Lawsuits	160	100%	171	100%	
Considered Factors	105	65.6%	131	76.5%	
Of Suits Considering Factors:					p > χ 2
Found Factor 1	61	58.1%	50	38.2%	0.002
Found Factor 2	52	49.5%	53	40.5%	0.164
Found Factor 3	33	31.4%	19	14.5%	0.002
Found Factor 4	4	3.8%	6	4.6%	0.975
Found Factor 5	45	42.9%	43	32.8%	0.113
Found Factor 6	18	17.1%	15	11.5%	0.210
Found Factor 7	51	48.6%	39	29.8%	0.003
Found Factor 8	10	9.5%	10	7.6%	0.604
Found Factor 9	13	12.4%	10	7.6%	0.222
All *Gingles* Factors	30	28.6%	38	29.0%	0.941

Source: Reproduced from Table 8.2 in Ellen D. Katz, *Not Like the South?*, at 216; *see also* VRI Database Master List (2006).

APPENDIX C

Local v. State Government Challenges Under Section 2, 1982–2005[a]

	Covered Jurisdictions			Noncovered Jurisdictions		
Level of Gov't	Total	Success		Total	Success	
State	38	11	28.9%	58	15	25.9%
Local	122	57	46.7%	113	40	35.4%
County	47	26	55.3%	44	16	36.4%
City/Town	54	25	46.3%	55	20	36.4%
School[b]	21	6	28.6%	14	4	28.6%
Total	160	68	42.5%	171	55	32.2%

Level of Gov't	Test of Difference[c]
	$p > \chi 2$
State	0.739
Local	0.078
County	0.070
City/Town	0.292
School[b]	0.703
Total	0.052

[a] This figure displays the governing body challenged. Where suits challenged multiple governments, the highest level is counted.

[b] The chi-square value for this level of government is Yates continuity-corrected.

[c] Chi-square values for each level of government analyze contingency tables for covered/noncovered jurisdictions versus successful/unsuccessful results.

Source: Reproduced from Table 8.3 in Ellen D. Katz, *Not Like the South?*, at 217; *see also* VRI Database Master List (2006).

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
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◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

- I. SECTION 5 OF THE VOTING RIGHTS ACT EXCEEDS CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT 2
  - A. Section 5 of the Voting Rights Act Impedes The Traditional Role Of The States In Conducting Elections 4
  - B. Section 5 Was Enacted To Be A Temporary Power Limited To Combat "Exceptional" And "Unique" Circumstances 6
  - C. The Widespread And Persistent Discrimination Giving Rise To The Exceptional And Unique Circumstances At The Time Section 5 Was Enacted No Longer Exist 8
  - D. Congressional Findings Of "Second Generation" Barriers Do Not Satisfy Katzenbach's Requirement Of "Unique" and "Exceptional" Circumstances 10
    - 1. Evidence of Racially Polarized Voting Is Constitutionally Insufficient To Justify Section 5 11

TABLE OF CONTENTS – Continued

Page

2. Other Forms Of Second Generational Barriers Are Not Constitutionally Sufficient To Justify Section 5 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 3

Carrington v. Rash, 380 U.S. 89 (1965) 5

City of Mobile v. Bolden, 446 U.S. 55 (1980) 11, 13

Gregory v. Ashcroft, 501 U.S. 452 (1991) 5

Holder v. Hall, 512 U.S. 874 (1994) 2, 3, 15, 16

Lopez v. Monterey County, 525 U.S. 266 (1909) 5, 6

Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009) 4, 6, 11

Oregon v. Mitchell, 400 U.S. 112 (1970) 5, 9

Rodgers v. Lodge, 458 U.S. 613 (1982) 11

Shaw v. Reno, 509 U.S. 630 (1993) 16

Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 4

Smith v. Allwright, 321 U.S. 649 (1944) 13

South Carolina v. Katzenbach, 383 U.S. 307 (1966) .... *passim*

Terry v. Adams, 345 U.S. 461 (1953) 13

Wright v. Rockefeller, 376 U.S. 52 (1964) 3

CONSTITUTION AND STATUTES:

U.S. Const. amend. XV .... *passim*

U.S. Const. amend. XV, cl. 2 8

Page

U.S. Const. amend. XXIV 9

U.S. Const. art. I, sec. 4 5

Section 5, Voting Rights Act, 47 U.S.C. §1973c (2012) ....*passim*

Voting Rights Act of 1965, Pub. Law 89-110, 79 Stat. 437 ....*passim*

Pub. Law 109-246, §2(b)(1), 120 Stat. 577 (2006) 8, 10

MISCELLANEOUS:

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Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 Saint Louis Univ. Pub. L. Rev. 77 (2010) 10, 13, 14, 15

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TABLE OF AUTHORITIES – Continued

Page

Voting Rights Act: Section 5 of the Act-History, Scope and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 299-301 (2006) 14

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the continuing implementation of Section 5 of the Voting Rights Act.

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SUMMARY OF ARGUMENT

In addition to other important legal questions presented by Petitioners related to the constitutionality of certain provisions of the Voting Rights Act, this case will determine whether "temporary" federal law enforcement powers designed to address "unique" and "exceptional" circumstances that no longer exist remain appropriate to remedy undefined "second generation" barriers to minority voting. The Court must determine the propriety of the "federal courts, and indeed the Nation, [continuing] in the enterprise of systematically dividing the country into electoral districts along racial lines – an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'" *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring). Amicus Curiae Landmark Legal Foundation urges this Court to reverse the lower court's ruling, declare Section 5 of the Voting Rights Act unconstitutional, and return the supervision of elections to the States as provided in the Constitution.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed with the Clerk of the Court letters granting blanket consent to the filing of amicus briefs.

◆

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT EXCEEDS CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT.

"As it was enforced in the years immediately following its enactment, the Voting Rights Act of 1965, Pub. Law 89-110, 79 Stat. 437 ("VRA"), was perceived primarily as legislation directed at eliminating literacy tests and similar devices that had been used to prevent black voter registration in the segregated South." *Holder v. Hall,* 512 U.S., at 894 (Thomas, J., concurring, citing Abigail Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 17-27 (1987).

The Act was immediately and notably successful in removing barriers to registration and ensuring access to the ballot. *Id.* Beginning with the Supreme Court's decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), however, the focus of Voting Rights Act cases moved away from the voting process to a more outcome-based approach applying "the broadest possible scope" to whether state laws might "dilute" the influence of minority votes. *Id.* This outcome-based federal supervision has been expanded with each VRA reauthorization.

As Justice Thomas correctly noted in *Holder v. Hall*, Section 5's application has moved from ensuring the removal of structural barriers to involving the Court in "questions of political philosophy, not questions of law. As such they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories." *Id.*, at 901-02.

Amicus Curiae Landmark urges this Court not to give its imprimatur to Section 5's continuing application as a tool for achieving federally preferred election outcomes. Landmark agrees with Justice Thomas and his assessment that "[t]he assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.* (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.").

A. Section 5 of the Voting Rights Act Impedes The Traditional Role Of The States In Conducting Elections.

Section 5 of the Voting Rights Act places significant burdens on covered states and localities. It mandates that when any "covered" jurisdiction seeks "to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" said jurisdiction must seek "preclearance" to either the Attorney General or a three-judge panel in Washington, D.C. 47 U.S.C. §1973c (2012). It "sweeps broadly" and "places the burden on covered jurisdictions to demonstrate [that the proposed law is not discriminatory]." *Shelby County v. Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012). Furthermore, Section 5 "is the quintessential prophylaxis." *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Northwest Austin*"). It suspends "all changes to state election law – however innocuous – until they have been precleared by federal authorities. . . ." *Northwest Austin,* 557 U.S., at 202. Originally created as a temporary federal power, the VRA established "stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition [it] strengthens existing remedies for pockets of voting discrimination elsewhere in the country." *South Carolina v. Katzenbach*, 383 U.S. 307, 308 (1966).

This significant encroachment runs counter to the Constitution's general framework that leaves to the States "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash*, 380 U.S. 89, 91 (1965). See U.S. Const. art. I, sec. 4. See also *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991) (holding that the "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."). Indeed, federal intrusion into the role the States play in conducting elections was intended to be the exception, not the rule. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) where Justice Black explained, "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters . . . and the nature of their own machinery for filling local public offices."

Courts have acknowledged the extraordinary federal powers imposed through Section 5 – finding that matters will "fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the states" provided said legislation "deters or remedies constitutional violations." *Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1909). However, such usurpation should be used to remedy and deter "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S., at 309. When confronted with "exceptional conditions" and "unique circumstances" Congress may exercise this "uncommon" power. *Id.,* at 335.

In short, the VRA "imposes substantial 'federalism costs.'" *Northwest Austin*, 557 U.S., at 202 (citing *Lopez*, 525 U.S., at 282) and "authorizes federal intrusion into sensitive areas of state and local policymaking." *Id.,* at 282. These serious federalism issues require particularized attention. Indeed, "because States still retain sovereign authority over their electoral systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination." *Northwest Austin,* 557 U.S., at 217 (Thomas, J., concurring).

B. Section 5 Was Enacted To Be A Temporary Power Limited To Combat "Exceptional" And "Unique" Circumstances.

In enacting the VRA, Congress addressed the pervasive institutionalized discrimination facing minority voters in mid-twentieth century America. Before its enactment, states and localities engaged in a myriad of practices intentionally designed to disenfranchise minorities. Congressional testimony at the time "revealed that the primary method of keeping minorities from participating in the election process was through the administration of State constitutional amendments and statutorily-authorized tests and devices, such as literacy tests, moral character requirements, and interpretation tests." H.R. Rep. No. 109-478, p. 7 (2006).

The record before Congress was replete with grotesque and overt examples of institutionalized discrimination. For example, in noting the types of methods states and localities utilized to bypass the Fifteenth Amendment, the *Katzenbach* Court explained that "beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting." *Katzenbach*, 383 U.S., at 310. While implementing these examinations, these states used "alternate" tests "to assure that white illiterates would not be deprived [of the right to vote]." *Id.*, at 311.

Other practices utilized to disenfranchise African-American voters included "grandfather clauses," "white primaries," "racial gerrymandering" and "discriminatory application of voting tests." *Id.* (internal citations omitted). Particularly pernicious were the adaptations made by states and localities to continue to disenfranchise minority voters once their use of a specific tactic was found impermissible. The case-by-case litigation strategy adopted by the Department of Justice to combat these practices during the 1950s failed to "cure the problem of voting discrimination." As reported, "registration in Alabama rose only from 14.2% to 19.2% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7%

to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964." *Id.*, at 313. The registration of white voters "ran roughly 50 percentage points or more ahead [of minority] registration." *Id.*

Congress acted pursuant to the authority set forth in the Fifteenth Amendment to enforce the Amendment by appropriate legislation. U.S. Const. amend. XV, cl. 2. South Carolina challenged the law, but a nearly unanimous Supreme Court upheld the law in *Katzenbach*. In justifying the federal intrusion into the traditional arena of states' rights, the Court noted that these circumstances were both "exceptional" and "unique." The VRA in general and Section 5 in particular were thus necessary to "combat *widespread* and *persistent* discrimination in voting. . . ." *Id.*, at 328 (emphasis added).

C. The Widespread And Persistent Discrimination Giving Rise To The Exceptional And Unique Circumstances At The Time Section 5 Was Enacted No Longer Exist.

Section 5's broad infringement upon state power is only justified when faced with the kind of "unique" and "exceptional" circumstances present in *Katzenbach*. These conditions do not exist today. In fact, during its most recent consideration of the VRA, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters." Pub. Law 109-246,

§2(b)(1), 120 Stat. 577 (2006). Moreover, many of these "barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." H.R. Rep. No. 109-478 p. 12 (2006).

Consider voter registration rates in states under Section 5 jurisdiction. The gap between registered white citizens and registered African-American citizens narrowed from 63.2% in 1965 to 6.3% in 1988 for the state of Mississippi. H.R. Rep. No. 109-478 p. 12 (2006). In Alabama the gap between whites and African-Americans narrowed from 49.9% in 1965 to 6.6% in 1988. Further, African-American total voter registration and voter turnout has increased since 1982. H.R. Rep. No. 109-478 p. 12 (2006). African-American enfranchisement roughly parallels that of whites.

Additionally, Congress found that there has been a significant increase in the number of African-American elected officials. H.R. Rep. No. 109-478 p. 18 (2006). "As of 2000, more than 9,000 African-Americans have been elected to office, an increase from the 1,469 officials who held office in 1970." H.R. Rep. No. 109-478 p. 18 (2006). In states covered by the VRA the number of African-Americans serving as elected officials "increased by approximately *1000 percent* since 1965." H.R. Rep. No. 109-478 p. 18 (2006) (emphasis added).

Poll taxes have been prohibited by Constitutional Amendment. U.S. Const. amend. XXIV. Literacy tests are no longer permitted. See *Oregon v. Mitchell,* 400

U.S. 112 (1970). In sum, Congress concluded during the 2006 VRA debate that Section 5's provisions had accomplished its purposes to ensure all voters could: (1) register to vote unchallenged; (2) cast ballots unhindered; and (3) cast meaningful votes. H.R. Rep. No. 109-478 p. 21 (2006). In other words, Section 5's original purpose has been fulfilled.

D. Congressional Findings Of "Second Generation" Barriers Do Not Satisfy Katzenbach's Requirement Of "Unique" and "Exceptional" Circumstances.

Despite having fulfilled its purpose, Congress did not allow Section 5 to expire, instead shifting the justification for Section 5 from eradicating "first generation barriers experienced by minority voters" to attacking "second generation barriers." 109 Pub. Law 246, 120 Stat. 577 (2006). These vaguely, if at all, defined barriers are purportedly evidenced by "racially polarized voting in each of the jurisdictions [covered by Section 5]." 109 Pub. Law 246, 120 Stat. 577 (2006). Second generational barriers are not specified in the statute, but have been characterized by "activists" as "broad" and include: "annexations and cancelled elections"; "abandonment of electoral structures"; and "discriminatory redistricting plans." See Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 Saint Louis Univ. Pub. L. Rev. 77, 86-88 (2010).

These second generational barriers do not constitute the "unique" and "exceptional" circumstances contemplated by the Court in *Katzenbach*. Importantly, they are not evidence of purposeful or intentional discrimination. See *Rodgers v. Lodge*, 458 U.S. 613, 618 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition or servitude.'"). Further, this "evidence is not probative of the type of purposeful discrimination that prompted Congress to enact § 5 in 1965." *Northwest Austin*, 557 U.S., at 228 (Thomas, J., concurring). Moreover, many of the examples of second generation barriers relied upon by Congress occurred decades ago. Reliance on these examples to justify the massive intrusion into the traditional state prerogative to administer elections should not be condoned by the Court.

1. Evidence of Racially Polarized Voting Is Constitutionally Insufficient To Justify Section 5.

According to Congress, racially polarized voting represents the "clearest and strongest evidence" of "the continued resistance within covered jurisdiction to fully accept minority citizens and their preferred candidates into the electoral process." H.R. Rep. No. 109-478 p. 34 (2006). This type of voting "occurs when voting blocs within the minority and white communities cast ballots along racial lines. . . ." H.R. Rep. No. 109-478 p. 34 (2006). Congress further concluded that "in elections characterized by racially polarized voting, *minority voters alone* are powerless to elect their candidates." H.R. Rep. No. 109-478 p. 34 (2006) (emphasis added).

Evidence of "racially polarized voting" is not sufficient to justify Section 5's mandates. First, it is not evidence of denial of voting. It discounts the contention that polarization is the result of differences in political opinion rather than race. Roger Clegg and Linda Chavez, *An Analysis of the Reauthorized Section 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol'y 561, 568 (2007). Moreover, it bears stating the obvious deficiency with Congress's conclusion – in a democracy the candidate who receives the majority of the votes in a given election will win. A candidate can receive one hundred percent of a particularized subset's vote (whether it is 100% of the Black vote, 100% of Catholic vote, or 100% of the American Indian vote) and still lose an election. Candidates are elected by forming coalitions among diverse populations to secure a majority vote. A minority voting bloc, by definition, will never alone be able to elect their preferred candidate.

Furthermore, racially polarized voting is not evidence of intentional discrimination. The Court's decisions "have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). Thus, "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Id.* The nonexistent connection between racially polarized voting and intentional discrimination cannot justify the sweeping mandates of Section 5.

Finally, this Court has specifically found that evidence of racially polarized voting alone is not evidence of impermissible discrimination. *Id.*, at 64 (citing *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953)).

2. Other Forms Of Second Generational Barriers Are Not Constitutionally Sufficient To Justify Section 5.

As noted earlier, other forms of second generation barriers purportedly include "annexations and cancelled elections," "abandonment of electoral structures that provide opportunities to elect candidates of choice," and "discriminatory redistricting plans." Jenigh J. Garrett, *The Continued Need for the Voting Rights Act,* 30 Saint Louis Univ. Pub. L. Rev., at 86-88 (2010). Assuming arguendo these barriers continue to exist, there is no evidence to indicate they are established with the intention of disenfranchising minority voters.

The "annexations and cancelled elections" examples relied upon by Congress and activists as justifying the need for Section 5 are limited and unconvincing.

Many of the alleged efforts to disenfranchise minority voters occurred almost 40 years ago, hardly constituting an ongoing crisis justifying Section 5's extraordinary burdens. See *id.*

The "abandonment of electoral structures that provide opportunities to elect candidates of choice" is another second generation barrier purporting to justify continuing use of Section 5. Commentators note "changes from single-member districts to at-large or multi-member districts, which *can* be designed to eliminate opportunities to elect candidates of choice, were common in the first few years following passage of the Act." See *id.* However, as was the case with "annexations and cancelled elections" no meaningful examples are provided of such activity currently taking place.

For example, the record reports, as a current example, the reduction of "satellite voter registration locations" and "the elimination of satellite registration during 18 months of the state's two year election cycle." Voting Rights Act: Section 5 of the Act-History, Scope and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 299-301 (2006). Not considered was whether the reduction of these satellite locations and elimination of satellite registration was intended to disenfranchise minority voters or whether these changes were made for a facially neutral reason – such as budgetary concerns. This tenuous example is not similar to the conditions existing when Section 5 was originally enacted. Again, even assuming states or localities are engaging in such activity, there is no evidence suggesting such actions are intentionally conducted to disenfranchise – or negatively affect in any fashion – minority voters.

Purportedly discriminatory "statewide legislative plans" suffer the same deficiencies as other second generation "barriers." Congress and commentators rely on no current examples of statewide legislative plans – the examples cited in the record include legislative plans written by the Alabama legislature in 1980 and 1990 respectfully. Garrett, *The Continued Need for the Voting Rights Act,* 30 Saint Louis Univ. Pub. L. Rev., at 90 (citation omitted).

Despite assertions to the contrary by proponents of Section 5, the legislative record contained scant examples of second generation barriers. Even in cases where these barriers exist, there is no evidence such measures were taken with the intent to deprive or dilute minority voting.

Contentions that legislative plans eliminating single member districts improperly "dilute" minority votes also fall short. The Court's previous determinations that the "minority's voting power is diluted by multi-member districting" discounts the importance of "swing" groups of voters in a two party system. See *Holder v. Hall*, 512 U.S. 874, 900 (1994) (Thomas, J., concurring). Moreover, minority vote dilution claims accept the "assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well."

Hall, 512 U.S., at 903. This claim assumes "that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representative holding seats in elected bodies if they are to be considered at all." *Id.*

Statewide legislative plans that eliminate single member districts or establish general "at large" elections cannot be considered second generation barriers. These efforts to "segregate the races into political homelands" amount to a "system of 'political apartheid.'" *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993)). These plans simply cannot be a legitimate basis for permitting Section 5's continuation.

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CONCLUSION

Section 5 of the Voting Rights Act was enormously successful in remedying shameful systematic structures that deprived millions of citizens the right to vote. In its current iteration, however, the section represents an unconstitutional abridgment of the States' constitutional authority to supervise elections. The extraordinary powers created by Congress were once justified, but they have served their purpose and are no longer a valid exercise of federal power, particularly given the undefined and impermissibly vague nature of so-called "second generation" barriers.

Accordingly, this Court should declare Section 5 unconstitutional.

Respectfully submitted,

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AMICUS
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BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AND THE LEADERSHIP CONFERENCE EDUCATION FUND *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. There Is Real and Substantial Risk That the Progress Made in Combatting Voting Discrimination Since 1965 Will Be Eroded If § 5 Is Invalidated 6

  A. History Shows That Gains In Minority Political Participation Can Be Reversed When Remedial Laws Are Invalidated 7

  B. Recent Court Decisions Show That Without the Protection of § 5 Many Covered Jurisdictions Would Adopt Practices That Abridge Minority Voting Rights 14

II. Congress's Decision To Reauthorize § 5 and To Retain the Existing Coverage Formula Are Amply Supported by the Legislative Record and Are Entitled to Deference 20

  A. Congress Reasonably Concluded on an Extensive Record That Discriminatory Voting Practices Still Continue in the Covered Jurisdictions 24

B. Congress's Decision To Retain the Existing Coverage Formula Was Reasonable. 28

III. The Coverage of § 5 Will Likely Be Reduced Over Time Through the Application of the Bailout Mechanism. 33

CONCLUSION 35

APPENDIX A: The Leadership Conference on Civil and Human Rights Participating Member Organizations

APPENDIX B: Additional *Amici Curiae*

TABLE OF AUTHORITIES

Cases: **Page**

City of Boerne v. Flores, 521 U.S. 507 (1997) 22

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- § 2(b)(3) 24
- § 2(b)(4)(A) 25, 27
- § 2(b)(4)(B) 27
- § 2(b)(7) 20-21
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- § 2, 42 U.S.C. § 1973 29
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152 CONG. REC. 14,303 (2006) 24

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LEEANNA KEITH, THE COLFAX MASSACRE (2008) 11, 12

MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) 8, 10

CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) 11

1 GEORGE SANTAYANA, THE LIFE OF REASON; OR, THE PHASES OF HUMAN PROGRESS (1905) 6

RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004) 7, 10

2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) 12

INTEREST OF *AMICI CURIAE*

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of over 200 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races and ethnicities.[2] One of the missions of The Leadership Conference is to promote effective civil rights legislation and policy. The Leadership Conference was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968. It also played a leading role in gathering evidence to submit to Congress and coordinating the efforts of the civil rights community in connection with the 2006 amendments to the Voting Rights Act that are at issue in this case.

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] See Appendix A for a list of The Leadership Conference's member organizations.

The Leadership Conference Education Fund ("The Education Fund") is the research, education, and communications arm of The Leadership Conference. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public understanding of issues of prejudice. The Education Fund has published studies and reports on many subjects, including voting rights.

The Leadership Conference and The Education Fund believe that a vital national interest is at stake in this case. That national interest is the right of all citizens to vote free from discrimination and to choose leaders that represent their interests and, by doing so, to promote the influence of the United States throughout the world as a viable and vibrant democracy.

Several other organizations also join as signatories to this brief. These organizations are identified and their interests set forth in Appendix B.

SUMMARY OF ARGUMENT

Congress's decision in 2006 to reauthorize § 5 of the Voting Rights Act for 25 years and to maintain the existing coverage formula was a reasonable and appropriate exercise of its enforcement authority under the Fourteenth and Fifteenth Amendments. The jurisdictions covered by § 5 are places where discriminatory voting practices have historically been severe. While many of these jurisdictions have made substantial progress toward eliminating discriminatory voting practices, the legislative record amassed by Congress—as well as more recent history—shows that these gains are fragile and that discriminatory practices still persist. This Court should not take the extraordinary step of second-guessing Congress's determination that § 5 is still needed, given the fundamental nature of the right to vote, the careful deliberation that Congress gave to the matter, and the extensive factual findings on which Congress's judgment rests.

We make three key points below.

1. If § 5 were to be invalidated, there is a real and substantial risk that the progress made in the covered jurisdictions since 1965 would be rolled back. American history offers a valuable lesson here. Following the Civil War, Congress enacted legislation designed to protect African Americans' right to vote, and federal authorities aggressively enforced these laws. These efforts led to substantial gains in African-American voter registration and political participation throughout the South. But those gains were quickly wiped out once Reconstruction ended. Decisions of this Court invalidating or narrowly construing federal laws designed to protect African-American voting rights played a major role in this reversal. With no effective federal statutory protection for minority voting rights, states and local jurisdictions implemented a wide variety of discriminatory laws and practices that effectively nullified the Fifteenth Amendment's guarantees for generations.

Recent court decisions show that there is a risk that similar retrenchment would occur in the covered jurisdictions if § 5 were not in place. Relying on § 5, federal courts have blocked enforcement of new laws in Texas, Florida, and South Carolina that had the potential to disproportionately prevent minority voters from casting ballots. These included a strict new voter identification law in Texas and new restrictions on early voting in Florida. A court also blocked South Carolina's new voter ID law from taking effect in the 2012 election because of likely discriminatory impact on African-American voters. While the court allowed the law to be enforced in future elections, it did so in reliance on a finding that the State had adopted ameliorative provisions that would reduce discriminatory impact in future elections, with two judge noting that § 5 had played an instrumental role in persuading the State to adopt these provisions and construe them broadly. A court also refused to preclear Texas's new Congressional, State Senate, and State House redistricting plans, specifically concluding that both the Congressional plan and the Senate plan were enacted with a discriminatory intent. Thus § 5 played a critical role in protecting minority voting rights in the most recent election cycle. If § 5 were not in place, covered jurisdictions would find it much easier to implement discriminatory voting practices, and there is a significant risk that the gains of the last five decades would be eroded, just as the gains of the Reconstruction era were lost once the statutory scheme to protect those rights was no longer in force.

2. Congress's determinations that § 5 is still needed to preserve and continue the progress of the last four decades and that the existing coverage formula remains appropriate are amply supported by the legislative record and are entitled to the highest degree of deference from this Court. Petitioner Shelby County challenges the conclusions that Congress drew from the record and urges the Court to reweigh the evidence and draw its own conclusions. But that is not the proper role of this Court. As this Court has held and the Court of Appeals properly recognized, "[t]he Constitution gives to Congress the role of

weighing conflicting evidence in the legislative process." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997). The Court does not reweigh the evidence *de novo*, but instead looks simply to whether Congress has drawn reasonable inferences based on substantial evidence. Here, Congress amassed a substantial legislative record and reasonably concluded from that evidence that the protections of § 5 are still necessary and that the existing coverage formula remains appropriate. Those findings are entitled to deference. The Court should reject Shelby County's invitation to substitute its own judgment for the considered judgment of Congress.

3. To the extent that the coverage formula is overinclusive or underinclusive, Congress intended that adjustments would be made on a case-by-case basis through the bailout and bail-in mechanisms. Congress anticipated that jurisdictions with "clean" records would avail themselves of bailout, and in fact, the number of bailouts has increased dramatically since 2006. Obtaining a bailout is not a difficult or expensive procedure, and since 1982, when the bailout procedure was liberalized, no application for a bailout has been rejected. There is every reason to expect that the number of bailouts will continue to climb, which will naturally reduce the reach of § 5 in the manner that Congress intended.

In sum, striking down the 2006 reauthorization and invalidating § 5 wholesale, as Shelby County now urges, could have far-reaching consequences for minority voters. Without the continued protection of § 5, there is a significant risk of "backsliding" by covered jurisdictions and a likelihood that millions of minority voters will face new barriers to the exercise of their most fundamental political right. The Court should not allow this to happen. It should respect the judgment of Congress as to the both the continued need for the protections of § 5 and the appropriateness of the existing coverage formula.

ARGUMENT

I. There Is Real and Substantial Risk That the Progress Made in Combatting Voting Discrimination Since 1965 Will Be Eroded If § 5 Is Invalidated.

As this Court has observed, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).[3] With that adage in mind, it is instructive to consider the history of Congress's first efforts to protect minority voting rights in the post-Civil War period, the role this Court played by invalidating those laws, and the consequences that ensued.

That history shows that even very substantial gains in minority political participation can be rolled back. This Court's decisions in the 1870s to invalidate federal voting rights legislation paved the way for Southern states to enact laws that effectively barred African Americans from exercising their right to vote for many generations. If this Court were to invalidate § 5, there is a very real and substantial risk that this history would repeat itself. The Court should not allow that to happen.

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[3] *Cf.* 1 GEORGE SANTAYANA, THE LIFE OF REASON; OR, THE PHASES OF HUMAN PROGRESS 284 (1905) ("Those who cannot remember the past are condemned to repeat it.").

A. History Shows That Gains In Minority Political Participation Can Be Reversed When Remedial Laws Are Invalidated.

As this Court noted in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), the United States has made extraordinary progress in combatting voting discrimination since 1965, improvements which are "due in significant part to the Voting Rights Act itself" and which "stand as a monument to its success." *Id.* at 202. These gains include dramatic improvements in minority voter registration and turnout, as well as the fact that minority candidates have been elected to office at "unprecedented levels." *Id.*

But there were also extraordinary advances in minority voter registration and political participation in the South in the decade following the Civil War. These gains resulted from aggressive federal efforts to secure and protect African Americans' right to vote. By 1868, more than 700,000 African Americans had been registered to vote under the supervision of federal troops.[4] As a result, 75% to 95% of eligible African-American men were registered to vote in the South during the early years of Reconstruction.[5]

The Fifteenth Amendment was ratified in 1870. Shortly afterward, Congress enacted the Enforcement Act of 1870, 16 Stat. 140, which prohibited discrimination in voter registration and prescribed criminal penalties for obstructing voting rights. The

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[4] BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 5 (1992).

[5] RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 33 (2004).

Act was amended in 1871 to permit federal courts to appoint election supervisors to oversee federal elections and voting registration. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

The combination of large numbers of African-American voters and the adoption of new legal mechanisms to protect their rights had a remarkable impact on minority political participation. Substantial numbers of African Americans were elected to political office at all levels of government in the early 1870s. By the end of Reconstruction, 18 African Americans had served in Southern states in such statewide offices as lieutenant governor, treasurer, superintendent of education or secretary of state, and by 1875 there were eight African Americans serving in Congress, representing six different states.[6] More than 600 African Americans also served in state legislatures—the large majority of them former slaves.[7] African Americans made up nearly half of the lower-house delegates in Mississippi and Louisiana and were a majority in South Carolina, which also had an African-American justice on its Supreme Court.[8] In the words of Professor Eric Foner, a leading historian of the Reconstruction period, this represented "a stunning departure in American politics."[9] And "[a]n equally remarkable transformation occurred at the local level, where the decisions of public officials directly affected daily life and the distribution of power."[10] According to Professor Foner, "[i]n virtually every county with a sizable black population, blacks served in at least some local office during Reconstruction."[11]

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[6] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 353, 538 (1988).

[7] *Id.* at 355.

[8] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 29 (2004).

[9] FONER, *supra*, at 355.

But these gains proved short-lived. Reconstruction ended in 1877, following a compromise between Democrats and Republicans that resolved the disputed presidential election of 1876. Southern jurisdictions then began implementing a wide variety of measures to nullify African-American voting rights. Many of the early measures involved racial gerrymandering techniques designed to dilute African-American voting strength and prevent the election of African Americans' preferred candidates.[12] In the 1890s, state efforts to disenfranchise African-American voters became more brazen. Beginning with Mississippi in 1890, several Southern states rewrote their constitutions and enacted laws adopting literacy tests, poll taxes, "good character" requirements, white primaries and other similar measures intended to exclude African Americans from the electorate.[13] As a result, the gains in minority political participation during Reconstruction were quickly erased.[14]

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[10] *Id.*

[11] *Id.* at 356.

[12] *See id.* at 590:

> "Throughout the South, . . . districts were gerrymandered to reduce Republican voting strength. Mississippi Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities. Alabama parceled out portions of its black belt into six separate districts to dilute the black vote. Cities from Richmond to Montgomery redrew ward lines to ensure Democratic control. Wilmington's black wards, containing four fifths of the city's population, elected only one third of its aldermen."

This Court's decisions in *United States v. Reese*, 92 U.S. 214 (1876), and *United States v. Cruikshank*, 92 U.S. 542 (1876), played a significant role in this reversal. In *Reese*, voting inspectors in Kentucky were indicted under the Enforcement Act for refusing to accept the vote of an African-American citizen. *See* 92 U.S. at 238–39 (Hunt, J., dissenting). The Court affirmed the dismissal of the indictment, holding that key provisions of the Enforcement Act were unconstitutional. *Id.* at 218–20.

In *Cruikshank*, decided the same day as *Reese*, the Court reversed the convictions of three Louisiana men under the Enforcement Act for conspiracy to deny African Americans a variety of civil rights, including the right to vote. This case arose out of a disputed election that escalated into an armed conflict—the notorious "Colfax Massacre" of 1873—in which whites seeking to expel African-American and Republican officeholders stormed a courthouse in Grant Parish, Louisiana, killing more than 100 African Americans who had gathered to defend the courthouse.[15] In reversing the convictions, the Court concluded that many of the rights referred to in the indictment—including the right of peaceable assembly, the right to bear arms, and the rights of life and personal liberty—were not granted or protected by the federal Constitution. 92 U.S. at 551–54. With respect to the convictions for hindering African Americans in the exercise of their voting rights, the Court concluded that the indictment had not alleged a racial motive: "We may suspect that race was the cause of the hostility; but it is not so averred." *Id.* at 556.

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[13] *See* GROFMAN ET AL., *supra*, at 8–9.

[14] For example, in the 1880 presidential election, African-American turnout in the South ranged from a low of 42% in Georgia to a high of 84% in Florida. VALELLY, *supra*, at 128. By the 1900 election, turnout had been reduced to the single digits in five southern states, and was well on its way to virtual extinction throughout the region. *Id.* By the mid-1890s, the number of African Americans in the Mississippi legislature had been reduced to zero (down from 64 in 1873), and just one African-American legislator remained in South Carolina. KLARMAN, *supra*, at 32. Similarly, local office-holding by African Americans all but disappeared. *Id.*; *see also* VALELLY, *supra*, at 52 (number of African-American legislators in the South fell by nearly 80% between the end of Reconstruction and 1890).

Historians have long agreed that these decisions gutted the federal statutory scheme for the protection of African-American voting rights. In 1923, Supreme Court historian Charles Warren observed:

> "The practical effect of these decisions was to leave the Federal statutes almost wholly ineffective to protect the negro, in view of the construction of the Amendments adopted by the Court,

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[15] *See generally* FONER, *supra*, at 437. For more detailed accounts of the Colfax Massacre and its aftermath, see CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); LEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

> the lack of adequate legislation in the Southern States, and the extremely limited number of rights which the Court deemed inherent in a citizen of the United States, *as such*, under the Constitution."[16]

Professor Foner describes *Cruikshank* as "devastating," noting that it "rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law."[17] Professor William Gillette likewise notes that *Reese* "made future enforcement [of voting rights] vastly more difficult, and in some cases clearly impossible."[18] And another history notes that the two decisions "limited the likelihood of intervention to prevent systematic abuses," and that "[i]n combination with the withdrawal of troops . . . this bar to oversight empowered mass intimidations and manipulations at the polls."[19] In short, the Court's failure to protect African-American voting rights played a significant role in the retrenchment that followed the end of Reconstruction.

The advances in minority political participation in the United States over the last four decades are undoubtedly more solid than the gains that were made in the post-Civil War era. But the history of the post-

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[16] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 604 (1922).

[17] FONER, *supra*, at 530–31.

[18] WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879, at 295 (1979).

[19] KEITH, *supra*, at 158.

Reconstruction period serves as a warning that the clock of progress can be turned back if the political and judicial branches of government fail to exercise sufficient vigilance to protect minority voting rights. The comments of another prominent historian, Professor C. Vann Woodward, at the hearings on the 1982 reauthorization of the Voting Rights Act are pertinent in this regard. Asked why the history of Reconstruction is relevant, Professor Woodward replied:

> "[I]t makes evident and clear that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made.
>
> "The first reconstruction cost us our greatest bloodshed and tragedy. It would seem that if anything has been paid for at a higher price, it was these advances. And yet, they were eroded and lost, and only a century later they were restored.
>
> "My history teaches me that if it can happen once, it can happen again."[20]

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[20] *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2027 (1981).

B. Recent Court Decisions Show That Without the Protection of § 5 Many Covered Jurisdictions Would Adopt Practices That Abridge Minority Voting Rights.

Professor Woodward's warning that history can repeat itself is as valid today as it was in 1982. Section 5 continues to play a critical role both in encouraging states to safeguard the interests of minority voters and in preventing discriminatory laws from ever taking effect. If § 5 were not in place, there is a substantial risk that many covered jurisdictions would implement discriminatory practices that would erode the gains that minority voters have made since 1965.

Recent court decisions in preclearance cases show that covered jurisdictions continue to engage in both "first generation" type discriminatory tactics—imposing direct barriers on registration and the right to vote—and "second generation" tactics—limiting the ability of minority voters to elect their preferred candidates.[21] In the former category, Texas enacted a new law in 2011 requiring voters to show photo identification in order to cast a ballot. While several states have enacted photo ID laws in recent years, and the Court has upheld the constitutionality of an Indiana photo ID law, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Texas law was extraordinarily onerous. The three-judge court reviewing the Texas statute noted that it was "far stricter" than either the Indiana law at issue in *Crawford* or a Georgia law that was precleared by the Justice Department. *Texas v. Holder*, No. 12-cv-128, 2012 U.S. Dist LEXIS 127119, at *47 (D.D.C. Aug. 30, 2012). First, while the Georgia and Indiana laws generally permitted voters to use expired IDs, the Texas law would have prohibited voters from using any ID that had expired more than 60 days previously. *Id.* at *47. Second, while the Texas law would have ostensibly allowed voters to obtain a free photo ID at a local office of the Texas Department of Public Safety ("DPS"), the burdens involved in obtaining a free ID would have been much heavier than in Indiana or Georgia. To obtain a photo ID, a voter would have been required to present one of a limited number of government issued documents, the cheapest of which (a certified birth certificate) cost $22—significantly more than the comparable cost in Indiana. *Id.* at *47–48. Moreover, 81 of Texas's 254 counties had no DPS office, and 34 additional counties had offices that were open two days a week or less. *Id.* at *15–16, *48–49. In some towns with large Hispanic or African-American populations, the nearest DPS office is 100 to 125 miles away. *Id.* at *81–82. And unlike the Indiana law, the Texas law did not enable indigent persons without valid photo ID to cast provisional ballots. *Id.* at *97.

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[21] The term "second generation" is a misnomer. As the Court of Appeals noted, these tactics are "in fact decades-old forms of gamesmanship." Pet. App. 28a. As noted above (*supra* n.12), these types of dilutive mechanisms were among the first discriminatory practices to be adopted after Reconstruction. Such tactics are just as pernicious as direct barriers because they prevent minority voters from having an equal and fair opportunity to participate in the political process.

Examining these features, the court concluded that Texas had "enacted a voter ID law that—at least to our knowledge—is the most stringent in the country." *Id.* at *96. It held that the law would weigh heavily on Texas's poorest residents, and that because the undisputed evidence showed that racial minorities were disproportionately likely to live in poverty, the law would likely have a discriminatory effect. *Id.* at *43. The court explained:

> "Based on the record evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote in the next election. This is retrogression." *Id. at* *86.

Because the court resolved the case based on the Texas law's discriminatory effect, it did not reach the discriminatory purpose prong of § 5. *Id.* at *95. But it noted that the legislature had "[i]gnor[ed] warnings that [the bill], as written would disenfranchise minorities" and tabled or defeated amendments that would have ameliorated these problems. *Id.* at *96–97.

Florida (which has five covered counties) provides another example of an effort to limit access to the ballot. In 2011, Florida enacted a law that would have decreased the number of early voting days (from 12 to 8) and offered election officials the discretion to reduce the number of daily hours available for early voting (from 12 to 6). ***Florida v. United States***, No. 11-1428, 2012 U.S. Dist LEXIS 115647, at *5, *24–28 (D.D.C. Aug. 16, 2012). A three-judge court denied Florida's preclearance request, finding that "minority voters will be disproportionately affected by the changes in early voting procedures because they disproportionately use early in-person voting." *Id.* at *6. The court further found that if early voting were limited to six hours per day, as permitted by the new law, "it is likely that early voting would start after the workday starts and would end before the workday ends, making it even more inaccessible to many minority voters who have inflexible work schedules." *Id.* at *91. It explained that "[t]his dramatic reduction in a form of voting disproportionately used by African-Americans would be analogous to . . . closing polling places in disproportionately African-American precincts" and would impose a burden that would dissuade African Americans from voting *Id.* at *91–92.

In the Texas and Florida cases, § 5 was used to block changes that could have limited minority voters' access to the ballot. But § 5 also plays an important role in shaping legislation so as to reduce discriminatory impact. For example, South Carolina, like Texas, enacted a photo ID law in 2011. *South Carolina v. United States*, No. 12-203, 2012 U.S. Dist LEXIS 146187, at *8–9 (D.D.C. Oct. 10, 2012). The South Carolina law, however, is less restrictive than the Texas law. Most notably, it contains a "reasonable impediment" provision which allows voters with a non-photo voter registration card to vote simply by signing an affidavit stating the reason for not having obtained a photo ID. *Id.* at *11–12. During the course of the preclearance litigation, State officials provided authoritative interpretations that this provision would be interpreted expansively so that only the veracity, not the reasonableness, of the voter's stated reasons would be subject to challenge. *Id.* at *15–21.

Relying on these interpretations, the court found that the law was not discriminatory in purpose or effect and granted preclearance. *Id.* at *55. It also concluded, however, that without the reasonable impediment provision the law might have a discriminatory impact on African-American voters, who disproportionately lack the required forms of photo ID. *Id.* at *59–60. Because the court concluded that it would not be possible to implement the law in the time remaining before the 2012 election, it blocked enforcement of the law in 2012, explaining that "there is too much of a risk to African-American voters for us to roll the dice in such a fashion." *Id.* at *60. It further noted that if State officials were to narrow their interpretation of the law in the future, that change would require preclearance. *Id.* at *65–66.

Two judges noted in a concurring opinion that § 5 played a critical role in persuading the legislature to adopt the reasonable impediment provision and encouraging state officials to construe it broadly:

> "[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be precleared. . . . The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretation of these key provisions of Act R54, particularly the reasonable impediment provision, subsequently presented to this Court were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act." *Id.* at *70-71 (Bates, J., concurring).

Another Texas case provides an egregious illustration of dilutive tactics designed to prevent minority voters from electing their preferred candidates. In

Texas v. United States, No. 11-1303, 2012 U.S. Dist. LEXIS 121685 (D.D.C. Aug. 28, 2012), the court declined to preclear Texas's redistricting plans for Congress, the State Senate, and the State House of Representatives. The court did not rely only on § 5's discriminatory effects prong, but also expressly found that some of the plans were enacted with discriminatory purpose.

The court held that the Congressional plan would have a retrogressive effect and that it was enacted with discriminatory purpose. *Id.* at *53, *76–77. It noted that "substantial surgery" had been conducted to remove the district offices of incumbent minority representatives from their new districts while no such surgery was performed on the districts of Anglo incumbents, that the "economic guts" of districts represented by minorities had also been removed, and that Texas had not offered a convincing explanation for these actions. *Id.* at *74–77. It also found that African-American and Hispanic members had been excluded from the process of drafting the new maps and that that there were procedural and substantive departures from the normal decision-making process. *Id.* at *77–79. It further noted Texas's "history of failures to comply with the VRA" in prior redistricting. *Id.* at *77.

With respect to the State Senate plan, the court concluded that the state had deliberately "cracked" an existing district by dividing politically cohesive and geographically concentrated African-American and Hispanic communities among three separate districts—again with no credible explanation for such action. *Id.* at *84–94. Finally, the court found that the State House plan would abridge minority voting rights in at least four districts. *Id.* at *94. Although the court did not reach the issue of discriminatory intent with respect to the House plan, it cited troubling evidence that mapmakers had specifically sought to manipulate the Hispanic vote and to "crack" districts along racial lines to dilute minority voting power. *Id.* at *129–30.

These decisions demonstrate that notwithstanding the many years that have elapsed since the Voting Rights Act was first enacted, covered jurisdictions continue to engage in practices that have the effect—and in some cases the purpose—of denying minority voters access to the ballot and an equal chance to elect their preferred candidates. During the 2012 election cycle, § 5 was instrumental in blocking discriminatory voting changes in covered jurisdictions from taking effect and persuading state officials to adopt ameliorative measures to reduce discriminatory impact. Without the safeguards provided by § 5, it is likely that these discriminatory changes (and potentially others) would be implemented, and the progress made in the covered jurisdictions since 1965 would begin to erode, just as it did in the post-Reconstruction era. As history shows, the clock of progress has been turned back before, and this Court should not let it happen again.

II. Congress's Decision To Reauthorize § 5 and To Retain the Existing Coverage Formula Are Amply Supported by the Legislative Record and Are Entitled to Deference.

In reauthorizing § 5, Congress concluded that, despite significant progress toward achieving political equality for minority voters in the covered jurisdictions, "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577 (2006). It further found that, without continuation of § 5, minority voters "will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9).

Congress amassed a substantial legislative record to support these conclusions. Shelby County now asks the Court to reexamine that record and draw its own conclusions about whether voting discrimination still exists in the covered jurisdictions and whether the coverage formula remains reasonable. This argument fundamentally misapprehends the role of this Court in reviewing Congressional determinations.

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) illustrates the level of deference that is appropriate in this case.[22] In *Turner*, the Court affirmed the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act against a First Amendment challenge. The Court explained:

> "In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable infer-

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[22] The Court of Appeals repeatedly cited *Turner*. *See* Pet. App. 21a, 35a, 44a, 47a.

> ences based on substantial evidence. [S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency. We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions. . . . This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Id.* at 195–96 (citations and internal quotation marks omitted).

The Court emphasized that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process," *id.* at 199, and that the Court is not to "reweigh the evidence *de novo*, or to replace Congress' factual predictions with [its] own." *Id.* at 211 (citation and internal quotation marks omitted).[23]

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[23] *See also City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (opinion of Harlan, J.)).

This case, like *Turner*, involves a constitutional challenge to a statutory scheme that is based on specific Congressional findings. Congress undertook an extensive effort to collect evidence and solicit the views of potentially affected parties (including both supporters and critics of § 5). Before the bill was introduced, the House held ten oversight hearings, at which it heard testimony from 39 witnesses, including "State and local elected officials, scholars, attorneys, and other representatives from the voting and civil rights community," as well as receiving written testimony from the Department of Justice, governmental and non-governmental organizations and private citizens. H.R. REP. NO. 109-478, at 5 (2006). It then held two additional legislative hearings and received oral and written testimony from another seven witnesses. *Id.* The Senate held another ten hearings on the bill, and heard testimony from some 40 witnesses. S. REP. NO. 109-295, at 2 (2006). The views that Shelby County expresses here—that § 5 is no longer needed and that the coverage formula should be changed—were heard and considered in the legislative process. But when Congress ultimately weighed the evidence, it did not agree. It found that voting discrimination continues in the covered jurisdictions and that the coverage formula remains appropriate. There is an ample legislative record to support these conclusions. Under *Turner*, the Court should defer to Congress's judgment.

It is also significant that the decision to reauthorize § 5 and retain the coverage formula received overwhelming bipartisan support in both houses of Congress—including broad support from the elected representatives of covered jurisdictions. The House of Representatives passed the 2006 Act by a vote of

390–33, while the Senate vote was unanimous, 98–0.[24] The Act was then signed into law by President George W. Bush—himself the former governor of a covered state. Members of Congress are elected representatives who are intimately familiar with voting patterns and electoral practices in the states and districts they represent. As such, they are uniquely qualified to make decisions about the extent of ongoing voting discrimination. Their judgments as to the continued need for § 5 and the proper coverage formula should be accorded the highest deference.

A. Congress Reasonably Concluded on an Extensive Record That Discriminatory Voting Practices Still Continue in the Covered Jurisdictions.

While Shelby County argues that Congress did not build a record to support its conclusion that § 5 is still needed in the covered jurisdictions, Congress in fact made specific findings regarding the continued need for § 5 based on an extensive legislative record. Congress's conclusion that voting discrimination continues to be a serious problem in covered jurisdictions is reasonable and entitled to deference.

1. Congress found that "continued evidence of racially polarized voting in each of the jurisdictions covered by [§ 5] demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." Pub. L. No. 109-246, § 2(b)(3). The

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[24] 152 Cong. Rec. 14,303 (2006) (House vote); 152 Cong. Rec. 15,325 (2006) (Senate vote). Shelby County's representative in the House, Rep. Bachus, voted for the reauthorization, as did both Alabama senators, Sen. Shelby and Sen. Sessions.

House Report cited and relied on numerous court decisions finding legally significant racially polarized voting in several covered jurisdictions. H.R. REP. NO. 109-478, at 35. Shelby County does not dispute the continued presence of racially polarized voting. Instead, it argues (Pet. Br. at 31) that racially polarized voting is not important because it is not government discrimination.

Congress, however, reasonably concluded that racially polarized voting was an important indication of the continued need for § 5. While racially polarized voting is not itself unlawful, the House Report explained that "[t]he ***potential*** for discrimination in environments characterized by racially polarized voting is great." H.R. REP. NO. 109-478, at 35 (emphasis added). When voting is polarized along racial lines, it facilitates the use of discriminatory electoral practices by the majority to limit the minority's voting power and political influence. Absent racially polarized voting, there is much less likelihood of discrimination. Thus Congress reasonably placed great weight on evidence that voting in the covered jurisdictions continues to be polarized along racial lines.

2. Congress also found that "the hundreds of objections interposed [and] requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by [§ 5]" evidenced continued discrimination. Pub. L. No. 109-246, § 2(b)(4)(A). The House Report noted that more objections were lodged between 1982 and 2004 than between 1965 and 1982 and that these objections "did not encompass minor inadvertent changes." H.R. REP. NO. 109-478, at 21. It found that the voting changes devised by covered jurisdictions resembled the methods used in earlier years, including, "enact-

ing discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements." *Id.* at 36. It cited numerous examples, including several from the post-2000 redistricting cycle. *Id.* at 36–40. And it found that these proposed changes were "calculated decisions to keep minority voters from fully participating in the political process," showing that "attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future." *Id.* at 21.[25] Shelby County largely ignores this evidence, instead arguing that the number of objections is small and the rate is declining. Pet. Br. at 29-30. But Congress reasonably looked at both the number of objections and the nature of the practices that were objected to, which supported its conclusion that § 5 was still necessary.

3. Congress also found that in addition to formal objections, requests by the Department of Justice for more information ("MIRs") had "affected more than 800 additional voting changes that were submitted for preclearance, compelling covered jurisdictions to either alter the proposal or withdraw it from consideration altogether." H.R. REP. NO. 109-478, at 40–41. Shelby County argues that this evidence is not important because an MIR does not show a constitutional violation. Pet. Br. at 30. But regardless of

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[25] *See also* H.R. REP. NO. 109-478, at 36 ("The Committee received testimony indicating that these changes were intentionally developed to keep minority voters and candidates from succeeding in the political process.").

whether particular changes would have violated the Constitution, Congress could reasonably conclude that the fact that jurisdictions were withdrawing or modifying changes in response to inquiries from the Department of Justice showed that § 5 was continuing to play an important role in preventing jurisdictions from trying to implement potentially discriminatory changes in the first place.

4. Congress also looked at actions for judicial preclearance and found that "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia" evidenced continuing discrimination. Pub. L. No. 109-246, § 2(b)(4)(B). As the Court of Appeals noted, the evidence before Congress showed that plaintiffs either withdrew their proposed changes or lost on the merits in 25 declaratory judgment actions filed between 1982 and 2004, compared to 17 between 1966 and 1982. Shelby County ignores this evidence.

5. Congress also found that actions undertaken by the Department of Justice since 1982 to block enforcement of changes that had not been precleared evidenced continued discrimination. It noted that these enforcement actions had "prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength." Pub. L. No. 109-246, § 2(b)(4)(A). The House Report cites numerous examples. H.R. REP. NO. 109-478, at 41–44. Shelby County argues that § 5 enforcement actions are not important because they only show that changes were not properly submitted for preclearance and that some of these changes may have been nondiscriminatory. Pet. Br. at 30 n.6. But the examples cited by Congress involve practices that are potentially

highly discriminatory and could have had a severe impact on minority voting rights.

In sum, Congress had an ample factual record to support its conclusion that § 5 is still needed in the covered jurisdictions. Even if the evidence could be read to support a different conclusion, the role of this Court is not to reweigh the evidence *de novo* but simply to determine whether Congress has drawn reasonable inferences based on substantial evidence. Congress's conclusion that § 5 is necessary was reasonably based on a careful consideration of the record, and the Court should defer to that judgment.

B. Congress's Decision To Retain the Existing Coverage Formula Was Reasonable.

In *Northwest Austin*, this Court expressed concern that § 5 "differentiates between the States, despite our historic tradition that all states enjoy equal sovereignty," and questioned whether "the evil that § 5 is meant to address" is still "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203. Picking up on this theme, Shelby County argues that the coverage formula is no longer rational. But the legislative record shows that Congress reasonably concluded that voting discrimination was still concentrated in the jurisdictions subject to § 5 and that the existing coverage formula therefore remained appropriate. That conclusion is also entitled to deference.

1. Congress heard evidence that discriminatory practices are more common in covered jurisdictions than in non-covered jurisdictions. The most significant evidence is the study by Professor Ellen Katz

which was presented to the House.[26] Professor Katz compared published § 2 decisions and concluded that of the 114 successful plaintiff outcomes, 64 originated in covered jurisdictions, even though these jurisdictions account for less than a quarter of the U.S population. She further found that § 2 plaintiffs from covered jurisdictions were more likely to prevail on discrimination claims than plaintiffs from non-covered jurisdictions; while 30% of lawsuits from non-covered jurisdictions produced a favorable result for the plaintiffs, the comparable figure from covered jurisdictions was 40.5%.[27] The House Report cited and relied on Professor Katz's findings as evidence that discrimination was more severe in the covered jurisdictions than in non-covered jurisdictions. H.R. REP. NO. 109-478, at 53.

Shelby County does not dispute the significance of the Katz study. Rather, it argues that Congress drew the wrong conclusions from the study, and offers an alternative analysis of the data. Pet. Br. at 47–48. But it is not the role of this Court to reweigh the evidence that was before Congress. Congress examined the data and drew reasonable conclusions, and its judgment should not be second-guessed.

2. Congress did not reflexively reenact all provisions of the Voting Rights Act. It carefully considered the need for each provision and made adjustments

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[26] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 964–1124 (2006).

[27] *Id.* at 974.

where it considered them necessary.[28] For example, Congress determined that the provisions relating to the appointment of federal examiners to monitor voting registration were outdated and repealed those provisions. Pub. L. No. 109-246, § 3(c); H.R. REP. NO. 109-478 at 61–62.

Congress also gave careful consideration to whether changes should be made to the coverage formula. Rep. Norwood offered an amendment on the House floor that would have altered the formula so that coverage would be determined by voting and registration rates in the three most recent presidential elections.[29] In response, the Chairman of the House Judiciary Committee, Rep. Sensenbrenner, stated that the amendment would "gut[] the Voting Rights Act" by "radically altering the coverage formula of the Voting Rights Act in a way that severs its connection to jurisdictions with proven discriminatory histories."[30] He explained:

> "The existing formula triggering coverage under the Voting Rights Act is not at all outdated in any meaningful sense of the term, and States covered are not unfairly punished under the coverage formula. Sixteen States are covered in whole or in part under the temporary provisions

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[28] *See* H.R. REP. NO. 109-478 at 61 ("[T]he Committee recognizes that the electoral environment has evolved since 1965. Recognizing these realities, the Committee amended and eliminated certain provisions to ensure that the VRA remains a relevant and effective remedy to the continued problems of discrimination in the 21st century.").

[29] 152 CONG. REC. 14,273-74 (2006).

[30] *Id.* at 14,274.

> of the Voting Rights Act. The formula does not limit coverage to a particular region, but encompasses those States and jurisdictions where less than 50 percent of the citizens of voting age population registered or turned out to vote in 1964, 1968 or 1972.
>
> "But coverage is not, and I repeat 'not' predicated on these statistics alone. States are not covered unless they applied discriminatory voting tests. And it was this aspect of the formula that brought these jurisdictions with the most serious histories of discrimination under Federal scrutiny."[31]

Following debate, the Norwood amendment was soundly defeated, 318–96.[32] Thus the legislative record shows that Congress made a considered decision that the existing coverage formula remained appropriate.

3. Congress was aware of criticisms that the existing formula is both underinclusive and overinclusive. But this problem is inherent in *any* coverage formula that could possibly be devised (including the alternative proposed by Rep. Norwood). The approach taken by Congress was to continue to target the jurisdictions where discrimination has historically been most severe and where the evidence showed that there was still a strong potential for discrimination. To the extent that changes in coverage may be appropriate, Congress addressed this issue through the statute's "bailout" and "bail-in" procedures. Bail-

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[31] *Id.* at 14,275.

[32] *Id.* at 14,301.

in allows federal courts to subject particular jurisdictions to preclearance upon finding a Fourteenth or Fifteenth Amendment violation. *See* 42 U.S.C. § 1973a(c).[33] Bailout, as amended by Congress in 1982, allows individual covered jurisdictions to obtain a declaratory judgment removing them from § 5 coverage if they can demonstrate a "clean" record for a period of 10 years *Id.* § 1973b(a).

Congress placed particular emphasis on the availability of bailout. The House Report noted that 11 counties had bailed out since the procedure was liberalized in 1982, and commented:

> "The Committee was encouraged that the bailout requirements have been utilized by some jurisdictions, and believes that the success of those jurisdictions illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. REP. NO. 109-478 at 25.[34]

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[33] The Court of Appeals noted that Arkansas and New Mexico have been subjected to bail-in procedures, as have cities or counties in California, Florida, Nebraska, New Mexico, South Dakota and Tennessee. Pet. App. 61a-62a. *See Jeffers v. Clinton*, 740 F. Supp. 585, 626-27 (E.D. Ark, 1990) (imposing partial preclearance on Arkansas); Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2010 & nn.100–08 (2010) (collecting cases).

[34] *See also* H.R. REP. NO. 109-478 at 58 ("The Committee reiterates that termination of covered status has been and continues to be within the reach of compliant covered jurisdictions and

In short, Congress expected that jurisdictions with a clean record could and would avail themselves of bailout.

4. While it is true that § 5 differentiates between states, our Constitutional system has built-in safeguards that protect the states against discrimination by the federal government—most notably, the participation of state representatives in the Legislative Branch. In the Senate, where states are represented as distinct political entities and each state has an equal vote, the vote to approve the 2006 extension was unanimous, 98–0. While there was limited opposition in the House, the reauthorization nonetheless passed with overwhelming bipartisan support, 390–33. There was not a single state, covered or uncovered, in which a majority of the House delegation voted against reauthorization.

III. The Coverage of § 5 Will Likely Be Reduced Over Time Through the Application of the Bailout Mechanism.

Shelby County urges the Court to invalidate § 5 in its entirety. This would be a drastic action that would remove a vital tool for combatting discrimination from *all* covered jurisdictions, including those that have continued to engage in discriminatory practices or where there is a significant risk of backsliding. Rather than taking such a radical step, the Court should allow decisions about whether coverage should be maintained in individual jurisdictions to be made on a case-by-case basis through the bailout

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hopes that more covered States and political subdivisions will take advantage of the process.").

process, as Congress intended and as this Court did in *Northwest Austin*.

The bailout process is working just as Congress intended. Prior to 1982 only five bailout applications were granted. From 1982 through 2006 an additional 17 applications were granted. Since 2006 the rate of bailouts has increased substantially (no doubt due in part to the Court's decision in *Northwest Austin*). A total of 25 bailout applications have been granted since 2006, including applications from covered jurisdictions in Alabama, California, Georgia, North Carolina, Texas and Virginia.[35] These figures understate the impact of the bailout process because one application often covers many different political subdivisions. Of the 236 jurisdictions that have bailed out so far, 145 have occurred since 2006.[36]

Obtaining a bailout is not a difficult or expensive proposition for a jurisdiction that has maintained a clean record. The standards for bailout are well defined, and Congress heard evidence that "[f]or the vast majority of jurisdictions, the process is relatively straightforward and easy" and the criteria are "easily proven for jurisdictions that do not discriminate in their voting practices."[37] Since the procedure was liberalized in 1982, no bailout application has ever been denied.[38] In short, there is every reason to expect that the number of successful bailout applications will continue to climb as the covered jurisdictions continue to make progress toward eliminating voting discrimination. This process will naturally reduce the coverage of § 5 over time. The Court should allow this process to proceed in the manner that Congress intended.

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[35] In addition, an application by New Hampshire on behalf of itself and the 10 covered towns within the State is currently awaiting court approval. *See New Hampshire v. Holder*, No. 12-cv-1854 (D.D.C.).

[36] The figures in this paragraph are derived from the information on the Department of Justice website. *See* http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Jan. 31, 2013).

[37] *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing*

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[38] J. Gerald Hebert, *An Assessment of the Bailout Provisions of The Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 257, 268 (Ana Henderson ed. 2007).

APPENDIX

APPENDIX A

The Leadership Conference on Civil and Human Rights Participating Member Organizations*

(Bold names denote Executive Committee member organizations)

A. Philip Randolph Institute

AARP

Advancement Project

African Methodist Episcopal Church

Alaska Federation of Natives

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Affirmative Action

American Association of People with Disabilities

AAUW

American Baptist Churches, U.S.A.-National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

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* Some member organizations are filing separate *amicus* briefs.

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Islamic Congress (AIC)

American Jewish Committee

American Nurses Association

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Amnesty International USA

Anti-Defamation League

Appleseed

Asian American Justice Center

Asian Pacific American Labor Alliance

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department, AFL-CIO

Center for Community Change

Center for Responsible Lending

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

DC Vote

Delta Sigma Theta Sorority

DEMOS: A Network for Ideas & Action

Disability Rights Education and Defense Fund

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church-Public Affairs Office

Equal Justice Society

Evangelical Lutheran Church in America

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

Improved Benevolent & Protective Order of Elks of the World

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Mashantucket Pequot Tribal Nation

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Na'Amat USA

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Colored Women's Clubs, Inc.

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Neighborhoods

National Association of Social Workers

9 to 5 National Association of Working Women

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD – National Coalition For Asian Pacific American Community Development

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.

National Congress for Puerto Rican Rights

National Congress of American Indians

National Consumer Law Center

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Latina Institute for Reproductive Health

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Women's Political Caucus

Native American Rights Fund

Newspaper Guild

OCA (formerly known as Organization of Chinese Americans)

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

ORT America

OutServe-SLDN

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

PolicyLink

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Progressive National Baptist Convention

Project Vote

Public Advocates

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

SAALT (South Asian Americans Leading Together)

Secular Coalition for America

Service Employees International Union

Sierra Club

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Sikh Coalition

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

Teach For America

The Association of Junior Leagues International, Inc

The Association of University Centers on Disabilities

The National Conference for Community and Justice

The National PTA

TransAfrica Forum

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Women of Reform Judaism
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board
YWCA USA
Zeta Phi Beta Sorority, Inc.

APPENDIX B

Additional Signatories

In addition to The Leadership Conference and The Education Fund, the following organizations are signatories to this Brief:

American-Arab Anti-Discrimination Committee

The American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC is the largest Arab-American grassroots civil rights organization in the United States. ADC is at the forefront in addressing discrimination and bias against Arab Americans. Through its Legal Department, ADC offers counseling in cases of discrimination and defamation, and provides assistance in selected litigation. ADC strongly urges the Court to find Section 5 of the Voting Rights Act constitutional. It is apparent that Section 5 provides the necessary safeguards to prevent discrimination. States with high concentrations of Arab Americans have encountered racial polarization, which in turn affects the community's ability to vote and feelings of comfort when voting. ADC has been, and continues to be, a significant force in securing justice for members of this community.

AARP

AARP is a nonpartisan, nonprofit organization with a membership. AARP strives to enable people age 50+ to secure independence, choice and control in ways beneficial and affordable to them and to society as a whole. In a variety of ways, including legal advocacy as an amicus curiae, AARP supports the fundamental right to vote. To that end, AARP advocates for interpretation and enforcement of federal and state laws so as to encourage robust political engagement, including voting by all persons eligible to do so. AARP strongly favors removal of unfair and unnecessary impediments to electoral participation, including measures that diminish the voting rights of minority citizens.

Anti-Defamation League

The Anti-Defamation League ("ADL") was founded in 1913—at a time when anti-Semitism was rampant in the United States—to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of the minority or the majority, and in ensuring that each individual receives equal treatment under the law regardless of race, ethnicity, or religion. ADL recognizes the Voting Rights Act of 1965 as one of the most important and most effective pieces of civil rights legislation ever passed.

Advancement Project

Advancement Project ("AP"), is a nonpartisan, not for profit, national racial justice organization. In partnership with local communities, AP engages in legal advocacy to achieve universal opportunity and a just democracy. AP has a voter protection program that focuses on litigation, policy, coalition-building, and voter education and community empowerment strategies. In 2012, AP utilized Section 5 to protect against retrogression of voting rights for African American and Latino communities in Florida and Texas. The continued viability of Section 5 is essential to AP's voter protection work in these and other covered jurisdictions. Thus, the issues in this case are directly related to AP's work to protect the right to vote and ensure that elections are free, fair, and accessible.

American Federation of Labor and Congress of Industrial Organizations

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of approximately 12.2 million working men and women throughout the Nation, including in every jurisdiction that is covered by Section 5 of the Voting Rights Act. The AFL-CIO represents the interests of working families, many of whom reside in jurisdictions covered by section 5 and are affected by changes to election laws. The AFL-CIO has long been active in legislative efforts and litigation to protect and advance the right to vote and to keep elections fair and free from discrimination. The AFL-CIO has a strong interest in the Court upholding and respecting Congress's legislative decisions in 2006 regarding the reauthorization of the Voting Rights Act.

American Jewish Committee

American Jewish Committee ("AJC") is a national organization of Jewish Americans founded in 1906 committed to, among other concerns, assuring equal protection of law and equal rights of citizenship for all Americans, including the right to vote. Long before enactment of the 1965 Voting Rights Act, AJC sought effective federal protection of the right to vote.

The Center for American Progress

The Center for American Progress is an independent nonpartisan educational institute dedicated to improving the lives of Americans through progressive ideas and action. Building on the achievements of progressive pioneers such as Teddy Roosevelt and Martin Luther King, the Center's work addresses 21st-century challenges, including combating racial and ethnic discrimination. The issues of this case are directly related to the work of the Center for American Progress work in these areas.

Charles Hamilton Houston Institute for Racial Justice

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice ("CHHIRJ") seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy. CHHIRJ, through research and litigation, seeks to address various issues of disparity and racial justice. The issue of ensuring the voting rights of minority group members protected under Section 5 of the Voting Rights Act is directly related to the Institute's mission.

Church Women United

Church Women United is a national volunteer Christian ecumenical women's organization that works to prevent discrimination and promotes actions and programs that embody racial, ethnic, and religious diversity and inclusion. The issues in this case are directly related to Church Women United's work in these areas.

Common Cause

Common Cause is a nonpartisan, nonprofit advocacy organization founded in 1970 as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Today, Common Cause is one of the largest nonprofit organizations working for accountability and reform in America. With over 400,000 members and supporters, Common Cause advocates for honest and open government. As part of its core mission, Common Cause works at the state and federal levels to defend the bedrock freedom of our democracy: casting a vote and having it counted, free from discrimination, suppressive tactics and intimidation. Common Cause is a leading partner organization of the national nonpartisan "Election Protection" coalition, which provides nonpartisan information to voters about the election process. Common Cause has a long history of supporting the Voting Rights Act, including its renewal in 2006 and 1982. Common Cause's former chairman emeritus, the late Archibald Cox, defended the constitutionality of the Voting Rights Act before this Court in 1966.

Dēmos

Dēmos is a national public policy center working for an America where we all have an equal say in our democracy and an equal chance in our economy. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are central to Dēmos' mission. Dēmos actively supported Congress' 2006 reauthorization of the protections of Section 5 of the Voting Rights Act and believes those protections remain indispensable to the goal of full and equal access to political participation.

The Fair Elections Legal Network

The Fair Elections Legal Network ("FELN") is a national, nonpartisan advocacy organization whose overall mission is to remove barriers to registration and voting for traditionally underrepresented constituencies and protect their ability to exercise the right to vote. The issues of this case are directly related to FELN's work in these areas.

The Hip Hop Caucus

The Hip Hop Caucus is a national membership organization working to combat discrimination and promote inclusion, particularly on behalf of urban and hip hop communities. The issues of this case are directly related to Hip Hop Caucus' work in these areas; voter suppression laws were the main target of its Respect My Vote! Campaign in which the Caucus aimed to educate urban voters (mostly 18-40) so as to help them exercise their right to vote in spite of suppression efforts. The Hip Hop Caucus uses its high profile platform of hip hop connections and networks to bring attention to issues that affect urban communities, especially where there are injustices. It is honored to join forces with other leading civil rights organizations in a concerted effort to address issues surrounding the voting rights of the underrepresented, namely African Americans.

The Lawyers' Committee for Civil Rights-San Francisco Bay Area

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR-SF") was founded after the assassination of Dr. Martin Luther King, Jr. in 1968 by leading members of the San Francisco Bar. LCCR-SF is a civil rights and legal services organization that advances, protects and promotes the rights of communities of color and immigrants and refugees, with a specific focus on low-income communities and a long-standing commitment to African Americans. Its core programs remain focused on addressing structural racism and ensuring that everyone has equal access to justice. LCCR-SF continues to expand on its legacy as a leader in the development, advocacy, and advancement of voting rights protections, both state and federal, through ongoing contributions to scholarly, litigation and community outreach and education efforts. The issues in this case are directly related to LCCR-SF's work in these areas.

The League of Women Voters

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively and knowledgeably in government and the electoral process. Founded in

1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 140,000 members and supporters, and is organized in approximately 800 communities and in every state. For more than 90 years, the League has worked to protect every American citizen's right to vote. The League has been a leader in seeking to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot, and the League continues to reach out to increase political participation among women, youth, and traditionally underrepresented communities, including racial and ethnic minorities and new citizens. The League has long supported the Voting Rights Act as a fundamental guarantee of the rights of American citizenship.

National Association for Equal Opportunity in Higher Education

The National Association for Equal Opportunity in Higher Education ("NAFEO"), 209 3rd Street, S.E., Washington, D.C., was founded in 1969 as the nonprofit, voluntary, independent association of the 105 historically black colleges and universities ("HBCUs") and other equal educational opportunity institutions in 25 states, the District of Columbia, and Virgin Islands. NAFEO institutions today include 92 Predominantly Black Institutions ("PBIs"). HBCUs and PBIs enroll 500,000 students, have 52,000 faculty and 5 million alumni, most of whose opportunities and successes are as the direct result of the Voting Rights Act. NAFEO was organized to articulate the need for a higher education system where race, income, and previous education are not the determinants of either the quality or quantity of higher education, and to tear down barriers to the full and unfettered participation of African Americans and other Americans who were historically disenfranchised in the educational, economic and civic life of this nation. NAFEO is not only committed to these goals, but its members are committed in terms of their resources, human and financial, to achieving these goals. NAFEO views the full and fair enforcement under the Voting Rights Act as well as its extension and expansion as essential to the realization of these goals.

The National Association of Social Workers

The National Association of Social Workers ("NASW") is the largest professional membership organization of social workers in the world with nearly 145,000 social workers and 56 chapters. The NASW, Alabama Chapter has 1,148 members. With the purpose of developing and disseminating high standards of practice while strengthening and unifying the social work profession as a whole, NASW promulgates professional standards and criteria, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the NASW Code of Ethics. The National Association of Social Workers recognizes that "those who are young, not white, poor and less educated are disproportionately unlikely to vote . . . [and] that increasing voter participation for these groups . . . is important as those elected will make decisions on policies that affect [the] lives of society's most vulnerable populations" (NASW, Voter Participation in SOCIAL WORK SPEAKS 346, 348 (9th ed., 2012; approved by the NASW Delegate Assembly in August 2011). NASW supports full implementation and enforcement of federal voting rights laws, including the Voting Rights Act of 1965, as amended in 2006. SOCIAL WORK SPEAKS, supra, at 349-350.

National Black Law Students Association

The National Black Law Students Association ("NBLSA") is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, a growing pre-law division, and six international chapters or affiliates. NBLSA has an interest in this case because one of the purposes of NBLSA is to utilize the collective resources of the member chapters to influence the legal community by bringing about meaningful legal and political change that addresses the needs and concerns of the Black community. In renewing the Voting Rights Act, Congress gathered extensive evidence of a continuing need for prophylactic legislation that ensures that the right to vote is not abridged on account of race. Without section 5, there is a risk that much of the political and social progress made since the passage of the Voting Rights Act would be lost.

National Council of Jewish Women

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access to the electoral process and that every vote counts and can be verified." In addition its principles state that "A democratic society and its people must value diversity and promote mutual understanding and respect for all" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with its Principles and Resolutions, NCJW joins this brief.

National Education Association

The National Education Association ("NEA") is a nationwide employee organization with more than three million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to equal voter access and enfranchisement. To that end, NEA vigorously supports the Voting Rights Act, including its 2006 reauthorization.

National Urban League

The National Urban League, founded in 1910, is an historic national civil rights organization dedicated to economic empowerment, combating discrimination, and promoting inclusion in order to elevate the standard of living in significantly underserved urban communities. The organization and its 98 local affiliates work through program development, public policy, research, advocacy, civic engagement, and provide direct services—including education, employment training and placement, health services, and housing—that improve the lives of over 2.6 million people. The National Urban League has historically fought for and supported the Voting Rights Act of 1965, including the Congressional decision in 2006 to extend § 5 of the Voting Rights Act for 25 years. Given its history and direct work in local communities, the National Urban League finds that the single issue that arguably stands to have the greatest impact on the future of Black America is the right to vote and have that vote counted. Indeed, more than half a century after the Voting Rights Act of 1965 was passed, protecting the Constitutional right to vote from poll taxes, literacy tests or other barriers, we face today a nationwide strategic campaign to suppress the vote of African Americans. As a 103-year old civil rights and human services organization, the National Urban League remains committed to this fight. Protecting each individual's fundamental right to vote, and the implications of the power of the vote, is inextricably linked to every individual's economic and social wellbeing and essential to preserving the very functioning of our democracy. The issues of this case are therefore especially and directly related to the work of the National Urban League.

Project Vote

Project Vote, Inc. is a national nonpartisan, nonprofit 501(c)(3) based in Washington, DC that promotes voting in historically underrepresented communities. Through its research, advocacy, and direct legal services, Project Vote works to ensure that these constituencies are able to fully participate in American civic life by registering and voting. Since its founding, Project Vote has assisted millions of low-income and minority citizens nationwide with voter registration, trained hundreds of low-income and minority organizers, and provided nonpartisan voter education on issues of voting rights and election administration.

Public Advocates, Inc.

Public Advocates Inc. is a California-based civil rights law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories. Public Advocates spurs change through collaboration with grassroots groups representing low-income communities, people of color and immigrants, combined with strategic policy reform, media advocacy and litigation. Since its founding in 1971, Public Advocates has engaged in a wide range of cutting edge civil rights issues from school finance, urban development, transportation policy, and climate justice, to language access, employment discrimination, and health services disparities. The issues of this case are directly related to Public Advocates' civil rights mission and work.

Service Employees International Union

Service Employees International Union ("SEIU") is one of the largest unions in North America. It represents over 2.1 million workers in service industries throughout the United States and Canada. Directly and through its affiliated local unions, SEIU activity participates in federal elections and has historically promoted legislation designed to assure full participation in the political process to citizens without regard to race, gender, sexual orientation or other classifications that should have no bearing on such participation. Because SEIU has many members who reside in jurisdictions currently subject to section 5 of the Voting Rights Act who wish to participate in a fair and open electoral process, SEIU has a substantial interest in the outcome of this litigation.

Southern Poverty Law Center

The Southern Poverty Law Center, founded in 1971 and based in Montgomery, Alabama, has litigated numerous civil rights cases on behalf of minorities, women, prisoners, and other victims of discrimination. The Center also founded and operates Teaching Tolerance, a national program designed to reduce prejudice, improve intergroup relations and support equitable school experiences for our nation's children. Although the Center's legal work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law. The issues of this case are directly related to the Southern Poverty Law Center's purpose and mission.

Union for Reform Judaism
Central Conference of American Rabbis
Women of Reform Judaism

The Union for Reform Judaism has 900 congregations across North America, and these congregations include 1.5 million Reform Jews. The membership of the Central Conference of American Rabbis includes more than 2000 Reform rabbis. The Women of Reform Judaism represents more than 65,000 women in nearly 500 women's groups in North America and around the world. Discrimination has no place in our society, including at the ballot box. Voting is the foundation of American democracy and the most important tool Americans have to influence our government's policies. We must not allow our nation's commitment to voting rights to be diminished.

AMICUS
CURIAE
BRIEF

No. 12-96

In the

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE HONORABLE CONGRESSMAN JOHN LEWIS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND INTERVENOR-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

- I. The History of Voting Rights In America Has Been One of Recurring Retrenchment and Reconstruction Rather than Uninterrupted and Continuous Progress. 5
  - A. Young Men and Women Risked and Sometimes Gave Their Lives During The Civil Rights Movement to Secure the Right to Vote for All Americans. 5
  - B. A Century Before the Congressman Was Nearly Murdered for Trying to Exercise The Right to Vote, His Great-Great-Grandfather Freely Voted During Reconstruction. 8
  - C. Congressman Lewis' Public Service Career Has Been Devoted to the Proposition that Democracy Is Not a State but an Act that

Requires Continued Vigilance to Ensure a Fair and Free Democracy.. 13

II. Section 5 of the Voting Rights Act Remains Crucial to Protect the Rights of All Americans to Participate in Our Electoral System Free from Racial Discrimination. 16

A. The Substantial and Persistent Electoral Discrimination in Georgia is Indicative of the Continuing Need for Section 5. 17

B. Recent Increases in Minority Voting Strength and the Election of Minority Candidates Engendered Discriminatory Reponses in Covered Jurisdictions. ... 21

C. Section 5 of the Voting Rights Act Prevented Electoral Discrimination Against Racial and Ethnic Minorities in the 2012 Election. 24

1. Section 5 Prevented Discriminatory Voter Identification Laws from Disenfranchising Minority Voters in the 2012 Election. 24

2. Section 5 Prevented the Reduction of Voting Hours in

the 2012 Election, Assuring Minority Voters Access to the Polls.. 29

3. Section 5 Prevented the Discriminatory Dilution of Minority Voting Strength in the 2012 Election........................ 32

4. Section 2 of the Voting Rights Act Would Not Have Been as Effective as Section 5 in Preventing Disenfranchisement of Minority Voters During the 2012 Presidential Election......... 35

CONCLUSION.. 38

TABLE OF CITED AUTHORITIES

Page(s)

Cases

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Beer v. United States, 425 U.S. 130 (1976) 26
Florida v. United States, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) 30, 31
Giles v. Harris, 189 U.S. 475 (1903) 13
Giles v. Teasley, 193 U.S. 146 (1904) 13
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 13
Guinn v. United States, 238 U.S. 347 (1915) 13
Lane v. Wilson, 307 U.S. 268 (1939) 13
League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 22
Morales v. Handel, No. 1:08-CV-3172 (N.D. Ga. Oct. 27, 2008) 19, 20
Myers v. Anderson, 238 U.S. 368 (1915) 13
Neal v. Delaware, 103 U.S. 370 (1880) 13
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Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 8
Perez v. Perry, 835 F.Supp.2d 209 (W.D. Tex. 2011), *vacated and remanded*, 132 S.Ct. 934 (2012) 34
Perez v. Texas, No. 11–CA–360, 2012 WL 4094933 (W.D. Tex. Feb. 28, 2012) 34
Smith v. Allwright, 321 U.S. 649 (1944) 13
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 35, 36, 38
South Carolina v. United States, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) 28, 29

Terry v. Adams, 345 U.S 461 (1953).......................... 13
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Texas v. United States, No. 11-1303, 2012 WL 3671924 (D.D.C. 2012), *petition for cert. filed*, 81 USLW 3233 (U.S. Oct 19, 2012)(No. 12-496) 32, 33
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United States v. Reese, 92 U.S. 214, 218 (1875)...... 13
Williams v. Mississippi, 170 U.S. 213 (1898).... 10, 13

Statutes

Civil Rights Act of 1866, 14 Stat. 27 (1866)............ 12
Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140 (1870).. 12
Civil Rights Act of 1871, 17 Stat. 13 (1871)............ 12
Fla. Stat. § 101.657(d) (2010) 30
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S.C. Code Ann. § 7-13-710 (D)(1)(b) (2011) 27
S.C. Code Ann. § 7-13-710(A) (2011) 27
U.S. Const. pmbl. 3
Voter Empowerment Act of 2013, H.R. 12, 113th Cong. (2013) 14
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Other Authorities

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Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2d ed. 2009)... 11, 12
Brief for Cato Institute as Amicus Curiae Supporting Petitioner 21

Brief for Georgia Governor Sonny Perdue as Amicus Curiae Supporting Appellants, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 17

Brief for Petitioner 3

Brief for the Hon. Congressman John Lewis as Amicus Curiae Supporting Appellant, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 9

Cong. Globe, 42nd Cong. 1st Sess. 389-92 (1871) ... 11

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Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65 (2008) 10

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Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Attorney Gen. of S.C. (Dec. 23, 2011) 27, 28

Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012) 25, 26

Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep't of Justice, to Tommy Coleman, Esq. (Sept. 12, 2006) 18

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To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R., 109th Cong. 58 (2005) 36

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Congressman John Lewis, is the United States Representative of Georgia's Fifth Congressional District, which includes the entire city of Atlanta, Georgia and parts of Fulton, DeKalb and Clayton counties.[1] He has served in this capacity since January 1987. Congressman Lewis has a continued interest in the development and protection of laws that guard against racial discrimination and promote social and political equality for all Americans.

Today, political historians and constitutional scholars acknowledge that the main impetus for President Lyndon Johnson submitting the Voting Rights Act of 1965 to Congress on March 15, 1965, and its passage by both Houses of Congress a mere five months later, was the brutal attacks on nonviolent civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama. Congressman Lewis was one of the marchers on that day and, like many of his fellow nonviolent civil rights demonstrators, was beaten with bullwhips, choked with toxic tear gas, and nearly trampled by horses simply because he wished to exercise his constitutional right to vote. In submitting this brief, Congressman Lewis hopes to attest personally to the high price many paid for the enactment of the Voting Rights Act and the still higher cost we might yet bear if we prematurely discard one of the most vital tools of our democracy.

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Fifty years ago, "at the height of the civil rights movement, when America itself felt as if it might burst at the seams," Congressman John Lewis and young men and women of his generation put their bodies in the path of armed troopers mounted on horses and club-wielding mobs yelling for murder, in order to secure the right to vote for all Americans. John Lewis, ***Walking with the Wind: A Memoir of the Movement*** xvii (1998). Years and months of protests culminated in a bloody Sunday afternoon in March 1965 when Alabama state troopers charged through a line of peaceful marchers led by Congressman Lewis and fractured his skull with a club. The Voting Rights Act of 1965 was the result of, and remains a testament to, their sacrifice. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified at 42 U.S.C. § 1973 *et seq.*) (VRA or "the Act").

No statutory enactment has been more important in combating minority disenfranchisement and advancing voting rights for all Americans than the VRA. If, as the late President Ronald Reagan once declared, the right to vote is "the crown jewel of American liberties," President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), the VRA made this crown jewel not just the prized possession of a fortunate few but the birthright of all Americans. The VRA in general, and the preclearance provisions of Section 5 in particular, helped break the back of Jim Crow segregation, made a place at the table of civic and political life for millions of Americans, and moved us closer to the goal of a "more perfect union." U.S. Const. pmbl.

And yet, as vital to American democracy as the VRA is, it has always endured intense criticism. Through the years, covered jurisdictions insisted with great sincerity, as Shelby County does today, that the Act's preclearance provisions were no longer needed, maintaining paradoxically on the one hand that the Act is an unwarranted abrogation of state authority by the federal government, and on the other hand that the Act has succeeded in doing so much good that covered jurisdictions should be relieved from the "burdens" of preclearance. Brief for Petitioner at 23-28.

At the heart of the argument against Section 5 of the VRA lies the unfounded belief that our history of voting rights has been one of consistent progress, that we have now reached the point where equal voting rights are guaranteed to all Americans, and that eliminating Section 5 as a tool of federal enforcement will not cause us to slide back. *Id.* at 19. But the fact is, a century before Congressman Lewis was nearly murdered on the Edmund Pettus Bridge for claiming the right to vote, his great-great-grandfather was among the first generation of former slaves to vote in Alabama. *See generally Finding Your Roots: John Lewis and Cory Booker* (PBS 2012). The fact that the Congressman had to fight to regain a right his former slave ancestors had exercised is living proof of the danger of this claim of ever-forward progress.

Today, our electoral portrait remains stained with the blight of racial discrimination. In 2006, after careful review of a record in excess of 15,000 pages, Congress acted on the continuing need for the VRA. Congress observed that mechanisms of minority voter suppression continue to be utilized in covered jurisdictions. H. Rep. No. 109-478, at 2 (2006). Unlike the blatant voter suppression mechanisms employed in the past, today's mechanisms manifest themselves more subtly and consist of a hazardous mix of old and new tactics. *Id.* at 21. What is clear, however, is that these mechanisms continue to suppress, dilute, and infringe upon minorities' constitutional right to vote. *Id.* Petitioner's misguided attempt to cast doubt on the constitutionality of Section 5 is simply not supported by the extensive record of electoral discrimination in covered jurisdictions before Congress in 2006, nor that which the country saw leading up to the 2012 election.

ARGUMENT

I. The History of Voting Rights In America Has Been One of Recurring Retrenchment and Reconstruction Rather than Uninterrupted and Continuous Progress.

A. Young Men and Women Risked and Sometimes Gave Their Lives During The Civil Rights Movement to Secure the Right to Vote for All Americans.

Though often neglected in the usual narrative of judicial opinions, the story of the VRA is the story of young men and women of all races, economic circumstances, and religious backgrounds who risked their lives to create a non-violent social movement to overturn segregation in the Jim Crow South, and to ensure political participation for all throughout the United States. The years, days, and moments of the movement were made of boycotts, sit-ins, freedom rides, jail marches, fire hoses, literacy tests, billy clubs, poll taxes, tear gas, burning crosses, lynchings in the night, church bombings, and drive-by murders. Lewis, at 239-47.

In June 1964, the Student Non-Violent Coordinating Committee (SNCC) began a voting campaign in Mississippi, where due to the state's Jim Crow voting practices only 5% of eligible African Americans were registered to vote. *Id.* at 241-62. The aim of what came to be known as "Freedom Summer" was to integrate the Mississippi

Delegation of the 1964 Democratic National Convention by educating and organizing African-American voters across the state, and to solicit their support for the Mississippi Freedom Democratic Party. *Id.*

As chairman of SNCC, Congressman Lewis helped plan and mobilize Freedom Summer. Years prior, he worked to register voters in Selma, Alabama. At that time in Alabama, only 1% of voting-age African Americans was registered to vote, state troopers used cattle prods to corral protestors, and crosses were burned in sixty-four of the state's eighty-two counties. *Id.* at 229-31, 233-37. In Mississippi, by the end of Freedom Summer, activists had endured more than a thousand arrests, thirty-five shootings, more than thirty church burnings, and just as many bombings. *Id.* at 274.

On March 7, 1965, nearly 600 people, including women and children wearing their Sunday church outfits, gathered at Brown's Chapel African Methodist Episcopal Church to march fifty-four miles from Selma to Montgomery to protest the killing of one of their own: Jimmy Lee Jackson, a twenty-six year old Army veteran and voting rights worker shot by an Alabama state trooper as he tried to protect his mother during a voting rights protest. *Id.* at 327-28. With Congressman Lewis leading the way, they marched "two abreast, in a pair of lines that stretched for several blocks . . . . At the far end, bringing up the rear, rolled four slow-moving ambulances." *Id.* at 337. The march was peaceful, "somber and subdued, almost like a funereal procession." *Id.* at 338. "There were no big names up front, no celebrities. This was just plain folks moving through the streets of Selma." *Id.*

And then, the marchers reached the Edmund Pettus Bridge, carrying U.S. Highway 80 across the Alabama River, where on the other side waited for them "a sea of blue-helmeted, blue-uniformed Alabama state troopers" backed by "several dozen more armed men . . . some on horseback . . . many carrying clubs the size of baseball bats." *Id.* at 338-39. As the marchers crested the top of the bridge, the trooper in charge ordered them to disperse. *Id.* at 339. When they knelt to pray, troopers and deputized citizens charged and, with the cries of rebel yells and "*Get 'em! Get the niggers!*", swept forward "like a human wave, a blur of shirts and billy clubs and bullwhips" *Id.* at 340.

Without a word, one trooper swung his club against the left side of Congressman Lewis' head, fracturing his skull. *Id.* A cloud of tear-gas enveloped the marchers. Bleeding badly and barely hanging onto consciousness, Congressman Lewis tried to stand up from the pavement only to find himself surrounded by women and children weeping, vomiting while "men on horses [moved] in all directions, purposely riding over the top of fallen people, bringing the animals' hooves down on shoulders, stomachs, and legs." *Id.* at 341.

In the late afternoon, hours after the attack had begun, "troopers, possemen, and sheriff's deputies pursued the marchers over the mile back to the neighborhood around Brown Chapel, where they attacked stragglers in a frenzy," taunting those who had taken refuge in the church "for the negroes to come out." Taylor Branch, *At Canaan's Edge: America in the King Years 1965-1968* 53 (2006).

That evening, just past 9:30 p.m., ABC Television cut into its Sunday night movie – a premiere broadcast of Stanley Kramer's *Judgment at Nuremberg*, a film about Nazi racism – with "a special bulletin," showing to the entire country fifteen minutes of film footage of the attack on the Edmund Pettus Bridge. *Id.* at 55.

Eight days later, President Johnson addressed the American people: "I speak tonight for the dignity of man and for the destiny of democracy. At times, history and fate meet at a single time, in a single place to shape a turning point in man's unending search for freedom . . . . So it was last week in Selma." President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965). The President ended by calling on Congress to enact the Voting Rights Act, which it did on August 6, 1965.

B. A Century Before the Congressman Was Nearly Murdered for Trying to Exercise The Right to Vote, His Great-Great-Grandfather Freely Voted During Reconstruction.

In 2009, Congressman Lewis participated as *amicus curiae* when this Court again considered the constitutionality of Section 5 in *Northwest Austin Municipal Utility District Number One v. Holder*. Brief for the Hon. Congressman John Lewis as

Amicus Curiae Supporting Appellant, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). He explained that "the danger of accepting the argument that we have made so much progress that we no longer need the very tool that made all that progress possible is that we will forget one of the most important lessons history has to teach us, namely: that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward . . . ." *Id.* at 10-11. At the time, unbeknownst to Congressman Lewis, his family history was proof "that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made." *Id.* at 11.

At the conclusion of the Civil War, a century prior to Bloody Sunday and the Edmund Pettus Bridge attack, Tobias and Elizabeth Carter, Congressman Lewis' great-great-grandparents, exercised the full rights and privileges of citizenship. Both former slaves, they married soon after the Emancipation Proclamation, bought land and settled in rural Alabama. Congressman Lewis' great-great-grandfather was part of the first generation of former slaves to register and vote in Alabama. *See generally Finding Your Roots: John Lewis and Cory Booker.*

In many ways, the life of full citizenship Congressman Lewis' great-great-grandfather led during Reconstruction was unique. For a short while immediately following their emancipation, African Americans in large numbers throughout the

South were able to participate in the American political system.

Immediately after Emancipation, African Americans in Alabama "began acting like independent men and women." Howard Zinn, *A People's History of the United States* 195 (5th ed. 2003). Former slaves, who had lived for generations under the control of white slave masters, who were not permitted to learn to read, who could not control the destiny of their own families and who certainly could not vote, were beginning to participate in civic life in unprecedented ways. In 1868, 700,000 African Americans, mostly freed slaves, voted for the first time in Ulysses Grant's presidential election. *Id.* at 194. Newly freed African-American men were elected to state legislatures in former Confederate States. In South Carolina, African Americans were the majority in the lower house. *Id.* at 195. By 1880, "African-Americans were an absolute majority in Louisiana, Mississippi, and South Carolina, and were over 40% of the population in Alabama, Florida, Georgia and Virginia." Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65, 66 (2008). By 1898, Mississippi had 190,000 African-American voters and only 69,000 white voters. *Williams v. Mississippi*, 170 U.S. 213, 215 (1898). At the federal level, in 1869, Hiram Rhoades Revels and Blanche Bruce, two African Americans, one a former slave, were elected to the United States Senate, along with twenty African-American Congressmen. Zinn, at 195.

Congress passed the Fifteenth Amendment on February 26, 1869, enfranchising more than a million African-American men who had been slaves only a decade earlier. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 80, 82 (2d ed. 2009). With the ratification of the Fifteenth Amendment, the words "right to vote" were written into the U.S. Constitution for the first time, "announcing a new, active role for the federal government in defining democracy." *Id.* at 82-83.

This progress was not the natural trajectory of emancipation, nor was it coincidental; it was the direct result of the federal government's presence throughout the southern United States. Once that federal presence was removed, the enormous political, social and economic progress was wiped away and would not be regained for almost a century.

By late 1870, all the former Confederate states had been readmitted to the Union and most were controlled by the Republican Party, due primarily to the support of African-American voters. The heavily disputed presidential election of 1876 ended in a compromise that resulted in troops being withdrawn from the South in 1877, signifying the formal end of Reconstruction. During floor debates on the Civil Rights Act of 1871, African-American representative Robert B. Elliot reminded his fellow legislators that, "the declared purpose [of the Democratic party of the South is] to defeat the ballot with the bullet and other coercive means . . . ." Cong. Globe, 42nd Cong. 1st Sess. 389-92 (1871).

His prediction came to pass. Democrats in the South convened state constitutional conventions with the explicit purpose to disenfranchise African Americans. Keyssar at 84-85. In the period after 1878, in a deliberate effort to disenfranchise the potentially powerful voting bloc of former slaves, southern states like Alabama, Georgia, Mississippi and Louisiana enacted literacy tests, grandfather clauses, poll taxes and other unfair voter registration practices. *Id.* at 89-91. By 1880, white Democrats in the South had regained control over state and local governments and the number of southern African-American legislators fell dramatically. *Id.* at 86.

Thus, it is inaccurate to say, as has sometimes been suggested when recounting the history of voting rights in this country, that after a century of congressional inaction and failure, the VRA served as the starting point of effective federal participation to enforce the Fifteenth Amendment. Rather, the narrative of voting rights, as evidenced by the story of Congressman Lewis' own ancestors, is one of a cycle of retrenchment and reconstruction. The approximately twenty-year period between 1866 and 1880 was a brief moment of reform. Among other things, the Civil Rights Act of 1866, 14 Stat. 27 (1866), the Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140 (1870), and Civil Rights Act of 1871, 17 Stat. 13 (1871), established robust federal enforcement of constitutional rights for all Americans by establishing civil and criminal penalties for denying African Americans the right to vote and providing for federal troops to patrol polls in the South.

If, by 1880, federal enforcement of voting rights began a period of relative retrenchment, with all due respect, it must be acknowledged that, even while striking down some of the most blatant forms of voter disenfranchisement,[2] this Court's expansive reading of state sovereignty also contributed to a weakening of federal involvement in voting rights enforcement, the end of Reconstruction, and the political disempowerment of African Americans. *See Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1889); *United States v. Cruikshank*, 92 U.S. 542 (1876); and *United States v. Reese*, 92 U.S. 214 (1875).

C. Congressman Lewis' Public Service Career Has Been Devoted to the Proposition that Democracy Is Not a State but an Act that Requires Continued Vigilance to Ensure a Fair and Free Democracy.

This brief history is not to simply revisit a past we all know too well, but to illustrate that "[d]emocracy is not a state. It is an act. It requires the continued vigilance of us all to ensure that we continue to create an ever more fair, more free democracy." Press Release, John Lewis, On

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[2] *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915); *Neal v. Delaware*, 103 U.S. 370 (1880).

Anniversary of Bloody Sunday, Rep. John Lewis Cites Current Voting Rights Struggle (Mar. 8, 2012). Since first being elected to the House of Representatives in 1986, Congressman Lewis has dedicated much of his twenty-seven-year political career to the preservation of voting rights for all Americans. Among other things, he has introduced bills designed to expand access to the polls, such as the Voter Empowerment Act of 2013, H.R. 12, 113th Cong. (2013) and the Voting Rights of Homeless Citizens Act of 1997, H.R. 74, 105th Cong. (1997). He has also introduced and co-sponsored many House resolutions to commemorate the events and figures of the Civil Rights movement and to draw attention to threats against voting rights. He has done this because he believes that "[t]he vote is the most powerful, nonviolent tool that our citizens have in a democratic society, and [that] nothing . . . should interfere with the right of every citizen to vote and have their vote count." Congressman John Lewis, 40th Anniversary of the Voting Rights Act (July 28, 2005).

When Congress reauthorized Section 5 in 1970, 1975 and 1982, Congressman Lewis was not yet elected to federal office. But during the 2006 reauthorization hearings, he defended the landmark legislation. During the House debate, Congressman Lewis implored his colleagues to reject all four proposed amendments to Section 5, saying, in part:

> Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register

> and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act. And we must not go back to the dark [past].
>
> We cannot separate the debate today from our history and the past we have traveled. When we marched from Selma to Montgomery in 1965, it was dangerous. It was a matter of life and death. I was beaten, I had a concussion at the bridge. I almost died. I gave a little blood, but some of my colleagues gave their very lives.

152 Cong. Rec. H5164 (daily ed. July 13, 2006) (statement of Rep. Lewis).

Today, 150 years after his great-great-grandfather cast one of the first African-American votes in our country, and nearly fifty years after his march across the Edmund Pettus Bridge, Congressman Lewis continues his life-long fight to ensure that all American citizens are able to exercise their right to vote, regardless of their race. The Voting Rights Act is as relevant and necessary today as it was upon its passage nearly fifty years ago.

II. Section 5 of the Voting Rights Act Remains Crucial to Protect the Rights of All Americans to Participate in Our Electoral System Free from Racial Discrimination.

Petitioner and its *amici* contend that Congress erred in its determination that Section 5 of the VRA is still necessary in light of the progress that has been made. The crux of their contention rests on the following conclusion: Section 5 of the VRA works. However, the VRA's achievements do not render it irrelevant; to the contrary, the Act's recent achievements illustrate its continuing relevance in a society where voting discrimination remains very much a reality.

The VRA's success is remarkable and undeniable. Indeed, its enactment was a turning point in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). In the nearly five decades since the Act's passage, minority voters have garnered increasing political power. While considerable progress has been made, the VRA's goal of bringing to life the promise of the Fifteenth Amendment has not been fully realized. Barriers to equal political participation persist; minority citizens are still denied access to the polls and have had to struggle through increasingly ingenious discriminatory roadblocks. That the Act has begun to cure the malaise of voting discrimination does not render its most powerful tonic superfluous. The acknowledged success of the VRA is not proof that Section 5's usefulness has expired. In fact, it is evidence that Section 5's powerful medicine is working and needs to continue.

A. The Substantial and Persistent Electoral Discrimination in Georgia is Indicative of the Continuing Need for Section 5.

Although there are no more literacy tests and grandfather clauses, today we see a new generation of tools being employed across the country: discriminatory redistricting and annexation plans, voter identification and verification laws, at-large election schemes, unexpected re-registration requirements, sudden polling place changes, and the last minute addition of new rules for candidate qualification. All of these methods are used to discriminate against minorities and have led to over 700 Section 5 preclearance objections by the United States Department of Justice (DOJ) between 1982 and 2006. H.R. Rep. No. 109-478, at 22 (2006).

Since Section 5's reauthorization in 1982, Congressman Lewis' state of Georgia has received an alarming ninety-one preclearance objection letters from the DOJ, *id.* at 37, even though the state's Governor insists that Georgia should be relieved of Section 5's preclearance provisions, Brief for Georgia Governor Sonny Perdue as Amicus Curiae Supporting Appellants, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009). Here are a few examples:

In 2002, a state court judge sitting by designation as Superintendent of Elections of Randolph County, Georgia, issued an opinion that Henry Cook, an African-American member of the Randolph County Board of Education was a resident of District 5, the majority African-American district from which he had been elected. Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep't of Justice, to Tommy Coleman, Esq. (Sept. 12, 2006). In 2006, however, the County Board of Registrars, all of whose members were white, removed Cook from District 5 and reassigned him to District 4, a majority white district. *Id.* Given the history of racial bloc voting in Randolph County, Cook would certainly have been defeated had he run for reelection in District 4. *Id.* Randolph County refused to submit Cook's reassignment for preclearance under Section 5, even though it constituted a change in voting. *Id.* The Board of Registrars then submitted the change for preclearance, and the DOJ objected. *Id.* The DOJ cited the absence of any intervening change in fact or law since the 2002 decision of the state court judge, and ruled that in light of the history of discrimination in voting in Randolph County, the County failed to sustain its burden of showing that the submitted change lacked a discriminatory purpose. *Id.*

In March 2007, Georgia instituted a data verification system for its voter registration database that sought to match information provided by a voter registration applicant with the information maintained by the state's Department of Driver Services and the Social Security Administration.

Letter from Loretta King, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to the Hon. Thurbert E. Baker, Attorney Gen. of Ga. (May 29, 2009) ("King Letter"). If the applicant's information did not match, the applicant would be "flagged" and would not be registered to vote unless and until the applicant provided additional documentation to prove his citizenship status. *Id.* Under the previous system, applicants seeking to register to vote only had to swear or affirm on the voter registration form that the information provided, including their citizenship status, was true. *Id.* Georgia claimed that the new verification system was part of its efforts to implement the requirements of the Help America Vote Act, 42 U.S.C. § 15301 *et seq.* *Id.* Although Georgia is a covered jurisdiction under Section 5, it did not seek preclearance before implementing this new system. *Morales v. Handel*, No. 1:08-CV-3172, at 22 (N.D. Ga. Oct. 27, 2008).

In September 2008, Jose Morales, a naturalized U.S. citizen and a Georgia resident, applied to register to vote. *Id.* at 2-3. Soon after, Morales received a letter from the county registrar informing him that he was required to provide documentation verifying his citizenship before being registered to vote. *Id.* at 3. That October, Morales filed suit in the U.S. District Court for the Northern District of Georgia seeking a temporary restraining order and a preliminary injunction against the Georgia Secretary of State under Section 5 of the VRA. *Id.* at 3-4. A three-judge panel found that Georgia violated Section 5 by not seeking preclearance for the new verification procedure. *Id.* at 22. Because there was an "imminent" general federal election, the court issued a preliminary injunction enjoining the secretary of state to undertake remedial action "unless and until preclearance is obtained under Section 5." *Id.* at 23. The court explained that the injunction addressed the state's "compelling interest in complying with Section 5's mandate to ensure that no eligible voter is denied the right to vote for failure to comply with an unprecleared voting practice." *Id.* at 26.

In October 2008, prompted by the lawsuit, Georgia finally submitted the new verification process to the DOJ for preclearance. The DOJ objected to the submission, finding that the system was "seriously flawed" and subjected a disproportionate number of African-American, Asian, and Hispanic voters to additional and erroneous burdens on the right to register to vote. King Letter at 4. The DOJ noted that because Georgia had implemented the new changes in violation of Section 5, there was data reflecting the actual results of the state's verification process. This data revealed that the system was inaccurate, resulting in "thousands of citizens who are, in fact, eligible to vote under Georgia law" being improperly flagged. *Id.* at 3. Moreover, the impact of these errors fell disproportionately on minority voters. More than 60% more African-American applicants were flagged than whites; Hispanic and Asian applicants were more than twice as likely to be flagged as white applicants. *Id.* at 4.

The long journey of Georgia's discriminatory citizenship verification system demonstrates Section 5's continued necessity in two important ways.

First, Georgia implemented its new system ignoring Section 5's preclearance requirement, providing clear data that illustrate the policy's actual discriminatory impact. Second, the case demonstrates how Section 5 provides swift legal recourse even when a state tries to avoid the preclearance process, giving courts the authority to quickly enjoin the state from implementing the law and to continue that enjoinder until the state complies with Section 5. Without Section 5, Georgia's flawed system would have continued to wrongly flag minority voter registration applications just weeks before an election.

B. Recent Increases in Minority Voting Strength and the Election of Minority Candidates Engendered Discriminatory Reponses in Covered Jurisdictions.

The Voting Rights Act played a direct and pivotal role in the election and reelection of our country's first African-American President. The election of Barack Obama in 2008, and his recent reelection in 2012, showcased both the progress the VRA helped to usher in, as well as the continuing animosity towards minority participation in our electoral process, especially in jurisdictions covered under Section 5. Amici in support of Petitioner argue that President Obama's election proves that Section 5 is no longer necessary. Brief for Cato Institute as Amicus Curiae Supporting Petitioner at 10. While there is no doubt that the gains in minority political participation can be largely attributed to the VRA, the legislative response in many covered jurisdictions to the 2008 election only lend further support to Congress' conclusion in 2006 that Section 5 remains vital.

In response to more minority voters participating in the political process, six of the nine states fully covered under Section 5 have passed legislation in the last two years designed to restrict voting rights and access to the polls. These laws harken back to the days of Jim Crow, and remind us all that we have not left the past behind.

When assessing electoral changes, the court must consider the "totality of the circumstances." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 401 (2006). This includes a state's history of voting-related discrimination, the extent to which voting is racially polarized, and the extent to which the state has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group. *Id.* We cannot ignore that the recent changes to voting practices and procedures were enacted against a backdrop of increasing racial animosity brought about by the election of the first African-American President. Following President Obama's election, covered jurisdictions were littered with billboards, signs, t-shirts, and bumpers stickers with messages such as "I do not support the nigger in the white house" and "don't renig [sic] in 2012." Two individuals were removed from the Republican National Convention after throwing nuts at an African American camerawoman and shouting, "[T]his is how we feed the animals." Empty chairs, symbolizing President Obama, were "lynched" in Texas and Virginia.

Candidates and pundits alike invoked the image of poor African Americans and Hispanics as inhibiting America's economic recovery, including Newt Gingrich branding President Obama as "the greatest food stamp president in history." This racially-charged, political rhetoric appeals to those white voters who are primed and listening for subtle racial calls to action. This is "dog whistle" politics, plain and simple.

The country has seen this interplay before. As racial animosity rises, some elected officials respond by appealing to racist sentiment. When overt racism permeated society, George Wallace and Barry Goldwater resurrected the double entendre of "states' rights" to oppose the integration of Alabama's schools and the Civil Rights Act of 1964, disguising their racism as federalism. *See* Juan Williams, *The 1964 Civil Rights Act—Then and Now*, 31 Human Rights 6 (2004). President Nixon appealed to white racists and anti-civil rights voters by referencing "busing" and "states' rights." *See* President Richard Nixon, Address to the Nation on Equal Educational Opportunities and School Busing (Mar. 16, 1972).

The continued use of racial appeals in political campaigns is just one additional piece of evidence that race impacts our political process, making it more difficult for minority candidates to be elected and for minority voters to have their votes count.

C. Section 5 of the Voting Rights Act Prevented Electoral Discrimination Against Racial and Ethnic Minorities in the 2012 Election.

Leading up to the 2012 election, several Section 5 covered jurisdictions attempted to implement new policies and practices that had discriminatory effects on minority voters. impeding their ability to register, vote, and elect representatives of their choice. In several states, Section 5 and its preclearance process served their purpose: to prevent the illegal disenfranchisement of hundreds of thousands of minority voters.

The unprecedented number of minority voters who participated in the 2012 election has garnered much attention in the media. It is a landmark our country should celebrate. But we must also recognize that this phenomenon is an accomplishment of the VRA, with Section 5 playing an important role. An examination of the voting rights cases leading up to the 2012 election reveals that this historical participation in our democratic process was in part the direct result of Section 5's protections. Indeed, without Section 5, minority voters in several states would have been denied their right to vote in 2012.

1. Section 5 Prevented Discriminatory Voter Identification Laws from Disenfranchising Minority Voters in the 2012 Election.

The most widespread legislative effort to curtail the right to vote leading up to the 2012 election was the imposition of stricter documentary identification requirements on voters. Section 5's preclearance requirement prevented the implementation of discriminatory voter identification laws in the 2012 general election by shifting the burden from the many voters who may have been disenfranchised by these laws, to the states seeking to implement them. Two covered jurisdictions—Texas and South Carolina—failed to persuade the DOJ and the U.S. District Court for the District of Columbia that they could implement their new voter identification laws prior to the 2012 election without discriminating against minority voters.

In May 2011, Texas passed Senate Bill 14, S. 14, 2011 Leg., 79th Sess. (Tex. 2011) ("SB 14"), amending its voter identification law to eliminate a number of acceptable forms of identification allowed under the existing law and instead requiring voters to present a Texas driver's license, military identification, citizenship certificate or passport before being allowed to vote. *Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676, *1 (D.D.C. Aug. 30, 2012). As a covered jurisdiction under Section 5, Texas was required to submit SB 14 for preclearance, which it did on July 25, 2011 by submission to the Department of Justice. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012).

On March 12, 2012, the Attorney General objected to Texas' preclearance submission finding that the state had failed to meets its burden that the new law would not have a retrogressive effect on the state's minority population. *Id.* Specifically, data submitted by Texas in support of its submission showed that over 600,000 registered voters in the state did not have the identification required by the new law, a disproportionate share of whom were Hispanic. *Id.* The data indicated that a Hispanic voter in Texas was 46.5% more likely than a non-Hispanic voter to lack the new forms of identification. *Id.*

In January 2012, after being denied preclearance by the DOJ, Texas sought preclearance for its new voter identification law from the U.S. District Court for the District of Columbia. *Texas*, 2012 WL 3743676, at *1. After an expedited trial, the district court concluded, "record evidence suggests that SB 14, if implemented, would . . . likely 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at *26 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Consequently, the court held that Texas' voter identification law violated Section 5 and could not be enforced for the 2012 election. *Id.* at *26, 32.

The swift rejection of Texas' voter identification law by both the DOJ and the district court prevented one of the most restrictive voter identification laws in the country from being implemented in a way that would have blocked a disproportionate number of minority voters from the polls on Election Day 2012. Section 5's preclearance process served its purpose—providing an efficient and effective means to prevent the rollback of minority voting rights.

In May 2011, South Carolina, also a covered jurisdiction, passed Act R54 which amended South Carolina's voter identification law to narrow the forms of permitted voter identification. R54, 119th Gen. Assemb., Reg. Sess. (S.C. 2011-2012). Similar to Texas, the South Carolina law required voters to present a South Carolina driver's license, motor vehicle photo identification, passport, military identification card or a photo voter registration card. S.C. Code Ann. § 7-13-710(A) (2011). The prior law did not require photo identification to vote, allowing voters to present a non-photo voter identification card. *Id.* But the South Carolina amendment differed from Texas' law in that it allowed voters with a "reasonable impediment" that prevents them from having one of the required forms of voter identification to sign an affidavit confirming their identity and explaining why they do not have one of the required forms of identification. S.C. Code Ann. § 7-13-710 (D)(1)(b) (2011).

On December 23, 2011, the DOJ denied preclearance for South Carolina's new voter identification law, finding that the new law would adversely affect minority voters. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Attorney Gen. of S.C. (Dec. 23, 2011). Data presented by the state demonstrated that minority voters were nearly 20% more likely to lack motor vehicle photo identification than white registered voters. *Id.* at 2. The DOJ also determined that the "reasonable impediment" exemption would not mitigate the law's discriminatory effects because it was ambiguous and could be applied in a discriminatory way. *Id.* at 3.

South Carolina then filed for preclearance in the U.S. District Court for the District of Columbia. ***South Carolina v. United States***, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). The court decided the case on October 10, 2012, less than one month before the general election. Like the DOJ, the court concluded that non-white voters were more likely than white voters to not have one of the required forms of voter identification, but found that the law's "sweeping reasonable impediment exemption eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." *Id.* at *9. In reaching its conclusion, the court was careful to explain that a broad interpretation and application of the exemption was critical to assuring the law's legality. *Id.* at *19 (stating, "this law, without the reasonable impediment provision, could have discriminatory effects and impose material burdens on African-American voters . . . .").

Importantly, the district court did *not* preclear the law for the 2012 election, finding that implementing the law so close to the election created too much of a risk to African-American voters. *Id.* The court explained, "[b]ecause the voters who currently lack qualifying photo ID are disproportionately African-American, proper and smooth functioning of the reasonable impediment provision would be vital to avoid unlawful racially discriminatory effect on African-American voters in South Carolina in the 2012 election." *Id.*

The preclearance of South Carolina's voter identification law provides an important example of the critical role Section 5 continues to play in protecting voting rights. First, the data shared during the preclearance process clearly demonstrated how a facially neutral law could have a dramatic discriminatory effect on minority voters. Second, the preclearance process provided an opportunity for the federal court to instruct the state that the reasonable impediment exemption must be expansively implemented in order to prevent the law's potentially discriminatory impact. Third, the court put South Carolina on notice, explaining in no uncertain terms that Section 5 would prohibit any ad hoc alteration to the implementation of the exemption. And finally, Section 5 prevented the law from going into effect too soon before the 2012 election, averting the serious risk of disenfranchising African American voters.

2. *Section 5 Prevented the Reduction of Voting Hours in the 2012 Election, Assuring Minority Voters Access to the Polls.*

Early voting, or the opportunity for voters to cast their ballots in-person before Election Day, was widely utilized in a number of states in the 2012 election. Florida implemented early, in-person voting in 2004, as part of its post-2000 election reform. Minority voters, who often have greater transportation and occupational challenges getting to the polls, have participated in early voting in large numbers. *Florida v. United States*, No. 11-1428, 2012 WL 3538298, at *29 (D.D.C. Aug. 16, 2012); Michael C. Herron & Daniel E. Smith, *Early Voting in Florida in the Aftermath of House Bill 1355* 10 (Working Paper, Jan. 10, 2013). In 2012, Section 5 prevented an attempt to cut nearly half the number of days allowed for early voting in Florida.

In 2011, the Florida legislature passed an omnibus election administration bill making some eighty changes to the state election law, including one that decreased the number of days allowed for early in-person voting. *Florida*, 2012 WL 3538298, at *3. Because five counties in Florida are covered jurisdictions under Section 5, Florida submitted the change to the early voting law to United States District Court for the District of Columbia for preclearance. *Id.* at *2.

Under its prior law, Florida permitted early, in-person voting for twelve days over a fourteen-day period beginning on the fifteenth day before an election and ending on the second day before the election. Fla. Stat. § 101.657(d) (2010). The new law amended the number of days, the number of hours and the weekend times that early voting was offered in the state, decreasing the period from twelve days to eight, and eliminating the last Sunday before the election. Fla. Stat. § 101.657(d) (2011); *Florida*, 2012 WL 3538298, at *5-6.

The district court denied preclearance, concluding that minority voters would be disproportionately affected by the decrease in early voting days. *Florida*, 2012 WL 3538298, at *23. The evidence presented at trial showed that in the 2008 general election, more than half of African-American voters in Florida used early in-person voting—twice the rate of white voters. *Id.* at *17. This trend has continued since 2008; African Americans have consistently used early in-person voting in Florida at rates that exceed those of white voters. *Id.* at *21-22.

Consequently, the court determined that the decrease in early voting days had a "retrogressive effect with respect to African-American voters' effective exercise of the electoral franchise" and could not be precleared under Section 5. *Id.* at *23.

For the 2012 general election, only thirty-two of Florida's sixty-seven counties, including the five counties covered by Section 5, offered the maximum ninety-six hours of early voting hours permitted under the new law. Minority voters again took advantage of the extra time to cast their votes. While African Americans made up less than 14% of Florida's registered voters in 2012, they made up more than 22% of the early voter electorate on each day of the 2012 early voting period. Herron & Smith, at 11. However, because there was a reduction in the total number of early voting hours and days in 2012, including the elimination of the Sunday immediately before Election Day, there were fewer opportunities for minorities to vote early. In Miami-Dade and Palm Beach counties, voters stood in line to cast early votes for more than five hours during the weekend before Election Day. *Id.* at 20. In those two counties, African Americans made up only 16.7% of registered voters, but accounted for 43.8% of the early voters on Sunday, November 4, 2012. *Id.* at 21. The data tell the story. There is simply no question that without Section 5, a disproportionate number of minority voters in Florida would have been deterred from exercising their right to vote in 2012.

3. Section 5 Prevented the Discriminatory Dilution of Minority Voting Strength in the 2012 Election.

In addition to preventing discriminatory voting laws from taking effect, Section 5 also prevented discriminatory legislative districts from diluting the voting strength of minority communities in 2012. After redrawing it legislative districts following the 2010 Census, Texas sought preclearance from the United States District Court for the District of Columbia. Texas has a long history of attempting to use the redistricting process to weaken the voting strength of minorities. In its opinion denying preclearance, the district court noted, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *20 (D.D.C. 2012), *petition for cert. filed*, 81 USLW 3233 (U.S. Oct 19, 2012)(No. 12-496).

According to the 2010 Census, Texas' population grew by approximately 4.3 million in the past decade, an increase of more than 20%. *Id.* at *17. Approximately 89% of this growth was from non-white minorities: Hispanics comprised 65% of the increase, African Americans 13.4%, and Asian Americans 10.1%. *Id.* As a result of this increase, the Texas Congressional delegation grew from thirty-two to thirty-six members, the largest growth ever in a jurisdiction fully covered by Section 5. *Id.* Prompted by this population growth, the Texas State Legislature drew and enacted new legislative districts. Despite the substantial increase in the minority population, the enacted Congressional districts did not include a single new minority district. *Id.*

After an expedited trial in the summer of 2012, the District Court denied preclearance, finding sufficient evidence that the proposed U.S. Congressional and State House plans would have a retrogressive effect on minority voters, and that the U.S. Congressional and State Senate plans were enacted with a discriminatory purpose. *Id.* at *37. The court found that under the enacted plan, proportional representation would yield fourteen new minority ability districts, but that there continued to be only the ten ability districts that had existed under the former plan prior to the new Census figures, creating a "representation gap" in the proposed plan of four districts. *Id.* at *18.

Moreover, evidence revealed that "substantial surgery" was performed on the Congressional districts of four African-American and one Hispanic members of Congress, removing each incumbent member's district office from the district. *Id.* at *19. Although Texas argued that this was the result of partisan politics and not racial discrimination, the court noted that, "[n]o such surgery was performed on the districts of Anglo incumbents. In fact, *every* Anglo member of Congress retained his or her district office." *Id.* at *20.

Due to the delayed resolution of preclearance, a Texas district court drew interim maps for the 2012 election. *Perez v. Perry*, 835 F. Supp.2d 209 (W.D. Tex. 2011), *vacated and remanded*, 132 S.Ct. 934 (2012). After an appeal to United States Supreme Court, the Texas federal court redrew the maps in February 2012, putting in place the districts for the 2012 election. *Perez v. Texas*, No. 11–CA–360, 2012 WL 4094933, at *1-2 (W.D. Tex. Feb. 28, 2012). Texas voters elected nine new members of Congress in 2012; four Hispanic and one African-American.

The Section 5 preclearance process prevented districts that had both the purpose and effect of discriminating against minority voters from going in to effect in Texas, and created the opportunity for more equitable districts to be put in place in time for the 2012 election. As a result, minority voters in Texas were able to elect representatives of their choice.

4. Section 2 of the Voting Rights Act Would Not Have Been as Effective as Section 5 in Preventing Disenfranchisement of Minority Voters During the 2012 Presidential Election.

The efficacy of the VRA's strong medicine is largely attributable to Section 5. Unlike Section 2, which is reactive and places the burden on individual plaintiffs to prove that a practice has a discriminatory effect, *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966), Section 5 is preemptive and acts as a barricade to ensure that discriminatory changes are not put into effect. In so doing, Section 5 shifts the burden onto covered jurisdictions to establish prior to implementation that a proposed voting change has neither a discriminatory effect nor purpose. By addressing the issue at the earliest possible stage, Section 5 decreases the cost and time associated with litigation. This anticipatory approach ensures that voting rights are not infringed upon in the first instance. Accordingly, Section 5 has played a significant role in deterring voting discrimination and remains vital to the protection of equal political participation. Indeed, the 2012 national election provides clear evidence that Section 5 remains an essential tool for protecting the right to vote in our country.

Without Section 5, voters' only recourse to pursue voting rights violations would be Section 2 of the VRA. Section 2's protections are insufficient to ensure minority access to the franchise. Section 2 litigation is time consuming and expensive, and the discriminatory impact of the challenged policy or practice remains in effect while the litigation proceeds. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R.*, 109th Cong. 58 (2005) ("VRA Hearing"). Voters seeking to challenge election laws under Section 2 must hire an attorney, engage in extensive fact-gathering, hire experts, and pay costs associated with filing a lawsuit, which can cost millions of dollars and take years to achieve. *Id.* at 78. Furthermore, state actors are entitled to an additional benefit under Section 2 because the burden of proving discrimination lies with the private plaintiff. *Id.* at 79-80. As this Court has explained, in designing Section 5, Congress "found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *Katzenbach*, 383 U.S. at 328.

Significantly, discriminatory laws remain in effect throughout the Section 2 litigation, giving the state actor all the benefits of elected office even if the discriminatory practice is ruled unconstitutional. VRA Hearing at 43. Section 5 prohibits the discriminator from benefiting from discriminatory practices, and also prevents the election of representatives based on discriminatory practices.

All of these concerns would have come to bear in challenging the discriminatory practices in Texas, South Carolina, Florida, and Georgia. The voters would have borne the burden of finding lawyers, marshaling evidence, hiring experts, and all the other expensive and time consuming complications of litigation. Election Day 2012 would be long passed, and untold hundreds of thousands of voters would have been wrongly denied their right to vote, officials elected under discriminatory practices would be comfortably settled in their offices and enacting new policies before the court could rule on the challenged practices.

Without Section 5, Hispanic and African-American voters in Texas would have been turned away from the polls on Election Day because they could not afford one of the few acceptable forms of photo identification required by SB 14. Without Section 5, African-American and Hispanic voters in South Carolina would have been confronted at the polls with new and complex identification requirements, resulting in confusion, confrontation, and frustration. Without Section 5, African-American and Hispanic voters in Florida would have arrived at the polls on their day off to exercise their most precious right only to find the polls closed and the doors locked. Without Section 5, Jose Morales and countless other United States citizens whether Hispanic, Asian, or African-American would have had their voter registration forms wrongly rejected by Georgia election officials who questioned their citizenship simply because of their last name, or a computer glitch.

Simply put, Section 2 alone cannot secure minority voting rights in covered jurisdictions because pervasive and consistent racial discrimination continues to exist. Section 5 remains a necessary tool to protect the right to vote in our country. "The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great . . . ." *Katzenbach*, 383 U.S. at 315.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-96

In The
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC J. HOLDER, JR., Attorney General, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

BRIEF OF MERCED COUNTY, CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

◆

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTERESTS OF *AMICUS CURIAE* MERCED COUNTY 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

- I. BACKGROUND OF THE COUNTY'S INITIAL COVERAGE UNDER SECTION 5 6
  - A. Initial Coverage 7
  - B. Demographic Circumstances Leading to Coverage under Section 5 10
- II. MERCED COUNTY'S RECORD OF COMPLIANCE UNDER SECTION 5 14
  - A. Compliance History 14
  - B. Successful Defense of Section 5 Enforcement Actions 17
  - C. The Issue of Independent Agencies within the County 20
- III. MERCED COUNTY'S PRIOR EFFORTS TO EXIT SECTION 5 COVERAGE 24
  - A. 1992 Objection Removes Opportunity for Bailout 24
  - B. Unsuccessful Efforts to Obtain Congressional Relief in 2005-2006 25

TABLE OF CONTENTS – Continued

Page

C. The Bailout Window Closes from 2006-2008, During the Pendency of *Lopez v. Merced County* 27

IV. MERCED COUNTY'S REASONS FOR SEEKING BAILOUT 28

V. MERCED COUNTY'S EFFORTS TO OBTAIN THE ATTORNEY GENERAL'S CONSENT TO BAILOUT (2009-2012)...... 30

VI. MERCED COUNTY'S ELIGIBILITY FOR BAILOUT 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Johnson, 521 U.S. 74 (1997) 16

Berry v. Doles, 438 U.S. 190 (1978) 37

Briscoe v. Bell, 432 U.S. 404 (1977) 7

Castro v. State of Cal., 2 Cal. 3d 223 (1970) 8

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 19

Cooper v. Leslie Salt Co., 70 Cal. 2d 627 (1969) 21

County of Fresno v. Malaga County Wat. Dist., 100 Cal. App. 4th 937 (2002) 21

Dougherty County Bd. of Ed. v. White, 439 U.S. 32 (1978) 37

East Flatbush Elec. Comm. v. Cuomo, 643 F. Supp. 260 (E.D.N.Y. 1986) 37

Edgemont Cmty. Servs. Dist. v. City of Moreno Valley, 36 Cal. App. 4th 1157 (1995) 21

Gallegos v. State of California, 03-cv-06157-REC-LIO (E.D. Cal. filed Aug. 25, 2003) 17

Hernandez v. Merced County, California, 03-cv-06147-OWW-DLB (E.D. Cal. filed Aug. 25, 2003) 17

Knights Landing Ridge Drainage Dist. v. Reclamation Dist. No. 730, 1 Cal. 2d 350 (1934) 21

TABLE OF AUTHORITIES – Continued

Page

Leyva v. Bexar County Republican Party, 2002 U.S. Dist. LEXIS 25916 (W.D. Tex. Dec. 5, 2002) 38

Lopez v. Merced County, 2007 U.S. Dist. LEXIS 44426 (E.D. Cal. June 8, 2007)..................18, 23, 24

Lopez v. Merced County, 2008 U.S. Dist. LEXIS 3941 (Jan. 16, 2008)..19

Lopez v. Merced County, 473 F. Supp. 2d 1072 (E.D. Cal. 2007)..18

Lopez v. Merced County, Case No. 06-cv-01526-OWW-DLB (E.D. Cal. filed Oct. 27, 2006) 18

Lopez v. Monterey County, 525 U.S. 266 (1995) ....*passim*

Marin Healthcare Dist. v. Sutter Health, 103 Cal. App. 4th 861 (2002) 21

Merced County, Cal. v. Holder, Case No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C.) (judgment entered Aug. 31, 2012) 3

Miller v. Johnson, 515 U.S. 900 (1995).....................16

Moore v. Caledonia Natural Gas Dist., 890 F. Supp. 547 (N.D. Miss. 1995)...............................37

N.W. Austin Municipal Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009)...................................37

Ramirez v. Brown, 9 Cal. 3d 199 (1973) 8

The State of New Hampshire v. Holder, Case No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. filed Dec. 5, 2012)...3

Thornburg v. Gingles, 478 U.S. 30 (1986) 27

Page

United States v. Bd. of Comm'rs of Sheffield, Alabama, 435 U.S. 110 (1978) 23

Velez v. Board of Elections, 1990 U.S. Dist. LEXIS 11669 (S.D.N.Y. Sept. 5, 1990) 38

Waide v. Waller, 402 F. Supp. 902 (N.D. Miss. 1975) 37

CONSTITUTION, STATUTES, RULES AND REGULATIONS

CAL. CONST. art. X, § 14 20

CAL. CONST. art. XI, §§ 2, 5 & 7 20

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA") 25

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 .... *passim*

Section 4 of the Voting Rights Act, 42 U.S.C. § 1973b .... *passim*

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c .... *passim*

42 U.S.C. § 1973a(c) 1

42 U.S.C. § 1973b 7

42 U.S.C. § 1973b(a) 1

42 U.S.C. § 1973b(a)(1)(B) 27

42 U.S.C. § 1973b(a)(1)(E) 25

42 U.S.C. § 1973b(a)(3) 36

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1973b(a)(4) 36

42 U.S.C. § 1973b(b) 10

Cal. Educ. Code 20

Cal. Govt. Code § 61000 *et seq.* 21

Cal. Health & Saf. Code § 32000 *et seq.* 21

Cal. Pub. Res. Code § 9001 21

Cal. Stats. 1972, ch. 920 8

Cal. Stats. 1972, Res. ch. 98 8

Cal. Water Code § 20570 21

Cal. Water Code § 30000 *et seq.* 21

Supreme Court Rule 32.3 .... *passim*

Supreme Court Rule 37.3(a) 4

Supreme Court Rule 37.4 1

28 C.F.R., Appendix to Pt. 51 2

40 Fed. Reg. 43746 (Sept. 23, 1975) 2

OTHER AUTHORITIES

111 Cong. Rec. 11714 (May 26, 1965) 13

Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 82 (1965) 14

TABLE OF AUTHORITIES – Continued

Page

Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing before the Subcommittee of the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess. 171-237 (Oct. 20, 2005) ("Presentation on Behalf of Merced County, California, Concerning Reauthorizations of Sections 4 and 5 of the Voting Rights Act") 25

Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry, *Hearing before the Subcommittee of the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary*, 109th Cong., 2d Sess. 113 (July 13, 2006) (S. Hrg. 109-823) ("Avila, Joaquin G., Assistant Professor of Law, Seattle University School of Law, Seattle, Washington, statement and attachment") 27

H.R. REPT. No. 109-478 (May 22, 2006).....................26

U.S. Dept. of Justice, Voting Section, *Notice of Preclearance Activity Under the Voting Rights Act of 1965, As Amended* (June 27, 2011) 34

U.S. Census Bureau, *Current Population Reports*, Series P-25, No. 627, "Language Minority, Illiteracy and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73)," U.S. Government Printing Office, Washington, D.C., June 1976 9

TABLE OF AUTHORITIES – Continued

Page

United States Gen'l Accounting Office, *Military Bases: Status of Prior Base Realignment and Closure Rounds* 86 (Dec. 1998) 2

64 Ops. Cal. Att'y Gen. 105 (1981) 21

Election Results, FRESNO BEE (Nov. 4, 2004), p. A8 27

Election Results, FRESNO BEE (Nov. 9, 2006), p. B6 27

Hans A. von Spakovsky, *Crooked Justice*, NAT'L REV. ONLINE (Dec. 4, 2012) 3

Harrison Sheppard, *Davis to Sue Again for Delay: Governor to Ask Court for March Recall Vote,* L.A. DAILY NEWS (Aug. 4, 2003), p. N3 30

Issacharoff, Karlan & Pildes, *The Law of Democracy: Legal Structures of the Political Process* (Foundation 2d ed. 2001) 7

J. Christian Adams, *Eric Holder Cons the Courts to Save Voting Rights Act*, P.J. MEDIA (Dec. 3, 2012) 3

J. Christian Adams, *Holder Con on Voting Extends to New Hampshire*, P.J. MEDIA (Dec. 4, 2012) 3

Mike North, *Elections: County Seeks to Shed Rule; Minority Groups Back Effort to Escape Federal Voting Rights Act's Costly Section 5*, MERCED SUN-STAR (Mar. 24, 2011), p. A1 34

STATEMENT OF INTERESTS OF *AMICUS CURIAE* MERCED COUNTY[1]

A central argument of those supporting the constitutionality of the continued application of Section 5, under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act ("Act" sometimes herein), is that any over-inclusiveness can be addressed through the so-called "bailout" mechanism contained in Section 4(a). As Respondent Holder states:

> The constitutionality of the VRA's determination of covered jurisdictions can only be fairly judged in the context of the statute as a whole, including the statute's built-in mechanism for a jurisdiction to earn a change in its status from covered to non-covered (or vice-versa). Covered jurisdictions that can demonstrate they have complied with specific nondiscrimination requirements for a ten-year period can seek bailout. See 42 U.S.C. 1973a(c), 1973b(a); Supplemental Apps. A & B, *infra* (listing jurisdictions that have been subject to preclearance under section 3(c) or have terminated coverage under section 4(a)). This Court has consistently described bailout as a critical limiting feature contributing to Section 5's constitutionality. . . .

Brief for the Respondents in Opposition to Petition for Certiorari, at 24.

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[1] Merced County does not require the consent of the parties to file this brief. *See* Sup. Ct. R. 37.4.

Among the "bailed-out" jurisdictions listed in Supplemental Appendix B of that opposition is this *amicus curiae*, **Merced County, California**. *See* Supplemental App. B, p. 10a.

In 1975, the U.S. Attorney General determined that Merced County, was "covered" by the preclearance obligations of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, based on the 1972 renewal of the Act and the corresponding update to the Section 5 coverage formula in that year. *See* 40 Fed. Reg. 43746 (Sept. 23, 1975); 28 C.F.R., Appendix to Pt. 51. Coverage resulted primarily because, in 1972, Merced County hosted a large military population at Castle Air Force Base during the height of the Vietnam War. That transient population caused the County's voter participation rate to fall just below 50 percent of eligible voters in 1972 (49.6 percent), thereby failing the Section 4(b) coverage test, as described below.

Castle AFB has since been closed and converted to civilian uses;[2] however, because the 2006 reauthorization of Section 5 relied on the pre-existing coverage formula, the County remained subject to Section 5.

Earlier this year, the County obtained the consent of Respondent Holder and a decree of the United States District Court for the District of Columbia for bailout. *Merced County, Cal. v. Holder*, Case No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C.) (three-judge § 5 court) (judgment entered Aug. 31, 2012). This welcome result ensued after the County's 40-year record of diligent Section 5 compliance, and over two years of study and evaluation by the Voting Section of the United States Department of Justice.

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[2] *See* United States Gen' Accounting Office, ***Military Bases: Status of Prior Base Realignment and Closure Rounds*** 86 (Dec. 1998), *available online at* http://www.defense.gov/brac/docs/gaostatus98-2.pdf (last visited Dec. 12, 2012).

Recently, however, Merced County's bailout has come under unjustified attack in the press and in a court filing opposing the bailout of several townships in New Hampshire.[3] Based on comments contained in some of the press attacks, Merced County anticipates one or more *amicus* briefs containing similar assertions may be filed in this Court by supporters of Petitioner Shelby County.[4]

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[3] *See* Peter Heilemann's Motion to Intervene, *The State of New Hampshire v. Holder*, Case No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. filed Dec. 5, 2012) (Dkt. #6), pp. 8-9; Hans A. von Spakovsky, *Crooked Justice*, NAT'L REV. ONLINE (Dec. 4, 2012), *online at* http://www.nationalreview.com/articles/334688/ crooked-justice-hans-von-spakovsky# (last visited Dec. 10, 2012); J. Christian Adams, *Eric Holder Cons the Courts to Save Voting Rights Act*, P.J. MEDIA (Dec. 3, 2012), *online at* http://pjmedia.com/jchristianadams/2012/12/03/eric-holder-cons-the-courts-to-save-the-voting-rights-act/ (last visited Dec. 18, 2012). J. Christian Adams, *Holder Con on Voting Extends to New Hampshire*, P.J. MEDIA (Dec. 4, 2012), *online at* http://pjmedia.com/tatler/2012/12/04/holder-con-on-voting-extends-to-new-hampshire/ (last visited Dec. 18, 2012).

[4] *See, e.g.*, Adams, *Eric Holder Cons the Courts*, *supra*, note 3 ("*But when the justices learn that the bailouts are being mass-produced with collusion and deception,* perhaps [they] will find a new reason to strike down the law." (emphasis added)). This

(Continued on following page)

Those attacks so far have asserted that Merced County was ineligible to bail out, and that it was only permitted to do so because the Attorney General has adopted a policy of ignoring the bailout requirements so that a large number of covered jurisdictions could bail out in advance of this case. Improper bailouts, the attack continues, cannot support an argument that the continuing application of Section 5 under the 1975 coverage formula is constitutional. Merced County does not purport to speak for the Attorney General, nor does it have any view on the merits of bailout efforts by any other jurisdiction. The success of those efforts will necessarily turn on the unique facts of each covered jurisdiction, about which the County has no direct knowledge.

However, the County does have knowledge about the circumstances of its own history under Section 5 and its bailout, which the County believes may be of interest and assistance to the Court in the determinations that it must make in this case.

◆

SUMMARY OF ARGUMENT

Assertions that Merced County was not eligible for bailout are incorrect.

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brief *amicus curiae* must be filed in anticipation of these arguments being made because of the timing for the filing of *amicus curiae* briefs in support of neither party set forth in Rule 37.3(a).

In 2009 the County approached the Attorney General to present its case, based on extensive evidentiary materials, that the County was eligible for bailout under the criteria set forth in section 4(a) of the Act. The County was also aware that, in order to qualify, it would be required to demonstrate that not only it, but 84 independent cities and state agencies within its boundaries, also met the bailout criteria.

Over the next two years, the County worked with the Voting Section attorneys to persuade them of the County's eligibility, and to obtain the Attorney General's consent to the County's bailout. The evaluation process undertaken by the Voting Section of the United States Department of Justice ("USDOJ") was diligent and painstaking. The County provided the Voting Section with tens of thousands of pages of public records. It twice sent County officials and special counsel to Washington, D.C., to meet with Voting Section attorneys to present its case. Where there were legal disputes about whether particular unprecleared actions were subject to preclearance, the County presented legal briefings supporting its position that preclearance was not required, but to ensure that there was no impediment to bailout, the County made precautionary preclearance submissions of every action without waiving its legal arguments to the contrary. *See* Consent Decree, *Merced County v. Holder, supra*, ¶ 29. Voting Section attorneys traveled to Merced County to meet with staff from numerous special districts within the County and to review their records for the preceding ten years. These attorneys also interviewed numerous members of local communities. *Id.* at ¶ 8. The County also extensively publicized its efforts to secure the Attorney General's consent to bailout and secured the support of groups representing minority voters and of numerous public entities. Finally, after two years, the Attorney General consented to the County's bailout.

A consent decree and final judgment granting that request was entered by a three-judge panel of the United States District Court for the District of Columbia on August 31, 2012. That judgment recites the particulars in which Merced County satisfied the criteria for bailout, and was fully warranted. No person or entity intervened in the bailout action to oppose the County's exit from Section 5 coverage.

Allegations that Merced County's bailout was not in compliance with law, but was instead the result of the Attorney General's disregard of the bailout criteria, are incorrect and are based on insufficient knowledge of the facts, and an incorrect interpretation of the relevant law. The Attorney General's review was thorough and comprehensive, and Merced County's bailout was fully warranted under the law.

◆

ARGUMENT

I. BACKGROUND OF THE COUNTY'S INITIAL COVERAGE UNDER SECTION 5.

When Congress enacted the Voting Rights Act of 1965, it determined that racial discrimination in voting had been especially prevalent in certain areas of the country. Section 4(a) of the Act (42 U.S.C. § 1973b) therefore established a formula that was "reverse-engineered" to target those areas and to subject them to more stringent remedies. Pet. App. 56a. Nothing in the legislative record indicates that Merced County, or anywhere in California, for that matter, was a target of these provisions.[5]

The jurisdictions identified by the formula were then subjected to a two-part remedy: the first part was a five-year suspension of the use of any "test or device" (such as a literacy test), as a prerequisite to register to vote. The second was the requirement for review ("preclearance") under Section 5 of any change affecting voting made by a covered area either by the United States District Court for the District of Columbia or by the Attorney General.

A. Initial Coverage.

The coverage formula as enacted in 1965, and as subsequently amended in 1970 and 1975, contained two prongs, both of which had to be met to subject a jurisdiction to the preclearance requirement.

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[5] One treatise on election law – co-written by prominent voting rights experts Samuel Issacharoff, Pamela Karlan, and Richard Pildes – states that the 1975 amendment that resulted in Merced County's coverage "was designed largely to bring" Texas – the only former Confederate state to have evaded Section 5 coverage to that point – "under the preclearance obligation." *See* Issacharoff, Karlan & Pildes, *The Law of Democracy: Legal Structures of the Political Process* (Foundation 2d ed. 2001), p. 557; *see also Briscoe v. Bell*, 432 U.S. 404, 406 (1977).

The first prong in the preclearance coverage formula was whether, at the presidential election immediately preceding the enactment/amendment of the Act, the state or a political subdivision of the state maintained a "test or device" restricting the opportunity to register and vote.

This prong was met in Merced County through no fault of the County. Merced County never had any such test or device of its own. The State of California, however, had a literacy test that had been on the books since 1894.[6] The California Supreme Court struck down that literacy test as unconstitutional in 1970, and it was not thereafter enforced.[7] It was not formally repealed by the voters, however, until November 7, 1972 – six days after the trigger date for Merced County's coverage.[8]

In 1975, the phrase "test or device" was broadened to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than five percent of the citizens of voting age. Merced County met this prong too, again through no fault of its own. Registration and voting was then – as now – governed by state law, which contained no provision for election materials to be in languages other than English. In addition, Merced County's "language minority" population constituted more than five percent of the citizens of voting age.[9] (Though California law governed the languages in which voting materials were provided, the State was not covered. *See Lopez v. Monterey County*, 525 U.S. 266, 268 (1995).)

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[6] *See Castro v. State of Cal.*, 2 Cal. 3d 223 (1970).

[7] *Id.*

[8] *See* Cal. Stats. 1972, ch. 920 & Res. ch. 98 (submitting Senate Const. Amend. 32, repealing the constitutional provision containing the literacy test, to the voters on Nov. 7, 1972); *Ramirez v. Brown*, 9 Cal. 3d 199, 204 & 210 (1973) (noting passage of SCA 32 (Proposition 7)).

The second prong of the preclearance coverage formula was met if the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote, or actually cast votes for the office of President, at the presidential election immediately preceding the Act's enactment in 1965 (Johnson v. Goldwater) or amendment in 1970 (Nixon v. Humphrey), or if less than 50 percent of citizens of voting age were registered to vote, or actually cast votes for the office of President, at the presidential election immediately preceding the Act's amendment in 1975 (Nixon v. McGovern). 42 U.S.C. § 1973b(b). Applying this second prong of the formula did not result in coverage for Merced County in 1965 or in 1970.

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[9] U.S. Census Bureau, *Current Population Reports*, Series P-25, No. 627, "Language Minority, Illiteracy and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73)," U.S. Government Printing Office, Washington, D.C., June 1976, p. 13, *available online at* http://www.census.gov/hhes/www/socdemo/voting/publications/p25/1975/index.html (last visited Dec. 10, 2012) (hereafter "1975 Amendments Report").

In November 1972, however, the voter participation figure for Merced fell barely under 50 percent, with 49.6 percent of the County's eligible voters voting in the 1972 presidential election.[10] The result was coverage under Section 5. Coverage was not appealable. 42 U.S.C. § 1973b(b). The only other jurisdiction with a voter participation rate between 49 and 50 percent that was covered in 1975 was Coconino County, Arizona, which would have been covered anyway as a result of the State of Arizona being covered.[11]

B. Demographic Circumstances Leading to Coverage under Section 5.

This low voter turnout in Merced County (just barely under 50 percent) was not an indication of racial vote suppression. Rather, as detailed in the report of respected demographer Dr. Jeanne Gobalet of Lapkoff & Gobalet Demographic Research, which was submitted to the Voting Section of the United States Department of Justice in connection with the County's quest to seek the Attorney General's consent to bailout, Merced County fell below the 50 percent voter participation threshold in 1972 for three reasons wholly unrelated to race. *See* Rule 32.3 Letter Proposing to Lodge Non-Record Materials, submitted herewith ("Rule 32.3 Letter"), Item #2b.[12]

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[10] *Id.*

[11] *Id.*

As documented in the Gobalet Report, the main reason that Merced County met the second prong of the preclearance formula was that the County had a large transitory population in 1972 who were counted as part of the County's voting population in the 1970 Census: military personnel living in Castle Air Force Base. In making its determination under Section 4, the Census Bureau treated those military personnel as eligible voters in Merced County, even though the U.S. Department of Defense encouraged them to vote in their legal places of residence (outside Merced County, in most cases). Not surprisingly, voter turnout in the two precincts covering Castle Air Force Base fell well below the 50 percent threshold, dragging down the County's overall voter turnout percentage to 49.6 percent. The Bureau's calculation of voter turnout made no adjustment for temporary military personnel. Outside the two precincts covering Castle Air Force Base, more than 50 percent of eligible voters in Merced County voted in the November

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[12] A similar analysis was presented to Congress in 2006, in connection with the reauthorization of the Voting Rights Act. *See* discussion, *infra*, at 22. Nobody has ever disputed the accuracy of that analysis.

1972 presidential election.[13] Had this adjustment been made, Merced County would not have been covered under Section 5. *See* Rule 32.3 Letter, Item #2b.[14] It is perhaps noteworthy that each of the other three California counties covered by Section 5 were also rural counties with large military installations and comparatively small civilian populations.[15]

This issue of military presence was one which Congress was fully aware could skew the results of the coverage test when the Voting Rights Act was enacted in 1965. In fact, the initial language of Section 4 of the Act as introduced in the Senate would have triggered coverage under Section 5 if 50 percent of the voting age population "other than aliens and persons in active military service and their dependents" did not register and vote.

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[13] The population of Castle AFB was even more transitory than most military bases, because it was a training base.

[14] Dr. Gobalet also notes two additional nondiscriminatory factors leading to Merced County's coverage. First, the Census Bureau's estimate of the citizen voting age population in Merced County was too large because it assumed, erroneously, that the estimated growth in Merced County's voting age population from 1970 through November 1972 contained no non-citizens. This means that in the formula used to calculate voter participation (votes cast ÷ eligible voters) the number in the denominator was too large, artificially lowering the participation rate. Also, the Bureau's measure of Merced County voter participation in the November 7, 1972, general election took account only of persons casting a vote for the office of President of the United States. The measure did not take into account the people who voted in the election but chose not to cast a vote for a presidential candidate.

[15] At the time of their coverage, Kings County hosted Lemoore Naval Air Station; Yuba County hosted Beale Air Force Base; and Monterey County hosted Fort Ord Army Base and Camp Roberts Army Base.

This exception was removed in the Senate, however, because – as explained by the amendment's sponsor, Senator Tydings of Maryland – "When these words were included in the original bill, it was not realized that the Census Bureau would be confronted with the troublesome question of determining the facts in regard to these figures." 111 Cong. Rec. 11714 (May 26, 1965) (statement of Sen. Tydings). Senator Tydings proceeded to explain that the Census Bureau did not have the figures required, and that insisting on including them would delay the Act's implementation. *Id.*

In other words, the inclusion of military personnel in the voting age population was a matter of expediency, rather than a determination that jurisdictions containing military populations were likely to be the seat of endemic racism.

Moreover, bailout was explicitly regarded as the solution for a jurisdiction caught in the Section 5 net due to a large military population. When challenged on whether it made sense to include military personnel in calculating the coverage formula, Attorney General Katzenbach responded that "My answer, again, would be if, because of that kind of fluke such as you suggest, sufficient difference was made to move you just over 49, just under 50, that, after all, you could get out from under it completely" by seeking to bail out. *Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary*, 89th Cong., 1st Sess. 82 (1965).

II. MERCED COUNTY'S RECORD OF COMPLIANCE UNDER SECTION 5.

A. Compliance History.

Following the County's coverage determination in 1975, the County immediately began complying with the Act, submitting hundreds of voting changes, including frequent submissions for its polling place changes, voting precinct changes, voting machine changes, bilingual procedures, special elections, etc. *See, e.g.*, Rule 32.3 Letter, Item #2 (Preclearance Submission Nos. X7007 (1976), X7080 (1976), X7081 (1976), X7082 (1976), X7083 (1976), X7084 (1976), X7085 (1976), X7086 (1976), X8077 (1976), X8644 (1976), X8645 (1976), A0149 (1977), A4889 (1978), A8480 (1978)).

As a result of that diligence, when Merced County requested the Attorney General's consent to bailout, the Voting Section identified only thirteen possible "voting changes" that had not been precleared in the preceeding ten years. *See* Rule 32.3 Letter, Item #11. The County disputed whether most of these items required preclearance.

Two of the changes involved landowner assessment proceedings under California's Proposition 218.

The County disputed that those actions even required preclearance, and provided the Voting Section with extensive legal analysis to that effect. The County nevertheless submitted them as a precautionary matter. *See* Rule 32.3 Letter, Item #13.

Four of the actions concerned special elections to fill vacancies on a city council or school board under precleared state law.[16] *See* Rule 32.3 Letter, Item #3 (Preclearance Submission Nos. 1994-0046 & 1994-0958). The County maintained that further preclearances were not legally required. However, to resolve any dispute, these too were submitted for preclearance, and preclearance was granted. *See id.* (Preclearance Submission Nos. 2011-2329, 2011-2330 & 2011-2331).

The other seven actions concerned special elections on tax and bond measures, placed on the ballot pursuant to precleared state law by one of the State's 22 school districts within the County. *See id.* (Preclearance Submission No. 2001-0158). The County is required by state law to conduct these elections for the school districts.

The County also had a practice of actively scouring its available historical records to identify "voting changes" and confirm preclearance. When unable to locate evidence of preclearance, the County sought preclearance of historical changes going back decades. For example, in 2002 – in connection with its decennial, post-redistricting re-precincting, the County made a comprehensive submission seeking preclearance of all changes to its voting precincts going back to 1972, because it was unable to definitively establish, based on its own documentation, that preclearance had been received. *See* Rule 32.3 Letter, Item #9. Upon being informed by the USDOJ that these precinct changes had been precleared, the submission was withdrawn, and only the 2002 precinct changes were precleared. *Id.*

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[16] In the course of its compliance review, the County, on its own, located one other special election to fill a vacancy on a city council that had not been precleared.

The County received only one objection to a voting change that it enacted, despite a long history of preclearance submissions. The one objection was in 1992, and was directed to the redistricting plan for its supervisorial districts. The objection was not based on a conclusion that the redistricting plan was "retrogressive," but rather on the plan's failure to gerrymander the supervisorial district lines to link Hispanic population concentrations in different cities in a manner to create a majority-minority district. *See* Rule 32.3 Letter, Item #10. The objection was interposed during a period when the Voting Section of the United States Department of Justice was enforcing a policy requiring the "maximization" of minority voting strength in redistricting plans. This Court subsequently declared that policy violated Section 5 and was unconstitutional. *See Miller v. Johnson,* 515 U.S. 900, 924-26 (1995); *Abrams v. Johnson,* 521 U.S. 74, 90 (1997). However, as a small rural county of limited resources, Merced County chose not to challenge the objection. Instead, the County rescinded its redistricting plan and redrew its supervisory district lines to link the Hispanic population in the southern part of the City of Merced, the county seat, with the Hispanic population in the City of Livingston, 15 miles away, skirting around the intervening City of Atwater along State Highway 99, thereby creating a "U"-shaped majority-Hispanic district. The new map received preclearance. *See* Rule 32.3 Letter, Item #3.

There has never been a Section 2 or constitutional lawsuit filed in the County alleging discrimination in voting.

B. Successful Defense of Section 5 Enforcement Actions.

There were three enforcement actions alleging Section 5 violations in the County, but they were resolved in the County's favor.

In 2003, a pair of related cases was filed concerning California's 2003 gubernatorial recall election. *Hernandez v. Merced County, California*, 03-cv-06147-OWW-DLB (E.D. Cal. filed Aug. 25, 2003); *Gallegos v. State of California*, 03-cv-06157-REC-LIO (E.D. Cal. filed Aug. 25, 2003). Those suits alleged – incorrectly – that Merced County was seeking to implement voting changes at the recall election without preclearance. In fact, a preclearance submission had been made by the County before the litigation was filed, and preclearance was received approximately two weeks later. *See* Rule 32.3 Letter, Item #3 (Preclearance Submission No. 2003-3023). Given that Merced County was in full compliance with Section 5, the plaintiffs voluntarily dismissed the actions. *See* Rule 32.3 Letter, Item #12.

The third action was filed just days before the November 2006 statewide election, and this action did not allege any violations by the County itself. Instead the action sought to enjoin the conduct of that election based upon the alleged failure to obtain preclearance of annexations, de-annexations, and other boundary changes to numerous independent cities and special districts within the County, which had been approved by a state agency called the Local Agency Formation Commission ("LAFCO"). *Lopez v. Merced County*, Case No. 06-cv-01526-OWW-DLB (E.D. Cal. filed Oct. 27, 2006). (This aspect of the case is discussed in more detail below.)

The County, cities, and special districts vigorously defended this litigation, and ultimately the original complaint and the first amended complaint were dismissed.[17] The plaintiffs then abandoned their

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[17] *See Lopez v. Merced County*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007) (three-judge § 5 court); *Lopez v. Merced County*, 2007 U.S. Dist. LEXIS 44426, *10 (E.D. Cal. June 8, 2007) (three-judge § 5 court). Many of these changes either had been precleared, were included in preclearance submissions pending with the Attorney General at the time the complaint was filed,

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challenges to the boundary changes and instead filed a second amended complaint challenging historical polling place changes by the County. All of the challenged changes were made in or before 1976.

The County vigorously defended against this new complaint as well, demonstrating that each of these ancient polling place changes either had been precleared, or did not require preclearance. Ultimately, however, the Court did not reach the merits. Instead, judgment was granted in the County's favor due to plaintiffs' lack of standing to bring the action. *Lopez v. Merced County*, 2008 U.S. Dist. LEXIS 3941 (Jan. 16, 2008).

Nevertheless, in an abundance of caution because its defenses on the merits were not resolved, the County submitted the historical polling place changes and received preclearance thereof. *See* Rule 32.3 Letter, Item #3 (Preclearance Submission No. 2007-3449).

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had not yet been administered in any election, or did not require preclearance for a variety of reasons. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462, 467-68 & n.8 (1987) (noting Attorney General's position that annexation of land for a public park not subject to preclearance requirement). The remaining boundary changes were submitted for preclearance immediately, and received preclearance.

C. The Issue of Independent Agencies within the County.

The presence of independent cities and state agencies within the boundaries of Merced County, over which the County has no legislative or regulatory control, has always presented a Section 5 compliance challenge.

- There are currently six incorporated cities within the boundaries of Merced County. Cities are not subject to the County's control, but are given independent authority by the California Constitution, subject only to the general law of the state. *See* CAL. CONST. art. XI, §§ 2, 5 & 7.
- The County also has 22 school districts partially or wholly within its boundaries. These districts are agencies of the State of California and are governed by state law, not by county ordinances. *See* CAL. CONST. art. X, § 14; Cal. Educ. Code, generally.[18]

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[18] The school districts in Merced County have a long history of compliance with the preclearance requirement, including numerous boundary changes, special elections, etc. *See, e.g.*, Rule 32.3 Letter, Item #3 (Preclearance Submission Nos. A3239 (1977), A3240 (1977), 1992-3584, 1992-3585, 1992-3387, 1993-0254, 1993-0255, 1993-1114, 1993-2244, 1993-2326, 1993-2327, 1993-2328, 1993-3911, 1994-3511, 1994-3512, 1994-4525, 1994-4526, 1995-3933, 1996-0350, 1996-0351, 2002-2950, 2002-2951, 2002-4773, 2004-0518, 2004-2641, 2006-1081, 2006-6824, 2006-6825,

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- And there are 56 special districts in the County with elective governing boards (primarily water districts, irrigation districts, community service districts, healthcare districts, drainage districts, and resource conservation districts). Each of these entities is a creature of state law and operates thereunder.[19] Several of them cover more than one county, such

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2007-6212, 2009-0212, 2009-1033, 2009-1598, 2009-1599, 2009-2002, 2009-1722).

[19] *See, e.g.*, Cal. Govt. Code § 61000 *et seq.* (community service districts); *Edgemont Cmty. Servs. Dist. v. City of Moreno Valley*, 36 Cal. App. 4th 1157, 1160 (1995) (a community service district is "a political subdivision and public agency of the State of California."); Cal. Water Code § 30000 *et seq.* (water districts); *County of Fresno v. Malaga County Wat. Dist.*, 100 Cal. App. 4th 937, 942 (2002) (water districts "are districts of 'limited powers' and are 'agenc[ies] of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.'"); Cal. Water Code § 20570 ("It is reaffirmed that [irrigation] districts are state agencies formed and existing for governmental purposes."); *Cooper v. Leslie Salt Co.*, 70 Cal. 2d 627, 632-33 (1969) (irrigation districts are "delegated agencies of the state government"); Cal. Pub. Res. Code § 9001 (resource conservation districts are organized and operated to fulfill state's leadership role in natural resource conservation); 64 Ops. Cal. Att'y Gen. 105 (1981) (same); Cal. Health & Saf. Code § 32000 *et seq.* (healthcare districts); *Marin Healthcare Dist. v. Sutter Health*, 103 Cal. App. 4th 861, 866 (2002) (healthcare districts are "political subdivision[s] of the state"); *Knights Landing Ridge Drainage Dist. v. Reclamation Dist. No. 730*, 1 Cal. 2d 350, 352 (1934) (drainage district "was 'a public mandatory or governmental agency of the state – indeed, the state itself'" (quoting *W. Assurance Co. v. Sacramento & San Joaquin Drainage Dist.*, 72 Cal. App. 68 (1925))).

> as Central California Irrigation District and San Luis Water District.[20]

These entities can make "voting changes" on their own under State law and without the approval of the County. For example, these entities can and do change their boundaries through the state agency called LAFCO (*see* note 20, *supra*). The County could object, but its objection does not carry the force of law; it cannot stop LAFCO approval.

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[20] One example of the difficulties the County faced with ensuring Section 5 compliance by these independent agencies is demonstrated by the consolidation of 11 local water districts – including four in Merced County – into one new district, the (New) Del Puerto Water District. In 1994, the Local Agency Formation Commission ("LAFCO"), a state agency in neighboring Stanislaus County, which is not covered under Section 5, approved the consolidation of these neighboring districts into a single regional district to streamline the efficient use of their water resources. The great majority of the new district's territory and population are in Stanislaus County. The District also incorporates territory in San Joaquin County, which does not even share a common boundary with Merced.

Merced County had no role in this consolidation. However, in 2010, upon learning of this consolidation, conducted in another county but which affected special districts in Merced County, the County of Merced submitted the change for preclearance, which it received. *See* Preclearance Submission No. 2010-0748. No election was ever held within the new District prior to that preclearance submission, so no violation of Section 5 occurred, but this case highlights the difficulties that Merced County faced in its effort to ensure Section 5 compliance by independent, self-governing entities that contain territory within its borders. *See* Rule 32.3 Letter, Item #2a.

There is an unresolved legal question – which the County raised in the *Lopez* litigation – as to whether these independent and state entities are even subject to the preclearance requirement. *United States v. Bd. of Comm'rs of Sheffield, Alabama*, 435 U.S. 110 (1978), held that cities and other "state actors" within a wholly covered State are subject to the preclearance requirement. *Id.* at 127. But no case has resolved whether independent cities and state agencies, which are not "county actors" but which have territory in a covered county, are subject to the preclearance requirement when the state in which that county is located is not covered.

While disputing its preclearance responsibility for these agencies, Merced County has historically made affirmative efforts at its own expense to ensure their compliance. For example, the County undertook a comprehensive audit of boundary change activity authorized by the LAFCO in Merced County. As part of that audit, the County made preclearance submissions on behalf of five of the six incorporated cities within its boundaries (the 6th – the City of Merced – made its own submission) and dozens of special districts, seeking preclearance of their historical annexations, de-annexations, consolidations, formations, etc.[21] The County also worked cooperatively

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[21] This task fell to the County – though it was not responsible for these boundary changes – because the federal court held that the LAFCO that approved these changes has no preclearance responsibility. *See Lopez v. Merced County*, 2007 U.S. Dist.

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with the larger entities – such as the multi-county Central California Irrigation District, Merced Irrigation District, and the City of Merced – to aid those entities in making their own submissions. *See, e.g.*, Rule 32.3 Letter, Item #3 (Preclearance Submission Nos. 2005-3948, 2005-4372 and 2007-5916).[22]

III. MERCED COUNTY'S PRIOR EFFORTS TO EXIT SECTION 5 COVERAGE.

A. 1992 Objection Removes Opportunity for Bailout.

The County of Merced's interest in seeking bailout has a long history. While the County's records cannot be located, former County officials recall that the County first explored exiting from Section 5 coverage in 1986, when Merced County Counsel Bill Gnass and County Supervisor Jerry O'Banion met with Voting Section personnel at USDOJ headquarters in Washington, D.C. They recall that the County was not encouraged to pursue bailout.

LEXIS 44426, *10 (E.D. Cal. June 8, 2007) (three-judge § 5 court).

[22] The *Lopez* action, discussed above, was filed after the County's audit of independent agency compliance was well-underway and preclearance submissions already made.

After the 1986 interview, and as noted above, the Attorney General objected to the County's 1992 supervisorial redistricting plan. Consequently, the County was ineligible to seek bailout for ten years. 42 U.S.C. § 1973b(a)(1)(E).

Upon the close of that period, however, the County began its systematic assessment of its own compliance status, as well as that of the independent cities and state agencies within its borders with the goal of availing itself of the bailout remedy.

B. Unsuccessful Efforts to Obtain Congressional Relief in 2005-2006.

Another opportunity to exit Section 5 coverage presented itself when Congress was considering The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"). The County of Merced participated in those proceedings, sending an extensive letter to the House Judiciary Committee, explaining the circumstances leading to the County's coverage in 1972, and requesting that the Voting Rights Act be amended to enable jurisdictions that could prove they were only covered due to the inclusion of military voters in the eligible voter base, and who had not received an objection under Section 5 in the prior ten years, to bailout. *See Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing* *before the Subcommittee of the Constitution of the House Committee on the Judiciary*, 109th Cong., 1st Sess. 171-237 (Oct. 20, 2005) ("Presentation on Behalf of Merced County, California, Concerning Reauthorizations of Sections 4 and 5 of the Voting Rights Act"). *See* Rule 32.3 Letter, Item #4.

The explicit rationale for the proposed amendment to the bailout provision was to "further tailor[ ] the provisions to the evils sought to be remedied," and thereby to "make[ ] it more congruent and proportional to the harms to be addressed." *See* H.R. REPT. NO. 109-478, 156 (May 22, 2006) (statement of Rep. Lungren, proposing above amendment to VRARA).

Though the congressional record contained no evidence whatsoever of racial discrimination in Merced County, the County's legislative efforts were ultimately unsuccessful. Congress did not make any changes to the bailout provisions of the Act in 2006.[23]

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[23] The only reference to Merced County in the legislative record – other than Congressman Lungren's unsuccessful effort to amend the bailout provisions at the County's request – is in the testimony of Joaquin G. Avila, the lawyer who subsequently filed the *Lopez* suit against the County. He suggested that Merced County would be unable to bail out for two reasons: (1) Mr. Avila alleged that the City of Los Banos, one of the cities in Merced County, conducted at-large elections, and it had no Latinos elected to its City Council; and (2) he alleged that a number of special districts had failed to preclear boundary changes. *See Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after* LULAC v. Perry, *Hearing before the*

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C. The Bailout Window Closes from 2006-2008, During the Pendency of *Lopez v. Merced County*.

In October 2006, very shortly after its unsuccessful legislative efforts leading up to the enactment of the VRARA, the *Lopez* action was filed against the County, again temporarily postponing any effort to bail out. Section 4 prohibits the district court from approving a bailout while a Section 5 enforcement action is pending. 42 U.S.C. § 1973b(a)(1)(B).

Subcommittee of the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess. 113 (July 13, 2006) (S. Hrg. 109-823) ("Avila, Joaquin G., Assistant Professor of Law, Seattle University School of Law, Seattle, Washington, statement and attachment").

Regarding the first of these contentions, this Court has held that at-large electoral systems are not *per se* illegal. *See Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). Moreover, Mr. Avila also failed to mention the success of other minority candidates in Los Banos elections, such as Tommy Jones, an African American candidate elected to the city council in 2004 and elected Mayor in 2006, and Latinos – such as Jack Vasquez and Mario Gonzalez, who had been elected to, and were serving on the overlapping Los Banos Unified School District governing board at the time Mr. Avila was giving his testimony. *See Election Results*, FRESNO BEE (Nov. 4, 2004), p. A8 (available on Lexis-Nexis); *Election Results*, FRESNO BEE (Nov. 9, 2006), p. B6 (available on Lexis-Nexis).

Regarding the second point, Mr. Avila subsequently filed the *Lopez* lawsuit challenging the alleged failure to preclear these boundary changes, and was unsuccessful, as noted above.

After judgment was entered in Merced County's favor in 2008, however, the County accelerated its preparations for contacting the Attorney General to seek his consent to the bailout, and finally made the initial contact in 2009, discussed below.

IV. MERCED COUNTY'S REASONS FOR SEEKING BAILOUT.

The County sought bailout because it never was a target for coverage and coverage was not a reflection of racial discrimination in voting, but rather of the military base in the County; the County had nevertheless worked very hard to comply with Section 5 and to satisfy the statutory criteria for bailout. The County believed that it was entitled to bail out under the law, as discussed below. In addition, as stated in Resolution No. 2010-142 (July 27, 2010) of the Merced County Board of Supervisors, the County determined to pursue a bailout action for the following additional reasons:

1. *To Remove the Stigma of Section 5 Coverage:* Section 5 is correctly regarded as a remedy aimed at historical bad actors – primarily states with a history of intransigent violations against the voting rights of minority voters. As discussed above, however, that does not accurately describe Merced County, which was covered under Section 5 due to the large temporary military population

in the County, and which had never been the target of a claim of intentional discrimination affecting voting rights or a violation of Section 2.

2. *To Mitigate the High Costs of Compliance:* Merced County spent close to $1 million in the last decade, primarily for legal fees, attributable solely to its coverage under Section 5 – for compliance by itself and other independent governmental agencies, and for the (successful) defense of Section 5 litigation. (This is in addition to the approximately $350,000 that the County spent in connection with the actual bailout effort itself.)

3. *To Protect the County from Being A Pawn in Larger Political Disputes:* Part of the reason Merced County's litigation costs were so high is that the County served as a political pawn in larger statewide policy disputes. The quintessential example of this dynamic was the 2003 recall of California Governor Gray Davis. Shortly before the recall election, Merced County was sued for allegedly failing to comply with Section 5 in its conduct of that election and two related ballot measure elections. These allegations were untrue, as discussed above – the County had complied. The ultimate target of the suit, however, was the statewide election, not Merced County itself. Thus, the plaintiffs also named

> the State as a defendant, and asked the district court to postpone the statewide recall and ballot measure elections until March 2004.[24]

See Rule 32.3 Letter, Items #2a & 7.

V. MERCED COUNTY'S EFFORTS TO OBTAIN THE ATTORNEY GENERAL'S CONSENT TO BAILOUT (2009-2012).

In 2009, after spending approximately ten years to make sure it qualified for bailout and successfully opposing Section 5 litigation, the County of Merced contacted the Department of Justice to inquire about the prospect of bailing out of Section 5 coverage.

County officials met with senior staff in the Voting Section on December 16, 2009, to present the County's history under Section 5, and its views of its eligibility for bailout. *See* Rule 32.3 Letter, Items #2a-2b.

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[24] As was widely reported at the time, opponents of the recall hoped to postpone the conduct of that election from October 2003 to March 2004, which was regarded as a more favorable time for the incumbent Governor because "[m]ore Democrats [we]re expected to vote because of the contested Democratic presidential primary, while some of the anger against Davis may [have] cool[ed] by then." *See* Harrison Sheppard, *Davis to Sue Again for Delay: Governor to Ask Court for March Recall Vote*, L.A. DAILY NEWS (Aug. 4, 2003), p. N3 (available on Lexis-Nexis).

On April 27, 2010, the Merced County Board of supervisors conducted a widely-publicized public hearing at a regular Board meeting to obtain public input regarding whether to pursue bailout. No opposition was expressed by any person at that public hearing. *See* Rule 32.3 Letter, Item #5.

On July 27, 2010, the County Board of Supervisors held another public meeting at which bailout was considered. Again, no member of the public spoke in opposition, and public comment – including from members of the Latino community – was favorable. The Board then adopted a resolution authorizing County Counsel and the County's special voting rights counsel to pursue bailout. *See* Rule 32.3 Letter, Items #6-7. At no time did the County ever receive an objection to its plan to seek to bail out from Section 5 coverage.

The County then worked with USDOJ for more than two years on its evaluation of the County's eligibility for bailout.

From August to December of 2010, the County widely publicized the bailout effort, and worked to obtain support from key groups within the County. Letters of support were ultimately sent to USDOJ by numerous organizations, including the West Merced and East Merced Chapters of the NAACP, the Merced County Hispanic Chamber of Commerce, and the Merced Lao Family Community. *See* Rule 32.3 Letter, Items #8a-8s.

The Voting Section was assiduous and thorough in its review of the County's bailout qualifications. The County worked diligently to assemble extensive background information, and to collect and forward thousands of pages of documents at USDOJ's request, including 10 years' worth of agendas and minutes for the County, and for virtually every city, school district and special district with territory in the County. The County also continued to make routine preclearance submissions in connection with each election it conducted during this period of time. *See* Rule 32.3 Letter, Item #3.

In February 2011, the Voting Section sent a team of investigators to Merced County to meet with representatives of dozens of special districts. This was followed by an additional in-person meeting between County representatives and Voting Section personnel in Washington, D.C., in March of 2011. *See* Rule 32.3 Letter, Item #16.

On March 16, 2011, USDOJ provided the County with a spreadsheet of 128 items, collected from its review of County, city and special district minutes, that it believed *might* have required preclearance. As discussed above, only about thirteen items on this list involved County action, and the County disputed the need to preclear most of them. The County nevertheless made preclearance submissions for these changes, while at the same time preserving its legal arguments.

The vast majority of the items on the March 16, 2011, list involved actions by the independent cities and state special districts within the County's borders. The Voting Section attorneys apparently believed that, despite their independence from the County, compliance by these entities as well was required as a prerequisite to bailout. The County worked with the Voting Section and the involved entities to assess the status of each one of the 128 items. Many had already been precleared, were already pending for preclearance, or did not require preclearance. *See, e.g.*, Rule 32.3 Letter, Item #15. The County argued that a substantial majority of the items (*e.g.*, landowner-voting assessment and tax district proceedings, appointment proceedings under precleared state law, etc.) simply were not subject to preclearance. But the County made precautionary preclearance submissions nonetheless, to ensure that the issue was resolved. *Id.*, Items #13-15. Many of the items on the March 16 list, although unprecleared, had never been implemented in violation of Section 5. *Id.*, Item #15. Submissions were made for these items as well.

In January 2012, the County received a letter from the Voting Section requesting that the County provide minutes for meetings conducted in 2011 by twenty (20) of the cities and special districts. The County coordinated the delivery of these additional minutes as well. Based on the contents of those minutes, the County made four more precautionary preclearance submissions for four special districts, covering four appointments (which the County did not believe required preclearance), one change of election cycle (*i.e.*, consolidation with the statewide election) that had not yet been implemented,[25] and two landowner improvement-district inclusion proceedings (which the County also did not believe required preclearance). *See* Section II.A, *supra*.

Finally, on March 6, 2012, the County filed its complaint seeking bailout in the District Court for the District of Columbia. Nobody intervened to oppose the County's bailout, despite extensive publicity of the County's quest for bailout and eventual filing of the complaint.[26]

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[25] This matter involved an independent school district that had just recently consolidated its board member election with the statewide election. It was the last in a series of actions under State law adopted by independent school districts, seeking to move the districts' odd-year elections to even years, so that they could be consolidated with the statewide general elections. All of the other consolidations (approximately 33) had previously been submitted for preclearance, *see* U.S. Dept. of Justice, Voting Section, *Notice of Preclearance Activity Under the Voting Rights Act of 1965, As Amended* (June 27, 2011), *available online at* http://www.justice.gov/crt/about/vot/notices/vnote062711.php (last visited Dec. 17, 2012), but the one in question was not yet finalized when that initial submission was made. It was precleared prior to implementation, so there was no violation of Section 5.

[26] *See, e.g.*, Mike North, *Elections: County Seeks to Shed Rule; Minority Groups Back Effort to Escape Federal Voting Rights Act's Costly Section 5*, MERCED SUN-STAR (Mar. 24, 2011), p. A1 (available on Lexis-Nexis).

On April 24, 2012, the Voting Section identified six additional, possibly unprecleared, changes by cities and special districts. Three were determined not to require preclearance. One was premature, but would be submitted in 2013 if necessary. The County precleared – on a precautionary basis – another landowner-voting assessment proceeding and one appointment pursuant to precleared state law.

On July 10, 2012, the Attorney General filed a notice in the district court of his consent to the County's bailout, and a final consent decree and judgment granting bailout were entered by the court on August 31, 2012.

VI. MERCED COUNTY'S ELIGIBILITY FOR BAILOUT.

Section 4 of the Voting Rights Act details the extensive criteria that a jurisdiction must establish to be entitled to bail out from Section 5 coverage.

Merced County provided the Attorney General with a detailed analysis of its ability to meet these criteria at the December 2009 meeting. *See* Rule 32.3 Letter, Items #2a-2b. Ultimately, the Attorney General agreed with the County's analysis and the three-judge district court approved a consent decree and judgment that concluded the same. *See* Rule 32.3 Letter, Item #1.

It is clear that the County did satisfy all of the Section 4 criteria, as specified in the consent decree.

As noted above, nobody intervened to contend otherwise, though they could have done so as of right. *See* 42 U.S.C. § 1973b(a)(4).

The County did make preclearance submissions, precautionary and otherwise, during the two-year process of securing the Attorney General's consent and during the *Lopez* litigation (in addition to the submissions that it was required to make as a matter of course in connection with its routine, ongoing administration of elections). However, no objections were interposed, and the Attorney General was well within his discretion in this case to conclude that any Section 5 violations "were trivial, were promptly corrected, and were not repeated." 42 U.S.C. § 1973b(a)(3).

The Attorney General (both Respondent Holder and his predecessors) has *long* taken the position that retroactive preclearance is sufficient to meet this criterion. Indeed, of the jurisdictions to successfully bail out between 1982 (when the bailout criteria were last amended) and 2006 – all of them cities and counties in Virginia – a number of them did *not* have perfect compliance with this requirement, yet still were successful in their efforts to bail out. For example, Roanoke County, Warren County, Shenandoah County, and Augusta County all admitted – in their bailout action complaints filed with the D.C. District Court – having administered multiple voting changes without preclearance. While these changes were ultimately submitted by the jurisdictions in connection with their bailout suits, and each received preclearance, not all the submissions were timely.[27] This Court "traditionally afford[s] substantial deference to the Attorney General's interpretation of § 5 in light of [his] 'central role . . . in formulating and implementing' that section." *Lopez v. Monterey County*, 525 U.S. at 281 (quoting *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978)).[28]

The Attorney General's interpretation is also supported by extensive case law under Section 5. *See, e.g., East Flatbush Elec. Comm. v. Cuomo,* 643 F. Supp. 260, 264 (E.D.N.Y. 1986) (three-judge § 5 court) ("retroactive federal approval satisfies the preclearance requirements of § 5.") (citing *Berry v. Doles*, 438 U.S. 190, 192 (1978)). *See also Moore v. Caledonia Natural Gas Dist.*, 890 F. Supp. 547, 550 (N.D. Miss. 1995) (same, citing *East Flatbush*); *Waide v. Waller*, 402 F. Supp. 902, 925 (N.D. Miss. 1975) (three-judge § 5 court) ("The belated satisfaction of the Voting Rights Act requirements moots the first prong of plaintiff's attack on § 25-31-1, and we therefore certify that the challenged statute *is in full compliance* with the requirements of the Voting Rights Act." (emphasis added)); *Leyva v. Bexar County Republican Party*, 2002 U.S. Dist. LEXIS 25916, *8-*10 (W.D. Tex. Dec. 5, 2002) (three-judge § 5 court) (granting defendant summary judgment based on retroactive preclearance); *Velez v. Board of Elections*, 1990 U.S. Dist. LEXIS 11669 (S.D.N.Y. Sept. 5, 1990).

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[27] The consent decrees entered in each of these cases are available on the USDOJ Voting Section website. *See* http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Dec. 12, 2012). The Augusta consent decree was cited in Merced County's own consent decree in support of this point.

[28] We note that the timing of these Virginia bailouts and others gives lie to the claim in press accounts (*see* note 3, *supra*) that this interpretation of the Act can be attributed to a desire by the present Attorney General to ease bailout to support the defense of this action. After all, these bailouts predated the 2006 VRARA renewal. They predated this Court's decision in *N.W. Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). And they predated the election of the present administration.

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CONCLUSION

After unintended coverage, decades of compliance with Section 5, extensive work by the County to oversee compliance by independent cities and state agencies that it does not control, the expenditure of more than $1 million in legal fees, an unsuccessful congressional lobbying effort, and more than two years of investigations by the United States Department of Justice, the County of Merced finally achieved its goal of bailing out of Section 5 coverage.

That effort finally relieved the County of the stigma of being covered by a statute designed to target historic discriminators; freed the County from the ongoing expenditure of funds for compliance and litigation; and will hopefully free the County, as well, from the historic practice of others to leverage the

County's Section 5 coverage in an attempt to influence California state politics.

Contrary to recent allegations in the press, and in pleadings opposing the efforts of New Hampshire entities to bail out, Merced County, California, was eligible to bail out from coverage under Section 5, and its unopposed bailout action was properly granted by the three-judge court.

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January 2, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-96

Supreme Court, U.S.
FILED
DEC 28 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

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SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER 1

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE CONGRUENCY AND PROPORTIONALITY STANDARD OF REVIEW APPLIES TO THE REVIEW OF CONGRESS' 2006 REAUTHORIZATION OF SECTION 5 OF THE VRA 7

A. There Is Only One Standard Of Judicial Review Of Prophylactic Legislation Enacted Pursuant To The Enforcement Clauses Of The Clauses Of The Fourteenth and Fifteenth Amendments 7

B. Both *Katzenbach* And *Boerne* Established The Congruency And Proportionality Standard Of Review 10

1. *Katzenbach* ruled that what is "appropriate" and "reasonable" remedial legislation depends upon the nature of the constitutional violation to be remedied or prevented and the means adopted to achieve those ends 10

TABLE OF CONTENTS – Continued

Page

2. *Katzenbach* established a congruency and proportionality standard of review without expressly so stating 12

3. *Boerne* adopted *Katzenbach*'s Fifteenth Amendment analysis as the model for its congruency and proportionality standard of review 16

C. The Congruency And Proportionality Standard of Review Ensures That Congress Does Not Exceed Its Remedial Powers Conferred By The Fourteenth And Fifteenth Amendments 18

II. THE 2006 REAUTHORIZATION OF SECTION 5 OF THE VOTING RIGHTS ACT UNDER THE PRE-EXISTING COVERAGE FORMULA OF SECTION 4(B) IS NOT A CONGRUENT AND PROPORTIONATE RESPONSE TO PREVENT OR REMEDY FIFTEENTH AMENDMENT VIOLATIONS 21

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Allen v. State Bd. of Elections, 393 U.S. 544 (1964) 21

Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 9, 22

City of Boerne v. Flores, 521 U.S. 507 (1997) ...... *passim*

City of Mobile v. Bolden, 446 U.S. 55 (1980) 26

City of Rome v. United States, 400 U.S. 156 (1980) 8, 9, 21, 22, 23

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 26

Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1879) 11, 12

Georgia v. Ashcroft, 539 U.S. 461 (2003) 20

Georgia v. United States, 411 U.S. 526 (1973) 21

James v. Bowman, 190 U.S. 127 (1903) 26

Katzenbach v. Morgan, 384 U.S. 641 (1966) 8, 9

Large v. Fremont County, Wyo., 709 F. Supp. 2d 1176 (D. Wyo. 2010) 2

Lopez v. Monterey County, 525 U.S. 266 (1999) 9, 19, 21

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 11, 12

Miller v. Johnson, 515 U.S. 900 (1995) 19

Page

Mixon v. State of Ohio, 193 F.3d 389 (6th Cir. 2006) 9

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) 20

Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 573 F. Supp. 2d 221 (D.D.C. 2008) 4, 5

Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009) ....*passim*

Oregon v. Mitchell, 400 U.S. 112 (1970) 8, 20

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 20

Shelby County, Ala. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) 3, 9

Shelby County, Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 2, 4, 5, 12

South Carolina v. Katzenbach, 383 U.S. 301 (1966) ....*passim*

United States v. Alamosa County, Colo., 306 F. Supp. 2d 1016 (D. Colo. 2004) 2

United States v. Blaine County, Mont., 363 F.3d 897 (9th Cir. 2004) 2

United States v. Louisiana, 363 U.S. 1 (1960) 20

United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110 (1978) 20

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIII 7, 8

U.S. Const. amend. XIV .... *passim*

U.S. Const. amend. XV .... *passim*

STATUTES

Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006) .... *passim*

Section 4(b) of the Voting Rights Act (42 U.S.C. § 1973b(b)) .... *passim*

Section 5 of the Voting Rights Act (42 U.S.C. § 1973c) .... *passim*

RULES

Supreme Court Rule 37.3 1

OTHER AUTHORITIES

Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & Pol. 357 (2012) 7

H.R. Rep. 109-478, 34, 2006 U.S.C.C.A.N. 618 25

Katz, Aisenbrey, Baldwin, Cheuse, & Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of The Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643 (2006) 26

TABLE OF AUTHORITIES – Continued

Page

S. Rep. 109-295 (2006) 24

Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives 3 (October 25, 2005), *available at* http://www.justice.gov/crt/speeches/voting15.pdf 25

U.S. Commission on Civil Rights, *Voting Rights Enforcement and Reauthorization* 29 (May 2006), *available at* http://www.usccr.gov/pubs/051006VRAStatReport.pdf (last visited December 28, 2012) 24

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

◆

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism and separation of powers is at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

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[1] Pursuant to Supreme Court Rule 37.3, all parties consent to the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Especially relevant to this case, MSLF attorneys have represented clients who challenged the power of Congress to enact the 1982 Amendment to Section 2 of the Voting Rights Act ("VRA" or "Act"). *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); and *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). Recently, MSLF also filed an amicus curiae brief with this Court supporting a challenge to the constitutionality of the 2006 Reauthorization of Section 5 of the VRA in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). MSLF also participated as an amicus curiae in the case below, *Shelby County, Ala. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012). MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding this case.

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SUMMARY OF ARGUMENT

Section 5 of the VRA requires that certain covered jurisdictions, determined by a formula in Section 4(b) of the Act, must seek "preclearance" from the Department of Justice before making changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c(a) In 2006, Congress reauthorized Section 5 of the Act. Shortly thereafter, Shelby County, a jurisdiction covered by Sections 4(b) and 5 of the Act, filed suit in the District Court for the District of Columbia arguing that Congress exceeded its Fourteenth and Fifteenth Amendment remedial powers by reauthorizing Sections 4(b) and 5 of the VRA (42 U.S.C. § 1973b(b) and 42 U.S.C. § 1973c, respectively) in the Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006).[2] *Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011). In response, "[t]he Attorney General . . . argue[d] . . . that 'when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard,'" not congruency and proportionality, as announced in *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). *Id*. at 448-49.

The district court rejected that argument: "*Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) ("*Katzenbach*"), and hence provides the appropriate standard of review to assess *Shelby*

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[2] All references to "Section 5" are references to Section 5 of the VRA.

County's facial constitutional challenge to Section 5 and Section 4(b)." *Id.*[3] But the district court erroneously held that Section 5 of the VRA met the congruency and proportionality standard. *Id.* at 502-03.

The Attorney General renewed his argument on appeal: "The Attorney General insists that Congress may use 'any rational means' to enforce the Fifteenth Amendment." *Shelby County*, 679 F.3d at 859 (citing *Katzenbach*, 383 U.S. at 324).[4] The D.C. Circuit did

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[3] The Attorney General successfully made the same argument to a three-judge panel of the district court in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 573 F. Supp. 2d 221, 235-36 (D.D.C. 2008), *rev'd on other grounds by Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). There, the three-judge panel opined that there are "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." That is, "notwithstanding the *City of Boerne* cases [under the Fourteenth Amendment], *Katzenbach*'s *rationality standard* remains fully applicable to constitutional challenges to legislation [under the Fifteenth Amendment] aimed at preventing racial discrimination in voting." *Nw. Austin*, 573 F. Supp. 2d at 235-36 (emphasis added). On writ of certiorari, this Court applied the doctrine of constitutional avoidance and declined to decide the constitutionality of Section 5. *Nw. Austin*, 557 U.S. at 205-06. This Court did, however, send a "powerful signal that congruence and proportionality is the appropriate standard of review[.]" *Shelby County*, 679 F.3d at 859 (citing *Nw. Austin*, 557 U.S. 193).

[4] On appeal, the Attorney General did concede that "the terms 'enforce' and 'appropriate legislation' have the same meaning in the Fourteenth and Fifteenth Amendments." Brief of Appellee at 27, *Shelby County, Ala. v. Holder*, No. 11-626, Dkt. 1345212 (D.C. Cir. 2012). Then he argued that *Katzenbach*'s "rational basis review" applied to all legislation under the Fifteenth Amendment. *Id.* at 27. Finally, he tried to extend

(Continued on following page)

not answer this question and settle the conflict between the district court's opinion and the opinion of the three-judge panel in *Nw. Austin*. Though noting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), it did not decide the issue: "[I]n any event, if section 5 survives the arguably more rigorous 'congruent and proportionality' standard, it would also survive *Katzenbach's* rationality review." *Id.* Thus, the D.C. Circuit analyzed the case under congruency and proportionality, without deciding that it was required to do so, and held that Section 5 was congruent and proportionate legislation and, therefore, constitutional under both the "congruency and proportionality" standard and the "rational means" standard. *Id.* at 873.

This Court has always applied the same standard of review when analyzing the scope of Congress' Enforcement Clauses Powers, regardless of the constitutional power it enforces. The "congruency and proportionality" standard of review ensures that Congress does not exceed its remedial powers under the Fourteenth and Fifteenth Amendments. As a

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deferential review to the Fourteenth Amendment, insofar as it targeted race discrimination, by suggesting that *Boerne*'s congruence and proportionality test applied to Fourteenth Amendment legislation only when it targeted acts "outside the core prohibitions on race discrimination[.]" *Id.* at 27-28.

result, this Court should apply the congruency and proportionality standard of review in this case.[5]

The record before Congress at the time of the reauthorization demonstrates that the 2006 reauthorization of Section 5 is not a congruent and proportional means to prevent or remedy Fourteenth and Fifteenth Amendment violations by the States. When the VRA was originally passed in 1965, Congress was confronted with widespread, systematic, and intentional voter suppression by many States. *See Boerne*, 521 U.S. at 525. As a result of these extraordinary circumstances, the extraordinary remedy in Section 5 was appropriate, at that time. These widespread and systematic violations no longer exist, however, and, as a result, Section 5 is no longer a congruent and proportional remedy to protect Fourteenth and Fifteenth Amendment rights.

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[5] MSLF agrees with Shelby County that the outcome of the challenge to the coverage formula under Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), does not necessarily depend upon whether the "congruency and proportionality" standard of review is applied to Section 4(b). *See* Pet. Br. at 18 n.4.

ARGUMENT

I. THE CONGRUENCY AND PROPORTIONALITY STANDARD OF REVIEW APPLIES TO THE REVIEW OF CONGRESS' 2006 REAUTHORIZATION OF SECTION 5 OF THE VRA

A. There Is Only One Standard Of Judicial Review Of Prophylactic Legislation Enacted Pursuant To The Enforcement Clauses Of The Clauses Of The Fourteenth and Fifteenth Amendments.

The Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments use similar language, and give Congress the "power to enforce," each amendment "by appropriate legislation." U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. These three Amendments were ratified during 1865 and 1870 following the end of the Civil War and were meant to address unequal treatment of United States citizens by the States. The similarities between the amendments demonstrate that Congress' enforcement authority is the same under all three Amendments. *See* Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & Pol. 357, 365 (2012).

Furthermore, this Court has made it clear that analysis of any Enforcement Clause power does not depend on the nature of the constitutional prohibition it enforces. *Boerne*, 521 U.S. at 518-19. Thus, although *Boerne* dealt only with the Fourteenth Amendment, it arrived at its congruency and proportionality standard, by relying on prior Thirteenth, Fourteenth, and Fifteenth Amendment cases, treating them as interchangeable.

Supporting its Fourteenth Amendment standard of review, *Boerne* relied on the "suspension of literacy tests and similar voting requirements [such as Section 5]" enacted pursuant to "Congress' *parallel power* to enforce the provisions of the *Fifteenth Amendment*[.]" *Id.* at 518 (citing *Katzenbach*, 383 U.S. at 308) (all emphasis added). *Boerne* also relied on the fact that this Court had "also concluded that the other measures protecting voting rights are within Congress' power to enforce the Fourteenth *and* Fifteenth Amendments[.]" *Id.* (citing *Katzenbach*, 383 U.S. at 326) (Fifteenth Amendment) (emphasis added); *see also Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("*Morgan*") (Thirteenth and Fourteenth Amendments); *Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) ("*Mitchell*"), (Fourteenth *and* Fifteenth Amendments) (Black, J., announcing the judgment of the Court); *City of Rome v. United States*, 400 U.S. 156, 161 (1980) (Fifteenth Amendment). Thus, *Boerne* clearly viewed the powers conferred on Congress by any of the Enforcement Clauses to be identical and reviewable only under one standard: congruency and proportionality.[6]

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[6] As demonstrated in more detail below, congruency and proportionality require that prophylactic legislation be congruent and proportionate to the ends sought to be achieved. *See Boerne*, 521 U.S. at 530-31.

Boerne's recognition that the same standard of review applies to both Amendments is not a departure from prior law; this Court has always treated the powers conferred by the Enforcement Clauses of the Fourteenth and Fifteenth Amendments identically. *See, e.g., Morgan*, 384 U.S. at 651 ("Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of Section 5 of the Fourteenth Amendment]."); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as co-extensive."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("*Garrett*") ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *see also*, *City of Rome*, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

Thus, the district court was correct in ruling:

> Given the nearly identical language and similar origins of [the Fourteenth and Fifteenth Amendments], there would seem to be "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment, and the Supreme Court has not held to the contrary."

Shelby County, 811 F.Supp.2d at 449 (quoting *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 2006)).

The enforcement provisions of both the Fourteenth and the Fifteenth Amendments grant Congress remedial power to enforce the provisions of the respective Amendments. Although the rights protected differ between the two Amendments, the power granted to Congress by the Enforcement Clauses is the same in each Amendment. As a result, the standard of review a court applies to determine whether Congress properly exercised each Amendment's enforcement power will also be the same for both the Fourteenth and the Fifteenth Amendments. As demonstrated below, the congruency and proportionality standard is the proper standard to apply to determine whether Congress exceeded its authority under the Enforcement Clauses of both the Fourteenth and Fifteenth Amendments.

B. Both *Katzenbach* And *Boerne* Established The Congruency And Proportionality Standard Of Review.

1. *Katzenbach* ruled that what is "appropriate" and "reasonable" remedial legislation depends upon the nature of the constitutional violation to be remedied or prevented and the means adopted to achieve those ends.

In *Katzenbach*, this Court stated that "[a]s against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting."

Katzenbach, 383 U.S. at 324 (emphasis added). *Katzenbach* then quoted a case construing whether Congress had the substantive power, under the Necessary and Proper Clause of Article I, to establish a national bank:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Id. at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

Katzenbach also cited to *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 340, 344 (1879), which involved enforcement of the Thirteenth and Fourteenth Amendments, and which prohibited judges from intentionally and discriminatorily disqualifying jurors on account of their race and providing penalties for doing so.[7] *Katzenbach*, 383 U.S. at 327. Importantly, *Ex Parte Virginia* "echoed [*McCulloch*'s] language in describing *each* of the Civil War Amendments." *Id.* (citing *Ex Parte Virginia*, 100 U.S. at 345-46). Accordingly, *Katzenbach* then observed that, with respect to all Civil War Amendments:

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[7] The statute at issue in *Ex Parte Virginia* was a direct prohibition and penalty, not a *prophylactic* statute. *Ex Parte Virginia*, 100 U.S. at 340.

> Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, . . . if not prohibited, is brought within the domain of Congressional power.

Id. (quoting *Ex Parte Virginia*, 100 U.S. at 345-46). Thus, *Ex Parte Virginia*, like *McCulloch*, required that enforcement of any of the Civil War Amendments must be "appropriate," "adapted to carry out the objects" of the constitutional prohibition it enforces, and not "prohibited" by other constitutional considerations.

The consistent lesson of *Katzenbach*, *McCulloch*, and *Ex Parte Virginia*, is that what is "rational," "appropriate," legislation, "not otherwise prohibited," depends upon the fit between the constitutional harm targeted and the means adopted to remedy it.

2. ***Katzenbach*** **established a congruency and proportionality standard of review without expressly so stating.**

Below, the Attorney General seized upon the phrase "Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination," *Katzenbach*, 383 U.S. at 324, to argue for a "deferential standard" of review of Fifteenth Amendment enforcement legislation. *Shelby County*, 679 F.3d at 859 ("the attorney general insists that congress may use 'any rational means' to enforce the Fifteenth Amendment"). But the Attorney General ignored *Katzenbach*'s next sentence: "We turn now to a *more detailed description of the standards* which govern our review of the Act." *Katzenbach*, 383 U.S. at 324 (emphasis added).[8]

Accordingly, this Court then detailed the egregious record of an unremitting, widespread pattern and practice of ingenious defiance of the Constitution, impervious to ordinary remedies, that it believed justified the extraordinary resort to Section 5 remedies. *Id.* at 335 ("States covered by the Act resorted to the *extraordinary* stratagem of contriving new rules of various kinds for *the sole purpose* of perpetuating *voting discrimination* in the face of adverse federal court decrees.") (emphases added). Based upon this egregious record, this Court ruled that Section 5 was, *under those circumstances*, a "rational" response. *Id.* at 334 (emphasis added). The "extraordinary stratagems" with which *Katzenbach* was confronted, and that were documented by Congress, consisted of widespread, persistent, intentionally discriminatory voting practices that prevented African-Americans from registering and voting, and which were not remediable by other, less drastic means. For example, more than half a dozen States "enacted tests . . . specifically designed to prevent [African-Americans] from voting." *Katzenbach*, 383 U.S. at 310. "At the same time, alternate tests were prescribed . . . to assure that white illiterates were not deprived of the franchise, [which] included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matters." *Id.* at 311. Worse still, these tests were discriminatorily administered; white voters were "given easy versions, . . . received extensive help from voting officials, and [were] registered despite serious errors in their answers," while African-Americans were "required to pass difficult versions . . . without any outside assistance and without the slightest error." *Id.* at 312.

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[8] In response to Shelby County's Petition, the Attorney General only briefly addressed the proper standard of review, instead arguing that certiorari was not appropriate because the Court of Appeals held that the 2006 reauthorization was constitutional under either standard of review. Resp. Br. in Opposition to Petition at 17 n.2.

Congress had originally addressed this pattern of intentional voting discrimination by passing laws to "facilitat[e] case-by-case litigation" and this Court responded by "striking down [unconstitutional] discriminatory voting tests and devices in case after case." *Id.* at 313. But widespread voting discrimination persisted. Thus, the VRA, particularly Section 5, which targeted facially constitutional practices, was enacted to defeat these efforts to intentionally nullify the Fifteenth Amendment that had "infected the electoral process in parts of our country for nearly a century." *Id.* at 308.

Therefore, *Katzenbach* concluded that, "*under the compulsion of these unique circumstances*, Congress responded in a permissibly decisive manner [in enacting Section 5]." *Id.* (emphasis added). *Katzenbach* held that the evidence before Congress – persistent, pervasive, and intransigent State action intentionally discriminating against African-Americans to prevent them from registering and voting, impervious to less drastic remedies – was sufficient to justify the extraordinary prophylactic exercise of remedial powers contained in Section 5:

> Two points emerge vividly from the voluminous legislative history. . . . First: Congress felt itself confronted by an *insidious and pervasive evil* which had been perpetuated in certain parts of our country through the *unremitting and ingenious defiance of the Constitution*. Second: Congress had concluded that the *unsuccessful remedies which it had prescribed in the past* would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 809 (all emphasis added). Far from employing the relaxed, deferential standard of review advocated by the Attorney General, *Katzenbach* recognized that Section 5 is "an *uncommon exercise of congressional power*" and that only "*exceptional* conditions can justify legislative measures *not otherwise appropriate*." *Katzenbach*, 383 U.S. at 334-35 (all emphasis added). Thus, *Katzenbach* held that the extraordinary and uncommon exercise of congressional power engaged in by Congress in enacting Section 5's prophylactic provisions was "appropriate" and "rational" only because it was adopted to remedy a widespread pattern of insidious, pervasive, unremitting, and ingenious defiance of the Constitution to deny African-Americans the right to register and to vote, which had defied previous lesser remedies.

In fact, the remedy approved by *Katzenbach* was congruent and proportionate to the nature and scope of the unremitting defiance of the Constitution presented to Congress and that it sought to remedy. *Boerne*, 521 U.S. at 519-20, 524-26. Therefore, *Katzenbach*, without expressly so stating, applied the congruency and proportionality standard that this Court would later articulate more specifically in *Boerne*. *Id.* at 530.

3. *Boerne* adopted *Katzenbach*'s Fifteenth Amendment analysis as the model for its congruency and proportionality standard of review.

In *Boerne*, this Court, quoting *Katzenbach*, ruled that "'the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects.'" *Id.* at 525 (quoting *Katzenbach*, 383 U.S. at 308)). Indeed, *Boerne* noted that *Katzenbach* approved the severe and intrusive remedies of Section 5 only because they were necessary to "'banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 308). Referring to *Katzenbach*, this Court emphasized that "[t]he new *unprecedented remedies* were deemed necessary given the ineffectiveness of the existing voting rights law. . . ." *Id.* at 526 (emphasis added).

Far from announcing a new standard of review for exercising remedial, prophylactic enforcement powers under the Fourteenth Amendment, *Boerne* relied heavily on *Katzenbach* to demonstrate the constitutional predicate necessary for a congruent and proportionate prophylactic remedy under *all* the Civil War Amendments. In fact, *Boerne* cited *Katzenbach* no less than eleven times to support its congruence and proportionality standard of review. *Id.* at 518, 519, 524, 525, 526, 530, 533. Accordingly, this Court, echoing *Katzenbach*, ruled that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Boerne* at 519. In other words, only congruent and proportionate remedial legislation is "rational" and "appropriate."

Therefore, it was only because Congress was confronted with egregious, widespread, pervasive, unconstitutional scheming to prevent African-Americans from registering or voting in spite of lesser remedies that *Katzenbach* ruled that Section 5's exceptional, prophylactic remedy was "appropriate" legislation that was a "rational means" of addressing those extraordinary discriminatory practices. Thus, Section 5 was, when passed in 1965, congruent and proportionate to the extreme constitutional violations targeted by Congress.

C. The Congruency And Proportionality Standard Of Review Ensures That Congress Does Not Exceed Its Remedial Powers Conferred By The Fourteenth And Fifteenth Amendments.

The Fourteenth and Fifteenth Amendments are remedial and merely prohibit certain State conduct. Thus, "Congress' power under § 5 [of the Fourteenth Amendment] extends only to 'enforcing the provisions of the Fourteenth Amendment[, which] [t]his Court has described . . . as 'remedial.'" *Boerne*, 521 U.S. at 519 (quoting *Katzenbach*, 383 U.S. at 326). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.* That is, "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id.* at 529.

Constitutional difficulty arises when Congress, in a purported attempt to prevent unconstitutional conduct, regulates conduct that is facially *constitutional*, without requiring proof of discriminatory intent – so-called "prophylactic legislation" like Section 5 of the VRA. In such a case, the question arises as to whether Congress has enforced the constitutional prohibition set forth in the Amendment, or whether it has unconstitutionally substantively defined the Amendment. *Id.* To address this, *Boerne* established the congruency and proportionality standard of review:

> There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519-20. In other words:

> While preventive rules are sometimes appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The *appropriateness of remedial measures must be considered in light of the [degree of] evil presented*. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (emphasis added). This standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments instead of enforcing them. *Id.* at 529. Properly restraining Congress is especially important in light of the federalism costs imposed by Section 5. *See Lopez*, 525 U.S. at 282 (Section 5 "authorizes federal intrusion into sensitive areas of state and local policymaking, [and] imposes substantial 'federalism costs.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

Section 5 seeks to regulate a function "essential to the separate and independent existence of the States and their governments . . . the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Mitchell*, 400 U.S. at 125 (Black, J., announcing the judgment of the Court). Section 5 does not just regulate what States can and cannot do, it invades State sovereignty and "goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law – however innocuous – until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. Section 5 requirements are broad, *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175-76 (1985), and apply "to every political subdivision in a covered State, no matter how small." *Nw. Austin*, 557 U.S. at 202 (citing *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 117-18 (1978)).

Another important federalism cost imposed by Section 5 is the way it differentiates between the States, despite "our historic tradition that all the states enjoy 'equal sovereignty.'" *Nw. Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). "These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another." *Id.* (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring)).

Therefore, "suspension of new voting regulations pending preclearance was an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992).

As a result, a court must apply the "congruency and proportionality" test to ensure that Congress does not unnecessarily invade state sovereignty.

As a result of these federalism costs, many members of this Court, both current and former, have expressed "serious misgivings" about the constitutionality of Section 5. *Nw. Austin*, 557 U.S. at 202 (citing *Katzenbach*, 383 U.S. at 358-62, (Black, J., concurring and dissenting); *Allen v. State Bd. of Elections*, 393 U.S. 544, 586 n.4 (1964) (Harlan, J., concurring in part and dissenting in part); *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); *City of Rome*, 446 U.S. at 209-21 (Rehnquist, J., dissenting); *id*, at 200-06 (Powell, J., dissenting); *Lopez*, 525 U.S. at 293-98 (Thomas, J., dissenting); *id.* at 288, 119 S.Ct. 693 (Kennedy, J., concurring in judgment)). As demonstrated below, these misgivings are warranted, as the record before Congress in 2006 did not demonstrate an "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 809.

II. THE 2006 REAUTHORIZATION OF SECTION 5 OF THE VOTING RIGHTS ACT UNDER THE PRE-EXISTING COVERAGE FORMULA OF SECTION 4(B) IS NOT A CONGRUENT AND PROPORTIONATE RESPONSE TO PREVENT OR REMEDY FIFTEENTH AMENDMENT VIOLATIONS.

The congruent and proportionality standard of review requires a court to engage in a three-step process. First, a court must identify with some precision the scope of the constitutional right at issue. *Garrett*, 531 U.S. at 365. Second, once a court has "determined the metes and bounds of the constitutional right in question," it examines "whether Congress identified a history and pattern of unconstitutional" action by the States. *Id.* at 368. Finally, "whether Congress has exceeded its § 5 [of the Fourteenth Amendment] powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

There is no minimum amount of requirements that an enforcement statute must have in order for it to be a Constitutional exercise of Congress' enforcement power. In *Boerne*, however this Court did list a number of factors of the original VRA that led it to be a congruent and proportional response to prevent intentional voting discrimination. This Court reinforced the fact that the legislative record must show a history of facially constitutional, generally applicable laws being used to violate individuals Constitutional rights. *Id.* at 530. Furthermore, while a statute does not need to have "termination dates, geographic restrictions, or egregious predicates," in order to be Constitutional, "[w]here . . . a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Id.* at 533. In *City of Rome*, the

Court examined the "number and nature of [Section 5] objections interposed by the Attorney General" between 1965 and 1975 to help determine the Constitutionality of the Act. 400 U.S. at 181.

When the VRA was originally passed, Congress was confronted with an "insidious and pervasive evil which had been perpetuated in certain parts of our country through the unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 808. As demonstrated above, intentional voting discrimination on the basis of race was widespread and systematic. As a result, Congress passed a law that restricted those jurisdictions that were committing egregious unconstitutional acts, and proportionally limited the time that Section 5 would be in force. *See Boerne*, 521 U.S. at 533.

In 2006, the situation before Congress was vastly different. First, Congress was not confronted with egregious, intentional discrimination by the States. In fact, Congress expressly noted that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local. . . ." Pub. L. No. 109-246, § 2(b)(1) (2006). Instead, Congress relied on "second generation barriers" that only reveal "vestiges of discrimination in voting." *Id.*

Second, the record in front of Congress in 2006 did not show that the States were engaging in widespread, systematic, and intentional voter suppression. The record did not even support the claim that there is widespread, systematic voter suppression of any kind. For example, the percentage of DOJ objections to changes in voting procedures has been in decline since the 1982 renewal. *See* S. Rep. 109-295 at 13-14 (2006); U.S. Commission on Civil Rights, *Voting Rights Enforcement and Reauthorization* 29 (May 2006), *available at* http://www.usccr.gov/pubs/051006VRAStatReport.pdf (last visited December 28, 2012) (Hereinafter "Voting Rights Enforcement and Reauthorization"). In 1982 the DOJ objected to 2.32% of proposed changes by covered jurisdictions. S. Rep. 109-295 at 13. In 2006, however, the DOJ objected to only 0.02% of proposed changes. *Id.* at 14. The U.S. Commission on Civil Rights concluded that, over the 10 years prior to the 2006 reauthorization, "the overall objection rate was so low as to be practically negligible, at less than 0.1 percent." Voting Rights and Reauthorization at 62. While it is true that the percentage of objections increased in the early 1990s, this was primarily a result of a DOJ policy that required jurisdictions to create the maximum possible number of majority-minority districts. S. Rep. 109-295 at 14. That policy was struck down by this Court in *Miller*, and the percentage of objections by the DOJ once again declined. S. Rep. 109-295 at 13-14.

As Bradley J. Schlozman, the former Acting Assistant Attorney General for Civil Rights, testified:

> Employing this standard [whether the purpose or effect of a voting change would put

> minority voters in a position inferior to the status quo] over the last 40 years, we have found retrogression in an extremely small number of cases. Since 1965, out of the 120,868 total Section 5 submissions received by the Department of Justice, the Attorney General has interposed an objection to just 1,401. And in the [last] 10 ten [sic] years, there have been only 37 objections. In other words, the overall objection rate since 1965 is only a hair over 1 percent, while the annual objection rate since the mid-1990's has declined even more, now averaging less than 0.2 percent. This tiny objection rate reflects the overwhelming – indeed, near universal – compliance with the Voting Rights Act by covered jurisdictions.

Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives 3 (October 25, 2005), *available at* http://www.justice.gov/crt/speeches/voting15.pdf.

Another purported reason cited by Congress for the continuation of Section 5 was "racially polarized voting." H.R. Rep. 109-478, 34, 2006 U.S.C.C.A.N. 618, 638 ("Racially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process."). Racially polarized voting, however, is not indicative of intentional voter discrimination by the States. *See Nw. Austin*, 557 U.S. at 228 (Thomas, J., concurring in the judgment in part and dissenting in part) (racially polarized voting is not evidence of unconstitutional discrimination, is not state action, and is not a problem unique to the south (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *James v. Bowman*, 190 U.S. 127, 136 (1903); and Katz, Aisenbrey, Baldwin, Cheuse, & Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of The Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 665 (2006))). Furthermore, there are many reasons besides race that might lead to "racially polarized voting," and to assume that race is the only factor in voting reinforces unhealthy racial stereotypes. "If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

Congress also tried to justify the reauthorization on the finding that there was a continued filing of Section 2 litigation against some jurisdictions. Pub. L. No. 109-246, § 2(b)(4)(C)-(D). The evidence supporting this claim, however, does not support the finding that there was widespread and systematic voter suppression. The number of Section 2 cases were relatively few. Congress pointed to only twelve published cases between 1982 and 2006 that found intentional voting discrimination on the basis of race, and only six of those were intentional voting discrimination against racial minorities. S. Rep. 109-295, at 13 (2006). Of all Section 2 cases filed, plaintiffs succeeded in only 72 out of 210, or 34.3%, of cases. *Id.* at 77. Furthermore, only 19 of the 72 cases occurred after 1995. *Id.* at 77-81. Importantly, the success rate of plaintiffs in covered jurisdictions was not significantly greater than plaintiffs in non-covered jurisdictions. *Id.* (showing success rate of 37.1% for plaintiffs in covered jurisdictions and 31.9% in non-covered jurisdictions). Therefore, the number of Section 2 violations does not support the claim that covered jurisdictions were significantly more likely to violate the Constitution.

The record before Congress showed that while there may be isolated incidents of intentional voting discrimination, the problem was not widespread. When Section 5 was originally passed, the extreme remedies were congruent and proportional to the Fifteenth Amendment violations because the violations were extreme. *See Katzenbach*, 383 U.S. at 330-31; *Boerne*, 521 U.S. at 530-33. The Section 5 restrictions, however, cannot be justified by a few isolated incidents. As Justice Thomas stated:

> [T]he existence of discrete and isolated incidents of interference with the right to vote has never been sufficient justification for the imposition of § 5's extraordinary requirements. From its inception, the statute was promoted as a measure needed to neutralize

> a coordinated and unrelenting campaign to deny an entire race access to the ballot. *See City of Boerne*, 521 U.S., at 526, 117 S.Ct. 2157 (concluding that *Katzenbach* confronted a "widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"). Perfect compliance with the Fifteenth Amendment's substantive command is not now – nor has it ever been – the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

Nw. Austin, 557 U.S. at 228-29 (Thomas, J., concurring in judgment in part, dissenting in part). As a result, Congress was not confronted with "egregious predicates" when it reauthorized Section 5 in 2006. *See Boerne*, 521 U.S. at 533.

In addition, the 2006 reauthorization involved different circumstances with respect to the "geographic limitations" imposed by Section 4(b). *Boerne*, 521 U.S. at 533. While the 2006 reauthorization does contain geographic restrictions on covered jurisdictions, and nearly the same geographic restrictions as the original act, the list of covered jurisdictions is now overbroad compared to 1965. As the U.S. Commission on Civil Rights concluded:

> Congress originally intended the Section 5 formula to target states with a history of discrimination. In contemplating Section 5 extension, an analysis of objections the Justice Department interposed on covered states is instructive. Overall, the Justice Department interposed a higher rate of objection to states with smaller numbers of submitted changes and a lower rate to states with larger numbers of changes. In other words, some of the states that have been required to submit the greatest number of changes have yielded low rates of objection.

Voting Rights Enforcement & Reauthorization at 39. While the broad pre-existing coverage formula of Section 4(b) may have been necessary in 1965, it is clear that the VRA covers far more jurisdictions than necessary. *Id.* at 45. Currently, Section 5 is "geographically restricted" only in the loosest sense of the terms:

> A review of the geographic distribution of objections within covered states indicates that a large number of counties (as well as a number of parishes and independent cities) have not had a Section 5 objection since at least July 1982 (i.e., the Justice Department has not objected to changes adopted by the county, by any subjurisdiction entirely or partially in the county, or by the state on behalf of the county or any subjurisdiction).

Voting Rights Enforcement & Reauthorization at 45. Although Section 5 does not apply to every jurisdiction in the United States, the record relied on by Congress shows that the geographic limitations were overbroad and, thus, not a congruent and proportional means to prevent or remedy Fifteenth Amendment violations. As a result, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions." *Boerne*, 521 U.S. at 532 (referring to, and holding unconstitutional, the Religious Freedom Restoration Act).

Finally, the time limitation of the 2006 reauthorization is not congruent and proportional in light of the record before Congress in 2006. Although technically Section 5 of the VRA has a termination date, this termination date is far removed from the original egregious actions that made Section 5 necessary in the first place:

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.

Nw. Austin, 557 U.S. at 203-04. The 2006 reauthorization ensures that Section 5 will remain in effect until at least 2031, over 65 years after the act was originally passed. The Act itself was already 40 years old when Congress reauthorized Section 5, with no significant changes, in 2006. In 1965, the VRA was limited to a length of time appropriate to deal with the Constitutional violations of that time. The circumstances, however, are significantly different 40 years later.

In 2006, there was not enough evidence to support Congress' conclusion that the extraordinary measures of Section 5 were a congruent and proportional response to remedy or prevent Fourteenth and Fifteenth Amendment violations. When Section 5 was originally passed, there was a history and pattern of widespread voter suppression by several States. *Boerne*, 521 U.S. at 508 (stating that the VRA originally remedied a "widespread and persisting racial discrimination which confronted Congress and the Judiciary in those cases."). As demonstrated above, in 1965 there were "exceptional conditions" that justified "an uncommon exercise of congressional power . . . not otherwise appropriate." *Katzenbach*, 383 U.S. at 334-35.[9]

The VRA may be "characterized accurately as one of the most successful pieces of civil rights legislation ever adopted by the Congress." Statement of Bradley J. Schlozman at 4. "Past success alone, however, is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202. While Section 5 was a congruent and proportional remedy to the "evil" of the time, the times have changed. *Boerne*, 521 U.S at 530. "In part due to the success of that legislation, we are now a very different Nation." *Nw. Austin*, 557 U.S. at 211. As Justice Thomas has noted:

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[9] As Shelby County points out, that Congress expanded the substantive grounds for denying preclearance – thus increasing the burdens on state and local governments – adds further support that the 2006 reauthorization was not a congruent and proportional response to prevent or remedy Fifteenth Amendment violations. *See* Pet. Br. at 19-20.

> [T]o accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments – a balance between allowing the Federal Government to patrol state voting practices for discrimination and preserving the States' significant interest in self-determination – the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible.

Id. at 224-25 (Thomas, J., concurring in judgment in part, dissenting in part). As a result of the successes of the VRA, the egregious conduct that originally justified the passing of Section 5 cannot justify the reauthorization of it 40 years later.

◆

CONCLUSION

For the foregoing reasons, this Court should emphatically rule that congruency and proportionality standard of review applies to all cases examining Congress' use of its enforcement powers granted by the Fourteenth and Fifteenth Amendments. This Court should further hold that the 2006 reauthorization of Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(B) is not a congruent and proportionate response to prevent or remedy Fifteenth Amendment violations.

Dated this 28th day of December 2012.

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BRIEF

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No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. SECTION 5 PRECLEARANCE REMAINS NECESSARY 6

  A. Section 5 Jurisdictions Continue To Discriminate Against Minorities 6

  B. Section 2 Is An Insufficient Remedy To Voting Discrimination 12

  C. Section 5 Deters Discriminatory Practices 15

II. WHEN SECTION 5 IS NO LONGER NECESSARY IN A COVERED JURISDICTION, THAT JURISDICTION CAN "BAIL OUT" OF SECTION 5 19

TABLE OF AUTHORITIES

Page(s)

CASES

City of Boerne v. Flores,
521 U.S. 507 (1997) 20

Crawford v. Marion County Election Board,
553 U.S. 181 (2008) 9

Lopez v. Merced County, California,
473 F. Supp. 2d 1072 (E.D. Cal. 2007) 26

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) 9

Reynolds v. Sims,
377 U.S. 533 (1967) 3

Shelby County, Alabama v. Holder,
679 F.3d 848 (D.C. Cir. 2012) .... passim

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 13

Texas v. United States,
Civ. A. No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) 9, 10

COURT FILINGS

Brief of Arizona, Georgia, South Carolina, and South Dakota as *Amici Curiae* in Support of Petitioner 22

Brief of Points and Authorities in Support of Motion For Court-Ordered Redistricting Plan, *Allen v. City of Evergreen, Alabama*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Dec. 12, 2012) 11

Brief of State of Alabama as *Amicus Curiae* Supporting Petitioner....4, 5

Brief of the State of Texas as *Amicus Curiae* In Support Of Petitioner....9

Complaint, *Allen v. City of Evergreen, Alabama*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Aug. 6, 2012)....11, 12

Consent Judgment and Decree, *Augusta County, Virginia v. Gonzalez*, No. 05-1885 (D.D.C. Nov. 30, 2005)....23

Consent Judgment and Decree, *Merced County, California v. Holder*, No. 1:12-cv-00354 (D.C. Cir. Aug. 31, 2012)....24, 25, 26

Joint Motion for Entry of Consent Judgment and Decree, *New Hampshire v. Holder*, No. 1:12-cv-01854 (D.C. Cir. Dec. 21, 2012)....23

Partial Consent Agreement, *Allen v. City of Evergreen, Alabama*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Aug. 20, 2012)....11, 12

Plaintiff's Memorandum of Points and Authorities in Opposition to Heilemann's Motion to Intervene, *New Hampshire v. Holder*, No. 1:12-cv-01854 (D.C. Cir. Dec. 19, 2012)....23

LEGISLATIVE MATERIALS

42 U.S.C. § 1973 (2006)....13

42 U.S.C. § 1973b (2006)....passim

42 U.S.C. § 1973c (2006)....10, 15

H.R. Rep. No. 89-439 (1965)....22

H.R. Rep. No. 94–196 (1975)....................................15

H.R. Rep. No. 109–478 (2006)........................... passim

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Bar Association, is the largest and oldest association of predominantly African-American attorneys and judges in the United States. It was founded in 1925 when there were only 1,000 African-American attorneys in the country and when other national bar associations, such as the American Bar Association, did not admit African-American attorneys. The National Bar Association represents approximately 44,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

The National Bar Association consistently has advocated for voting rights on behalf of African Americans and other minority populations since its founding nearly ninety years ago. It was at the forefront of the Civil Rights movement and played an integral role in helping African Americans secure the rights guaranteed by the United States constitution—particularly the right to vote.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* states that the position it takes in this brief has not been approved or financed by Petitioner, Respondents, or their counsel. Neither Petitioner, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission, of this brief. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

The National Bar Association therefore has an interest in and strongly supports the purposes for which Congress originally enacted Section 5 of the Voting Rights Act, *i.e.*, "eliminat[ing] practices denying or abridging opportunities for minorities to participate in the political process."[2] Such practices still exist, and Section 5 remains necessary to combat discrimination and diminution of African American's voting rights. The National Bar Association files this brief to demonstrate that Section 5 of the Voting Rights Act remains necessary to ensure equal access to the fundamental right to vote.

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[2] S. Rep. No. 97–417, at 44, 59 (1982); *see also* H.R. Rep. No. 109–478, at 58 (2006) (noting that Congress intended for the bailout provision to "encourage covered jurisdictions to work to end discriminatory conduct"); J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 257, 275 (Ana Hernandez ed., 2006) (noting that the bailout provision mirrors Congress' intent in passing the Voting Rights Act).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1965, Congress enacted the Voting Rights Act to protect every American's right to vote. As this Court noted:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[3]

Section 5 of the Voting Rights Act supplemented the retroactive remedy provided in Section 2 by requiring jurisdictions with particularly severe histories of racial discrimination in voting to preclear any change to their voting standards, practices, or procedures. Section 5 thus prevents state and local actors from denying equal ballot access to minority voters.

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[3] *Reynolds v. Sims*, 377 U.S. 533, 555 (1967); *see also* President Lyndon B. Johnson, Remarks at the Signing of the Voting Rights Act, (Aug. 6, 1965), *available at* http://millercenter.org/president/speeches/detail/4034 ("The right to vote is the basic right, without which all others are meaningless.").

Petitioner and certain *amici curiae* contend that the discrimination that previously warranted the imposition of Section 5 no longer exists and, thus, Section 5 is no longer necessary. For example, *amicus curiae* the State of Alabama asserts that "the Alabama of 2013 is not the Alabama of 1965."[4] This assertion is misplaced, however. Although Alabama in 2013 is better than Alabama in 1965, it is not perfect, and progress made to date is due, at least in part, to Section 5. Section 5 is therefore vital to continued progress.

Voting discrimination is not a thing of the past. Although the Voting Rights Act, and particularly Section 5, has resulted in great strides forward from Jim Crow-era disenfranchisement, jurisdictions are still attempting today to restrict the ability of minority voters to exercise their right to vote.

Historically, discrimination in Section 5 jurisdictions was both overt and violent. Modern discrimination, although perhaps more subtle, also is devastating to the voting rights of minorities. Legislatures continue to discriminate against minority voters by means of restrictions on early voting and voter registration drives, onerous voter-identification requirements, and discriminatory redistricting plans. And these discriminatory acts continue to draw objections from the Department of Justice under Section 5. Thus, contrary to Petitioner's and *amici curiae's* contentions, Section

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[4] Br. of State of Alabama as *Amicus Curiae* Supporting Pet'r at 4.

5 remains necessary to protect minorities in covered jurisdictions from discrimination.

Further, Section 2 of the Voting Rights Act is an insufficient remedy to counter continuing discrimination. Unlike Section 5, which prevents and deters discriminatory practices, Section 2 provides minority voters with a *post hoc* remedy for discriminatory conduct. Moreover, unlike administrative proceedings under Section 5, Section 2 lawsuits are complicated, expensive, and time-consuming, and, if successful, provide a more limited remedy. Once a court strikes down an election practice under Section 2, jurisdictions can (and often do) enact new methods of voter discrimination. As the State of Alabama concedes, historically, when the United States government sued Alabama for discrimination, its legislature defied court orders and implemented new discriminatory measures.[5] This "gamesmanship"[6] demonstrates that *post hoc* remedies (like Section 2) are an inadequate, or at least incomplete, means by which to protect equality in voter access.

Moreover, covered jurisdictions know that any discriminatory change to voting rules will be preemptively reviewed under Section 5. This deters covered jurisdictions from proposing discriminatory changes in the first place.

Petitioner and certain *amici curiae* also contend that Section 5 must be held unconstitutional because it is not sufficiently narrowly tailored. To the contrary, Section 5 jurisdictions that have corrected past discriminatory practices can "bail out" under Section 4(e) of the Voting Rights Act. It therefore is within a covered jurisdiction's control to demonstrate that voter discrimination *is* a thing of the past. Yet Petitioner has not attempted to avail itself of this option.

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[5] *See id.* at 6-7.

[6] *Id.*

Given that discriminatory practices persist in Section 5 jurisdictions, that Section 2 provides only *post hoc* remedies that do not sufficiently protect minorities' right to vote, that Section 5 deters discrimination, and that it is within a covered jurisdiction's control to correct discriminatory practices and end federal oversight under Section 5, this Court should uphold the constitutionality of Section 5.

ARGUMENT

I. SECTION 5 PRECLEARANCE REMAINS NECESSARY

A. Section 5 Jurisdictions Continue To Discriminate Against Minorities

Petitioner and certain *amici curiae* argue that the discrimination that prompted Congress to pass the Voting Rights Act is a thing of the past. That is wrong.

In just the six years since Congress reauthorized the Voting Rights Act, Section 5 jurisdictions have proposed a wave of voting-related rules that abridge the rights of minorities to vote. That the means of discrimination today are less blatant than they were in 1965 does not make them less nefarious.

Jurisdictions subject to Section 5 recently have enacted limitations on voter registration drives and early voting that disproportionately impact minorities. Minorities are significantly more likely than Caucasians to register to vote at registration drives, which several Section 5 jurisdictions, including Florida and Texas, have sought to limit.[7] Minorities also are significantly more likely than Caucasians to vote early. For example, during the 2008 presidential election, African Americans and Hispanics respectively comprised thirty-one percent and twenty-two percent of all citizens who cast votes on the last Sunday of early voting in Florida.[8] The same two groups cast only thirteen percent and eleven percent of votes in that election in total.[9] Proposals to eliminate early voting on the Sunday before Election Day thus targets minority voters.

Section 5 jurisdictions also recently have proposed voter-identification laws that would disenfranchise minority voters, because African-

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[7] *Summary of Voter ID Laws Passed*, The Brennan Center for Justice 5, 12 (2012), http://brennan.3cdn.net/2287283f66edc3a2fe_n3m6b9nvg.pdf.

[8] Editorial, *Florida's Voting Fairness Problem*, Tampa Bay Times, Jan. 31, 2012, *http*://www.tampabay.com/opinion/editorials/floridas-voting-fairness-problem/1213083.

[9] *Id.*

American and Hispanic citizens are statistically less likely than Caucasians to possess the necessary identification required by voter-identification laws. While only eight percent of Caucasian voters do not possess current, government-issued photo identification, sixteen percent of Hispanics and twenty-five percent of African Americans do not possess this form of identification.[10] Discrimination is compounded by the fact that, in states with voter-identification requirements, poll workers are more likely to request identification from African-American and Hispanic voters than from Caucasian voters. During the 2008 election, poll workers asked for identification from seventy percent of African-American voters and sixty-five percent of Hispanic voters, but only fifty-one percent of Caucasian voters.[11] Potential partisan issues aside, Section 5 jurisdictions' application of voter-identification laws reduces the opportunity and/or ability of minorities to exercise their constitutional right to vote.[12]

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[10] *The Right to Vote Under Attack: The Campaign to Keep Millions of Americans from the Ballot Box*, People for the American Way, http://www.pfaw.org/rww-in-focus/the-right-to-vote-under-attack-the-campaign-to-keep-millions-of-americans-from-the-ball (last visited Jan. 29, 2013).

[11] *Id.*

[12] Alabama, Florida, Mississippi, and Texas have proposed laws requiring voters to show photo identification at the polls. Wendy Weiser and Nhu-Y Ngo, *Voting Rights in 2011: A Legislative Round-Up*, The Brennan Center for Justice (2011), http://www.brennancenter.org/content/resource/voting_rights_in_2011_a_legislative_round-up/. As of September 2013 in New Hampshire, a voter must produce New Hampshire or United

Section 5 jurisdictions also recently have proposed redistricting schemes that federal courts concluded were drafted with discriminatory intent and would have a discriminatory effect. For example, in August 2012, the United States District Court for the District of Columbia denied preclearance for Texas' proposed redistricting plan for the United States House of Representatives.[13]

States government-issued photo identification or execute an affidavit of identity to vote; no other form of identification will be accepted. *Id.* Virginia recently passed a law that not only requires identification to vote, but also eliminates the option to confirm identity when voting or applying for an absentee ballot by signing an affidavit. *Id.* At least one *amicus curiae* argues that because this Court previously approved a voter-identification law passed in Indiana, which is not subject to Section 5, the Court must hold unconstitutional the Department of Justice's insistence on the necessity of preclearing voter-identification laws in Section 5 jurisdictions. *See generally* Br. of the State of Texas as *Amicus Curiae* In Support Of Pet'r. In *Crawford v. Marion County Election Board,* this Court deferred to the judgment of the Indiana legislature regarding the necessity of a voter-identification law, reasoning that "[i]t is for state legislatures to weigh the costs and benefits of possible changes in their elections codes . . . ." 553 U.S. 181, 208 (2008) (Scalia, J., concurring). If the Court is willing to defer to the Indiana legislature's judgment, despite the minimal amount of evidence on which that judgment was based, this Court likewise should defer to Congress' judgment in reauthorizing Section 5, which was made upon a far more extensive evidentiary record. *See, Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579-80 (2012) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.").

[13] *Texas v. United States*, Civ. A. No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012). The court also denied

Between 2000 and 2010, the population of Texas grew by more than four million people.[14] Texas therefore gained four seats in Congress and needed to redraw its congressional districts.[15] Section 5 required Texas to submit its plan for preclearance. The court found, however, that the proposed plan had a discriminatory intent and would have had a discriminatory effect. Specifically, the court found a discriminatory effect because the proportion of congressional districts in which African Americans and Hispanics had the ability to elect candidates of their choice (often referred to as "ability districts"[16]) decreased under the proposed plan.[17] The court found that the plan had a discriminatory intent because, among other things, Texas had redrawn ability districts in a way that (a) moved their main source of economic growth to non-ability districts, but made no such changes to non-minority districts,[18] and (b) excluded African-American and Hispanic members of Congress from the drafting process.[19] The court therefore denied preclearance for Texas' revised congressional plan.[20]

It is particularly surprising that *amicus curiae* the State of Alabama argues that voter discrimination is no longer a problem because just

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preclearance for Texas' revised districting plans for State Senate and State House of Representatives. *Id.*

[14] *Id.* at *1.

[15] *Id.*

[16] *Id.* at *2 (citing 42 U.S.C. § 1973c(b) (2006)).

[17] *Id.* at *18.

[18] *Id.* at *19-20.

[19] *Id.* at *21.

[20] *Id.* at *37.

last year, under Section 5, the United States District Court for the Southern District of Alabama enjoined Evergreen, Alabama from employing a potentially discriminatory redistricting plan.[21] In 2011 and 2012, Evergreen attempted to implement a new voter redistricting plan after the 2010 census revealed that, since 2000, the city's African-American population had increased and its Caucasian population had declined.[22] The proposed plan packed the African-American population into two of the city's five voting districts, and fragmented the remaining African-American population among the other three districts.[23] The city adopted this plan without any meaningful participation from the African-American community.[24] It also did not submit the plan for preclearance review until June 12, 2012, and failed to provide all of the information necessary for preclearance until July 23, 2012—only 36 days before the August 28, 2012 election.[25]

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[21] *See* Partial Consent Agreement at 5, *Allen v. City of Evergreen, Ala.*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Aug. 20, 2012) [hereinafter *Allen* Consent Agreement].

[22] *Id.* at 3; Complaint at 5, *Allen v. City of Evergreen, Ala.*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Aug. 6, 2012) [hereinafter *Allen* Complaint].

[23] *Id.* at 8.

[24] Brief of Points and Authorities in Support of Motion For Court-Ordered Redistricting Plan at 9, *Allen v. City of Evergreen, Ala.*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Dec. 12, 2012) (stating that "black citizens sought in vain changes in district boundaries which would give them a more equal opportunity to elect candidates of their choice").

[25] *Allen* Complaint, *supra* note 22, at 8-9; *Allen* Consent Agreement, *supra* note 21, at 3. Evergreen also failed to request expedited consideration for preclearance, which would

Despite its failure to obtain Section 5 preclearance, Evergreen began to conduct the 2012 election for mayor and council members using the 2012 plan.[26] As a result, the court enjoined further use of the 2012 plan and delayed Evergreen's elections.[27]

Although 2013 is not exactly 1965, as demonstrated above, the vestiges of that damaging period remain strong and discrimination in Section 5 jurisdictions is not a thing of the past.

B. Section 2 Is An Insufficient Remedy To Voting Discrimination

Petitioners and their *amici curiae* also argue that Section 5 is unnecessary because Section 2 provides adequate protection against efforts to infringe minorities' right to vote. But Section 2 of the Voting Rights Act is a backward-looking remedy

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have averted, or at least lessened, the law's potential discriminatory impact. *Allen* Complaint at 8-9.

[26] *Allen* Consent Agreement, *supra* note 21, at 3.

[27] *Id.* at 6. Similarly, a mere matter of weeks ago, the Virginia state Senate passed a redistricting plan that some observers contend is racially motivated. *See* Ryan J. Reilly, *Virginia Redistricting Plan "Shameful," Says State Sen. Henry Marsh*, Huffington Post, (Jan. 23, 2013, 5:31 PM) http://www.huffingtonpost.com/2013/01/22/virginiaredistricting_n_2528519.html. Because Virginia is subject to Section 5, if necessary, the preclearance process would ensure that the plan would not take effect unless the state demonstrated that it has neither a discriminatory purpose nor a discriminatory effect. As addressed below, *infra* Part I.B., if the plan was subject only to a Section 2 *post hoc* challenge, it potentially could impact multiple elections before a challenge was litigated to conclusion.

that, alone, is an insufficient antidote to discriminatory voting practices.

Before Congress enacted the Voting Rights Act of 1965, the Department of Justice brought individual lawsuits against jurisdictions with discriminatory voting practices,[28] similar to the way the Department of Justice and individual plaintiffs can bring lawsuits under Section 2.[29] As this Court has noted, however, litigation of voting rights cases is "exceedingly slow" and "usually onerous to prepare," in part because the plaintiff must collect copious amounts of documentation about the discrimination.[30] Section 2 requires that a discriminatory policy go into effect potentially for several election cycles before there is enough evidence to bring a successful Section 2 challenge.[31]

Further, few potential plaintiffs want to pursue Section 2 cases because they require "huge amounts of resources in the litigation process to be used, both by the jurisdictions and by the individual citizens."[32] While a few nonprofit organizations represent plaintiffs in voting rights cases, they have limited resources,[33] and the voting rights bar as a whole is very small.[34] Even when a violation of the Voting Rights Act is "blatant," costs can be staggering: in one case with multiple, well established examples of discrimination, a plaintiffs' attorney worked 5,525 hours and spent $96,000 in out-of-pocket expenses, "exclusive of expenses incurred by Justice Department lawyers after the department intervened [in support of the plaintiffs] and the costs of expert witnesses and paralegals."[35]

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[28] Vernon Francis et al., *Preserving a Fundamental Right: Reauthorization of the Voting Rights Act*, Lawyers' Committee for Civil Rights Under Law 1 (2003), http://faculty.washington.edu/mbarreto/courses/Voting_Rights.pdf.

[29] *See* 42 U.S.C. § 1973 (2006).

[30] *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

[31] *Voting Rights Act: Section 5 of the Act- History, Scope and Purpose: Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 54 (2005) (statement of Nina Perales, Regional Counsel for the Mexican American Legal Defense and Educational Fund); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 Wm. & Mary L. Rev. 725, 736 (1998) (internal citation omitted).

Because Section 2 requires such massive efforts and imposes such extensive costs, striking down Section 5, and thus having Section 2 as the only remaining means to address discrimination

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[32] *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 15 (2006), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf [hereinafter *Continuing Need*].

[33] *See* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 Hastings L.J. 923, 956 (2011) (citing Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Bar, in Controversies in Minority Voting: The Voting Rights Act in Perspective* 230-57 (Bernard Grofman & Chandler Davidson eds., 1992)).

[34] *Continuing Need*, *supra* note 32, at 15 (statement of Anita Earls, Director of Advocacy, Center for Civil Rights).

[35] Karlan, *supra* note 31, at 736 (internal citation omitted).

"would quite plausibly leave literally thousands of unconstitutional systems in place."[36]

C. Section 5 Deters Discriminatory Practices

Section 5 deters discrimination by placing the burden and cost of litigating discriminatory practices on covered jurisdictions, rather than placing that burden on victims of discrimination. Under Section 5, covered jurisdictions must prove that a proposed rule has neither a discriminatory intent nor effect. This serves to address the reality of discrimination and the shortfalls of Section 2.[37] In fact, as Congress explained:

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided . . . to shift the advantage of time and inertia from the perpetrators of the evil to its victim[.][38]

Section 5 additionally deters discrimination through its requirement that a covered jurisdiction seeking preclearance must specify the extent to which minorities were involved in its decision-making process.[39] In practice, this requirement deters discrimination by "encourag[ing] local jurisdictions to consult and involve local minority representatives in the preclearance process,"[40] which will highlight the potential for discriminatory effect *before* measures are enacted.

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[36] *Id.*

[37] *See* 42 U.S.C. § 1973c (2006).

[38] *See* Francis, *supra* note 28, at 26 n.113 (quoting H.R. Rep. No. 94–196, at 57-58 (1975)).

[39] *Id.*

Section 5 also provides that during the preclearance review process, if the Department of Justice preliminarily finds that some aspect of a proposed rule change is discriminatory, or that it needs additional information about a proposed rule change, it will request additional information from the jurisdiction.[41] Congress, scholars, and voting rights attorneys alike have found that such requests (which are referred to as "more information requests" or "MIRs") deter covered jurisdictions from enacting discriminatory procedures because, in practice, many jurisdictions withdraw requests for preclearance when they receive such a request.[42]

Between 1990 and 2005, the Department of Justice issued 885 MIRs in response to which the covered jurisdiction either (i) changed its preclearance submission, (ii) withdrew its request for preclearance, or (iii) ignored the MIRs, which is the functional equivalent of withdrawal because the jurisdiction cannot implement the proposed change.[43] Ultimately, the Department of Justice objected to 365 submissions during that time period.[44]

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[40] Halberstam, *supra* note 33, at 958.

[41] *Id.* at 963.

[42] *See, e.g.*, Ana Henderson & Christopher Edley, Jr., *Voting Rights Act Reauthorization: Research-Based Recommendations to Improve Voting Access*, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, 9-10 (2006), http://www.law.berkeley.edu/files/Warren_Inst._VRA_policy_report5-5.pdf (citing Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf); H.R. Rep. No. 109–478, at 3.

For example, in Monterey County, California, election officials sought to reduce the number of polling places for a recall election for governor.[45] In response to an MIR, Monterey County withdrew its request for preclearance of five of its proposed precinct consolidations.[46] The Department of Justice ultimately granted preclearance, but as Congress noted, "[a]bsent Section 5 coverage there would not have been a withdrawal of these particular polling place consolidations."[47] As Congress has concluded, the frequency with which MIRs result in preclearance withdrawals demonstrates that Section 5's "strength lies not only in the number of discriminatory voting changes it has thwarted . . . [but also] in the discriminatory voting changes that have never materialized."[48]

Additionally, a jurisdiction must prove that its proposed changes are not discriminatory or the

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[43] Henderson & Edley, *supra* note 42, at 11.

[44] *Id.*

[45] H.R. Rep. No. 109–478, at 41 (internal citation omitted).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 36.

Department of Justice will deny preclearance. This denial of preclearance also prevents discriminatory rules from taking effect.

For example, in 2012, a parish in the State of Louisiana (a Section 5 jurisdiction), enacted a new redistricting plan that would have significantly lowered the percentage of potential African-American voters in one of the districts in the Parish, mainly by adding a new, primarily white, area to the district.[49]

The Parish claimed these changes were necessary to prevent the district from being under-populated, but the United States Department of Justice rejected that argument and noted that the district was only the third-least populated district without the proposed plan, and that adding the new area made it over-populated and violated the Constitution's one-person, one-vote requirement.[50] The Parish did not explain why it had not made simple non-discriminatory changes to the district by adding adjacent areas that had fewer people and were majority African-American. The Department of Justice therefore concluded that the Parish had not established that the plan was adopted without a discriminatory purpose.[51]

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[49] Letter from Thomas E. Perez, Assistant Attorney General, to Nancy P. Jensen, Baton Rouge, Louisiana (October 3, 2011) in Voting Rights Act Objections and Observers Searchable Index, http://lawyerscommittee.org/projects/section_5/ (Search by "Objection Letter"; then "State-Louisiana"; then "Published after 10/01/2011"; click "Search" and then click the PDF icon).

[50] *Id.*

Similarly, in Texas, when a Section 5 jurisdiction attempted to decrease the number of polling places from 84 to 12, the Department of Justice objected.[52] Had the proposed change taken effect, it would have disproportionately burdened minority and low-income individuals because they are less likely to have the transportation necessary, or the flexibility to take the time off of work, to travel to the fewer and more distant polling places.[53] Moreover, the Department of Justice found that if the jurisdiction implemented the change, "the site with the smallest proportion of minority voters served just 6,500, while the site that served a population that was 79.2% African American and Hispanic served over 67,000 voters."[54] If not for Section 5, the proposed change would have been enacted and minority voters would have suffered.

II. WHEN SECTION 5 IS NO LONGER NECESSARY IN A COVERED JURISDICTION, THAT JURISDICTION CAN "BAIL OUT" OF SECTION 5

When covered jurisdictions have "eliminate[d] practices denying or abridging opportunities for minorities to participate in the political process,"[55]

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[51] *Id.*

[52] *Continuing Need*, *supra* note 32, at 4.

[53] *Id.*

[54] *Id.* at 4-5.

[55] S. Rep. No. 97–417, at 44, 59.

Section 4(e) of the Voting Rights Act expressly allows such jurisdictions to "bail out" of Section 5. This mechanism—which the congressional record shows is "easily proven for jurisdictions that do not discriminate in their voting practices"[56]—ensures that the means by which Congress seeks to correct past discrimination are "neither permanent nor overbroad."[57] Moreover, hundreds of jurisdictions have "bailed out" of Section 5.[58] In fact, every jurisdiction that has sought to bail out has established that it was entitled to bail out.[59] Petitioner here has not, however, even attempted to bail out or to establish that it has corrected past discrimination.[60]

Under Section 4(e) of the Voting Rights Act, a covered jurisdiction bails out of Section 5 by proving that it currently does not engage in discriminatory practices and has not done so in the past ten years.[61] Moreover, if, after an independent investigation, the Department of Justice finds that a covered jurisdiction has demonstrated by "objective and compelling evidence" that it satisfied Section 4(e), the Department of Justice may consent to the jurisdiction's request to bail out.[62] A jurisdiction that has complied with the Voting Rights Act thus can "exempt itself" from Section 5 quickly and efficiently.[63]

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[56] *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provision the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005).

[57] H.R. Rep. No. 109–478, at 25; *see also City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (noting that the bailout provision of the Voting Rights Act the Voting Rights Act's means are proportionate to its ends).

[58] *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 881 (D.C. Cir. 2012) (citing U.S. Dep't of Justice, Section 4 of the Voting Rights Act,
http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 29, 2013)).

[59] *Id.*

[60] *Id.* at 857.

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[61] Specifically, the jurisdiction must prove that it currently is seeking to expand minority participation in the political process and has, at no time in the preceding ten years:

> (1) used a voter-eligibility requirement that had the purpose or effect of "denying or abridging" the right to vote based on race, color, or membership in a language-minority group;
>
> (2) maintained voting procedures that inhibit or dilute equal access to voting;
>
> (3) had a final judgment entered against it, or entered into a consent decree or settlement agreement, finding that it had employed discriminatory voting practices;
>
> (4) been assigned a federal observer to monitor elections held in the jurisdiction;
>
> (5) failed to timely submit voting changes for preclearance applications or to timely withdraw unapproved changes as required under Section 5;
>
> (6) had any preclearance applications opposed by the Department of Justice and United States District Court for the District of Columbia;
>
> (7) allowed known harassment or intimidation of voters to persist; nor
>
> (8) violated any voting-related provision of the Constitution, state, or federal law (unless such violation was "trivial," "properly corrected," or "not repeated").

See 42 U.S.C. 1973b(a)(1), (a)(3) (2006); *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, § 13(d)(2), 120 Stat. 580 (July 27, 2006) (providing additional detail on the enumerated factors); S. Rep. No. 97–417, at 53 (same).

In total, as of May 9, 2012, there were 136 covered jurisdictions and sub-jurisdictions that had successfully bailed out.[64] Indeed, since Congress liberalized bailout in 1982 to "incentiv[ize] jurisdictions to attain compliance with the law and increas[e] participation by minority citizens in the political process in their community,"[65] every single jurisdiction that has sought to bail out has done so successfully.[66] More than 100 jurisdictions currently have bailout applications pending.[67]

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[62] 42 U.S.C. § 1973b(a)(9). It is worth noting, however, that even if a covered jurisdiction bails out, its declaratory judgment action can be reopened within ten years should the Department of Justice or an aggrieved person allege conduct that would have barred bailout had it occurred during the ten years preceding the jurisdiction's bailout application. *Id.* § 1973b(a)(5).

[63] J. Gerald Hebert & Renata E. B. Strause, *The Future of the Voting Rights Act*, 64:4 Rutgers L. Rev. 953, 965 (2012) (quoting H.R. Rep. No. 89–439, at 15 (1965)).

[64] *Shelby Cnty.*, 679 F.3d at 856 (citing U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 29, 2013)). Petitioners and/or their *amici curiae* argue that the prospect of bailout is "illusory" because a state's ability to bailout can be hindered by its subdivision's actions. *See, e.g.*, Br. of Arizona, Georgia, South Carolina, and South Dakota as *Amici Curiae* in Support of Pet'r at 27-30. This is, however, at best an argument for further liberalizing Section 4(e), not for striking down Section 5.

[65] Hebert, *supra* note 2, at 262 (quoting S. Rep. No. 97–417, at 44); *see also Shelby Cnty.*, 679 at 856 (noting that "the 1982 version of the Voting Rights Act made bailout substantially more permissive").

Moreover, the Voting Rights Act does not require jurisdictions to be perfect in order to bail out; a jurisdiction can bail out despite its failure to comply with Section 5 preclearance so long as any such failure was "trivial," "properly corrected," or "not repeated."[68] This flexibility has enabled "once-bad actors" who have meaningfully eliminated discrimination to bail out.[69]

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[66] *Shelby Cnty.*, 679 F.3d at 882.

[67] *Id.* Most recently, the Department of Justice and the State of New Hampshire filed a joint motion for a consent decree to the United States District Court for the District of Columbia stating that New Hampshire has met the requirements laid out in Section 4(e), and thus is entitled to bailout. Joint Motion for Entry of Consent Judgment and Decree, *New Hampshire v. Holder*, No. 1:12-cv-01854 (D.C. Cir. Dec. 21, 2012). The District Court's ruling is pending. At least one interest group has sought to intervene in New Hampshire's bailout action (and thus stop preclearance). *See* Ryan J. Reilly, *Conservative Group Attempts to Block New Hampshire's Bailout from Voting Rights Act*, Huffington Post, (Jan. 2, 2013, 4:59 PM) http://www.huffingtonpost.com/2013/01/02/new-hampshire-voting-rights-act_n_2397801.html. The Department of Justice has argued that such permissive intervention should not be granted because the interest group's "purpose appears to be to advance" Petitioner's position in this action, rather than a legitimate concern regarding the merits of New Hampshire's compliance with the Voting Rights Act. *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Heilemann's Motion to Intervene at 15, *New Hampshire v. Holder*, No. 1:12-cv-01854 (D.C. Cir. Dec. 19, 2012).

[68] 42 U.S.C. § 1973b(a)(3); S. Rep. No. 97–417, at 53. *See, e.g.*, Consent Judgment and Decree at 6, *Augusta Cnty., Va. v. Gonzalez*, No. 05-1885 (D.D.C. Nov. 30, 2005) (granting bailout where covered jurisdiction had implemented minor changes to its electoral procedures without first seeking preclearance).

For example, on August 31, 2012, the United States District Court for the District of Columbia granted a consent judgment and decree releasing Merced County, California from Section 5.[70] Merced County had been a covered jurisdiction since 1975, when the Attorney General and Director of the Census determined that it fell under the Voting Rights Act's coverage formula because the County provided registration and voting materials only in English and more than five percent of voting-age citizens in the County spoke only Spanish.[71] Since at least 2002, however, (*i.e.*, the ten years preceding the County's bailout), and during the pendency of the bailout action, Merced County provided voter

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For example, the Department of Justice will allow a jurisdiction that inadvertently failed to submit minor rule changes for preclearance to submit such changes for clearance while applying for bail out so long as the jurisdiction establishes that it was not seeking to evade the preclearance process. *See* Hebert, *supra* note 2, at 273.

[69] Hebert & Strause, *supra* note 63, at 967. In fact, Congress expressly acknowledged that the preclearance provision should apply only to jurisdictions so long as those jurisdictions were unable to correct discriminatory practices on their own, and thus liberalized the bailout provision. *See* H.R. Rep. No. 109–478, at 10, 25; *see also* Hebert & Strause, *supra* note 63, at 955-56 (noting that when Congress renewed the Voting Rights Act in 1982, it did not change the coverage formula, but it did amend the provisions under which jurisdictions can bail out).

[70] Consent Judgment and Decree at 14, *Merced Cnty., Cal. v. Holder*, No. 1:12-cv-00354 (D.C. Cir. Aug. 31, 2012) [hereinafter *Merced County* Consent Judgment and Decree].

[71] *Id.* ¶ 40; *see also* 40 Fed. Reg. 43.746 (Sept. 23, 1975).

registration materials in both English and Spanish, provided in-person bilingual assistance at all polling places, and printed all signs, ballots, and sample ballots in both English and Spanish.[72]

Although Merced County had failed to submit several potential voting changes for preclearance during the ten years preceding its bailout action, the Department of Justice determined after an independent investigation that "the [County's] failure to make such submissions prior to implementation was inadvertent or based on a good faith belief the changes were not covered by Section 5 [rather than] the product of any discriminatory reason."[73] Additionally, as soon as the Department of Justice notified Merced County of these errors, the County submitted those proposed rule changes to the Department of Justice for approval.[74] The Department of Justice did not object to the late-submitted requests and found that "objective and compelling evidence" demonstrated that Merced County, including its eighty-four political subdivisions, had met the requirements of Section 4(e).[75] The Department of Justice therefore agreed that Merced County had corrected its previous language-related discriminatory voting practice and was entitled to bail out of Section 5's preclearance requirement.[76] The District Court agreed and entered judgment for Merced County.[77]

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[72] *Merced County* Consent Judgment and Decree, *supra* note 70, ¶¶ 22-23.

[73] *Id.* ¶ 29.

[74] *Id.*

[75] *See* 42 U.S.C. § 1973b(a)(9). The Department of Justice found that Merced County met all other enumerated requirements to bail out. For example, Merced County had submitted 252 preclearance requests in the preceding ten years. *See Merced County* Consent Judgment and Decree, *supra* note 70, ¶ 29. The Department of Justice had not objected to a preclearance request from Merced County for

Unlike Merced County and the hundreds of other jurisdictions that have been excused from Section 5 by correcting past discrimination, Petitioner has never sought to bail out.[78] This is not surprising, given that the Department of Justice recently has objected to annexations and redistricting plans proposed in Shelby County and because the County recently has failed to seek preclearance on multiple occasions.[79] Discrimination therefore persists in Shelby County[80]—as it does in many Section 5 jurisdictions—and Petitioner should not be permitted to escape its obligations under the Voting Rights Act. If and when Petitioner "eliminate[s] practices denying or abridging opportunities for

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over ten years. *Id.* ¶ 19. Although Merced County did have one Section 5 suit filed against it in 2006, that case did not go to judgment, and thus did not preclude bailout. *See id.* ¶ 28; *see also Lopez v. Merced Cnty., Cal.*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007). The Court also found that Merced County had "engaged in a variety of constructive efforts" to correct prior discrimination. *See Merced County* Consent Judgment and Decree, *supra* note 70, ¶ 40 (citing 42 U.S.C. § 1973b(a)(1)(F)(iii)).

[76] *See Merced County* Consent Judgment and Decree, *supra* note 70, ¶¶ 7-9, 13, 31.

[77] *See id.* at 16.

[78] *Shelby Cnty., Ala.*, 679 F.3d at 882.

[79] *Id.*

[80] *Id.* at 857.

minorities to participate in the political process,"[81] then it can bail out of Section 5.

* * *

As demonstrated above, discrimination against minority voters persists and Section 5 deters jurisdictions from enacting voting procedures that have discriminatory intent or effect in a way that *post hoc* litigation cannot do. Moreover, to the extent a covered jurisdiction demonstrates that is has corrected past discriminatory practices—which Petitioner has not even attempted to do—that jurisdiction will no longer be subject to federal oversight under Section 5. Section 5 thus remains a meaningful and proportionate guardian of the fundamental right to vote and should be upheld.

January 31, 2013

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[81] S. Rep. No. 97–417, at 44, 59.

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL BLACK CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 7

I. The Court Has Always Considered the Availability and Effectiveness of Alternative Remedies When Reviewing Exercises of Congress's Fourteenth and Fifteenth Amendment Enforcement Powers 7

II. Alternative Remedies, Less Intrusive Than Section 5, Are Adequate To Combat Lingering Discrimination 11

- A. Case-by-Case Adjudication Under Section 2 and Section 1983 13
- B. The Section 3 "Pocket Trigger" 23
- C. State Law Remedies and State Court Litigation 27

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Albert v. 2001 Legislative Reapportionment Comm'n, 790 A.2d 989 (Pa. 2002) 28

Alexander v. Taylor, 51 P.3d 1204 (Okla. 2002).... 31

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Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 281 F. Supp. 2d 436 (N.D.N.Y. 2003).. 14, 15

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446 U.S. 156 (1980) 6, 8, 9, 12, 24

Coleman v. Court of Appeals of Md.,
132 S. Ct. 1327 (2012) 6, 10, 11

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406 F. Supp. 2d 1326 (N.D. Ga. 2005) 16

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(N.M. 1st Dist-Santa Fe, Jan. 16, 2012) 29

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(N.M. 1st Dist-Santa Fe, Feb. 27, 2012) 29

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527 U.S. 627 (1999) 6, 9, 10, 12, 27

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863 F.2d 1407 (9th Cir. 1988) 18, 19

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813 N.W.2d 391 (Minn. 2012) 29, 30

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44 P.3d 141 (Alaska 2002) 31

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828 P.2d 185 (Colo. 1992) 28

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805 A.2d 292 (Md. 2002) 28, 29

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597 So.2d 276 (Fla. 1992) 28

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740 F. Supp. 2d 585 (E.D. Ark. 1990) 5, 26

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528 U.S. 62 (2000) 10

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410 F.3d 404 (7th Cir. 2005) 4, 18

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142 N.W.2d 35 (Iowa 1966) 30

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629 A.2d 646 (Md. 1993) 29

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203 S.W.3d 201 (Mo. 2006) 31, 32

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Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) 7

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42 U.S.C. § 1973 ("Section 2") .... *passim*

42 U.S.C. § 1973a ("Section 3") .... *passim*

42 U.S.C. § 1973c ("Section 5") .... *passim*

42 U.S.C. § 1973j 20

42 U.S.C. § 1973*l* 4, 18, 19

42 U.S.C. § 1983 19

42 U.S.C. § 1988 18

28 C.F.R. § 51.8 24

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INTEREST OF THE AMICUS CURIAE[1]

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African-American-owned businesses and advocates on behalf of the 2.1 million black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

The Chamber rejects the assumption underlying Congress's reauthorization of Section 5 of the Voting Rights Act that the exceptional circumstances which justified close federal oversight of the electoral practices of many states and localities in 1965 and 1975 persist today. They do not. The Chamber and its members and affiliates work hand-in-hand with government at all levels to foster an environment in which black-owned businesses can take root and thrive. The government officials who are partners in this effort are people of good faith, and do not deserve to be labeled and treated as presumptive discriminators. Federal control of elections, through the "preclearance" process, undermines these officials' authority and flexibility, to the ultimate detriment of their constituents, many of them minorities. Worse, Section 5 has been abused in some instances *to enforce* stereotypes regarding minority voters' preferences and affiliations, preventing voters who do not embody these stereotypes from electing their candidates of choice.

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[1] Pursuant to Rule 37.6, counsel for the amicus certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

The Chamber supports vigorous enforcement of those federal laws that prohibit actual voting discrimination, including the Fifteenth Amendment and Section 2 of the Voting Rights Act. By contrast, Section 5 is no longer necessary to combat widespread and persistent discrimination in voting and now, perversely, serves as an impediment to race-neutral voting and to the empowerment of state and local officials who represent minority constituencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Whether the "current burdens" of Section 5 of the Voting Rights Act of 1965 ("VRA") are "justified by current needs," *Nw. Austin Mun. Util Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) ("*Nw. Austin*"), depends on the availability and effectiveness of less intrusive remedies to combat discrimination in voting practices. As *Katzenbach* explained, "exceptional conditions can justify legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Though the Fifteenth Amendment had barred voting discrimination over 90 years before, "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration" in a group of states that flouted federal law through discriminatory administration of voting requirements. *Id.* at 313. As quickly as Congress acted to prohibit particular means of discrimination by facilitating case-by-case litigation, these jurisdictions contrived new ones, exhibiting an "unremitting and ingenious defiance of the Constitution." *Id.* at 309. In the face of this massive resistance and the failure of more traditional remedies, Congress exercised its Fifteenth Amendment power in an "inventive manner" by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims" through Section 5's temporary preclearance regime, which it confined to those specific regions where "immediate action seemed necessary." *Id.* at 327-28.

The exceptional conditions that prevailed in 1965 and justified "one of the most extraordinary remedial provisions in an Act noted for its broad remedies," *United States v. Bd. Of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting), no longer exist. In today's South, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202. And crucially, the legislative record supporting the VRA's 2006 reauthorization identifies not a single example of any state "contriving new rules . . . for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees"—the precise evil that motivated and justified the extraordinary remedy of Section 5. *Katzenbach*, 383 U.S. at 335. Instead, "the majority of § 5 objections today concern redistricting" and other claims of vote dilution. Pet.

App. 99a (Williams, J., dissenting) (citing Peyton McCrary, et al., The Law of Preclearance: Enforcing Section 5, in *The Future of the Voting Rights Act* 20, 25 tbl.2.1 (2006)).

Decades of judicial experience, reflected in the case reports, demonstrate that less intrusive alternative remedies are more than adequate to combat the remaining voting discrimination identified in the 2006 legislative record. Foremost among them is Section 2 of the VRA. 42 U.S.C. § 1973(a). Section 2 prophylactically bans any practice that "results in a denial or abridgement of the right of any citizen of the United States to vote," whether or not motivated by an intent to discriminate. This remedy is both expeditious, with courts in many instances issuing preliminary injunctions in a matter of days, and flexible, empowering courts to supervise the replacement of invalidated districting plans. And its burden on plaintiffs is far less than in other civil cases, given that Section 2 provides for reimbursement of attorneys' fees, expert fees, and other expenses, 42 U.S.C. § 1973*l*(e), even in cases where the federal Department of Justice ("DOJ") intervenes and largely assumes the burden of litigation. *See, e.g., King v. Illinois State Board of Elections*, 410 F.3d 404, 424 (7th Cir. 2005). There can be no question that Section 2 litigation is equal to defeating the "second generation barriers" cited by Congress as justifying reauthorization of Section 5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577, 577-78 (2006) ("VRARAA").

But if there was any question, Section 2's protections are reinforced by the Section 3(c) "pocket trigger," which provides a judicially-supervised preclearance remedy targeted at any state or local jurisdiction that has violated the voting guarantees of the Fourteenth or Fifteenth Amendment. 42 U.S.C. § 1973a(c). Because Section 3(c) applies nationwide and is triggered only by actual constitutional violations, it sidesteps the equality and congruence problems of the inflexible and outdated Section 4(b) coverage formula that applies to Section 5. *See Nw. Austin*, 557 U.S. at 203-04. Moreover, Section 3(c)'s preclearance remedy offers greater flexibility, in terms of duration and breadth of coverage, applying either to all changes to voting practices (as under Section 5) or only to those identified by the court as presenting a special risk of discrimination. *See Jeffers v. Clinton*, 740 F. Supp. 2d 585, 601-02 (E.D. Ark. 1990). Although there is no indication in the 2006 legislative record that Section 2 decrees are being evaded by recalcitrant jurisdictions, the pocket trigger is available to defeat the kind of "unremitting and ingenious defiance" that marked the pre-VRA era and is no less powerful or less effective to that end than the Section 5 preclearance regime.

Finally, the state courts are an additional bulwark against infringement of voting rights. The state courts routinely enforce federal voting law—including the requirements of the VRA, Fourteenth Amendment, and Fifteenth Amendment—as well as state law requirements that go beyond the protections of federal law. In recent election cycles, for example, state courts have enjoined the operation of voter identification laws and supervised the procedural and substantive aspects of legislative reapportionment. Such litigation, while effective at protecting voting rights, is far less intrusive than Section 5's preclearance regime. Yet the legislative record reflects that, as in other recent cases where the Court has struck down exercises of Congress's enforcement powers, "Congress . . . barely considered the availability of state remedies." *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 643 (1999); *see also Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1335 (2012). In this way, Congress has once again failed to "tailor" an asserted exercise of its enforcement powers "to remedy or prevent conduct transgressing the Fourteenth [or Fifteenth] Amendment's substantive provisions." *Id.* at 1333 (internal quotation marks omitted).

The logic of *Katzenbach* and *City of Rome v. United States*, 446 U.S. 156 (1980), does not support Congress's latest 25-year reauthorization of the VRA's preclearance regime. Today's redistricting challenges and vote dilution cases are nothing like the "extraordinary circumstances" that justified "the federalism costs exacted by § 5 preclearance," *Miller v. Johnson*, 515 U.S. 900, 926 (1995). The relevant difference is that they are amenable to case-by-case adjudication by federal and state courts, with the backstop of the Section 3(c) pocket trigger in the unlikely instance that a jurisdiction attempts to evade a court decree. For that reason, the 2006 reauthorization of Section 5 is not a valid means of enforcing the substantive provisions of the Fourteenth and Fifteenth Amendments.

ARGUMENT

I. The Court Has Always Considered the Availability and Effectiveness of Alternative Remedies When Reviewing Exercises of Congress's Fourteenth and Fifteenth Amendment Enforcement Powers

The Fifteenth Amendment does not grant Congress plenary power to regulate states' electoral practices. As Congress itself recognized in the 1965 Act, suspending facially nondiscriminatory voting regulations and subjecting them to review for discriminatory purpose or effect was so novel and aggressive an exercise of its enforcement power that it applied the VRA's preclearance requirement only to those jurisdictions employing tests or devices to violate the Fifteenth Amendment's affirmative prohibition and did so only on an emergency basis, limited to five years. Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965).

This Court upheld that enactment as specifically justified by "widespread resistance" to the constitutional prohibition against racial discrimination in voting. As it explained, laws providing for case-by-case adjudication had "done little to cure the problem of voting discrimination," *Katzenbach*, 383 U.S. at 313, due to certain states' intransigence:

> Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the

> federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

Id. at 314 (footnotes omitted).

The Court reasoned that these "exceptional circumstances" could "justify legislative measures not otherwise appropriate," including the Section 5 preclearance regime. *Id.* at 334. Because the legislative record showed that certain states "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," Congress "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.* at 335. And because the alternative of "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting," preclearance "was clearly a legitimate response to the problem." *Id.* at 328; *see also Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (upholding the VRA's bar on certain language tests where Congress had found "the adequacy or availability of alternative remedies" to be lacking).

In *City of Rome*, the Court upheld the 1975 reauthorization of Section 5 for an additional seven years, again finding alternative remedies insufficient to protect voting rights. The legislative record showed that "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions," and Congress feared that, absent Section 5, the VRA's "limited and fragile" achievements could "be destroyed through new procedures and techniques" designed to evade case-by-case enforcement of voting rights. 446 U.S. at 181 (internal quotation marks omitted). Agreeing that the potential for continued "'unremitting and ingenious defiance of the Constitution'" had not dissipated within ten years of the VRA's enactment, the Court upheld Section 5's extension as "plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.* at 182 (quoting *Katzenbach*, 383 U.S. at 309).

The Court has expressly relied on the reasoning of *Katzenbach* and *City of Rome*—including their focus on alternative remedies—in its cases concerning the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores* identified the initial enactment of Section 5 of the VRA as a paradigmatic example of properly remedial legislation, explaining that its "unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation." 521 U.S. 507, 526 (1997) (citations omitted).

Accordingly, subsequent cases have surveyed the availability and effectiveness of less-intrusive alternatives to asserted prophylactic exercises of Congress's Fourteenth Amendment enforcement power. *Florida Prepaid*, for example, faulted Congress for ignoring "the availability of state remedies for patent infringement" when it sought to abrogate states' sovereign immunity for that conduct. 527 U.S. at 644.

"[A] few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses," was an insufficient basis for an intrusive remedy that "made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration." *Id.* at 644, 647; *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) (surveying state law remedies for age discrimination by state employers in the course of striking down a federal remedy); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001) (striking down a federal remedy requiring special accommodations for disabled state employees where, "by the time that Congress enacted the [Americans with Disabilities Act] in 1990, every State in the Union had enacted such measures").

In the previous term, the Court held that application of the Family and Medical Leave Act's self-care leave provision to state employers was not a properly tailored exercise of Congress's enforcement power in light of state law remedies:

> [A]s a remedy, the provision is not congruent and proportional to any identified constitutional violations. At the time of the FMLA's enactment, ninety-five percent of state employees had paid sick-leave plans at work, and ninety-six percent had short-term disability protection. State employees presumably could take leave for pregnancy-related illnesses under these policies, and Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies. "Con-

> gress . . . said nothing about the existence or adequacy of state remedies." *Florida Prepaid*, 527 U.S. at 644. It follows that abrogating the States' immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed.

Coleman, 132 S. Ct. at 1335 (citation and internal quotation marks omitted).

In sum, under this Court's jurisprudence, it is Congress's burden to show that existing, less-intrusive remedies under federal or state law are ineffective to address and prevent violations of the substantive provisions of the Fourteenth or Fifteenth Amendments before it may act to enforce those provisions prophylactically.

II. Alternative Remedies, Less Intrusive Than Section 5, Are Adequate To Combat Lingering Discrimination

Although acknowledging the central importance of alternative remedies to determining whether "the current burdens imposed by section 5 [are] 'justified by current needs,'" Pet. App. 22a (quoting *Nw. Austin*, 557 U.S. at 203), the court below failed to apply faithfully the standard set in this Court's cases. As it explained, the "emphasis on the inadequacy of case-by-case litigation makes sense: if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions, then Congress might have no justification for requiring states to preclear their voting changes." *Id.* at 26a. Thus, "what is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate.” *Id.*

Yet the court below erred in carrying out that inquiry in two respects. First, it blithely rejected *Katzenbach's* recognition that only the “unique circumstances” present at that time—i.e., “the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees”—justified what the Court identified as “an uncommon exercise of congressional power” that was “not otherwise appropriate.” 383 U.S. at 334-35; *see* Pet. App. 25a. Instead, it denied (incorrectly) “that such gamesmanship was necessary to the Court's judgment [in *Katzenbach*] that section 5 was constitutional” and stated (incorrectly) that *City of Rome* “sustained section 5's constitutionality without ever mentioning gamesmanship of any kind.” Pet App. 25a; *see City of Rome*, 446 U.S. at 181 (quoting congressional findings regarding the risk of gamesmanship “through new procedures and techniques”).

Second, the court below accepted as conclusive the legislative record's “fleeting references” to alternative remedies “essentially repeating the testimony of the witnesses,” *Florida Prepaid*, 527 U.S. at 644, that “section 2 claims involve ‘intensely complex litigation that is both costly and time-consuming’” and that Section 2 is therefore inadequate. Pet. App. 45a (quoting Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 96 (2006)). In all of one paragraph, reciting a few scattered quotations from the legislative record, it adopted Congress's blanket conclusion that case-by-case litigation "'would be ineffective to protect the rights of minority voters.'" *Id.* at 45a-46a (quoting H.R. Rep. No. 109-478, at 57 (2006)).

Such blind deference to Congress's assertion of its enforcement power is inappropriate. *City of Boerne*, 521 U.S. at 536 ("Congress' discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). And it is especially misplaced here, where Congress's conclusions regarding the failings of alternative remedies find no support in the legislative record and where the Court may refer to an extensive body of case law that contradicts any assertion that redistricting and other vote dilution claims are not susceptible to case-by-case adjudication.

A. Case-by-Case Adjudication Under Section 2 and Section 1983

Although Section 5 was initially targeted at circumvention of court decrees enforcing Fifteenth Amendment rights, typically through the inventive "misuse of tests and devices," today "the majority of § 5 objections today concern redistricting" and other claims of vote dilution. Pet. App. 99a (Williams, J., dissenting). Congress itself found that "first generation barriers" to the right to vote are now rare, and it therefore premised the extension of Section 5 on "second generation barriers constructed to prevent minority voters from fully participating in the electoral process"—in other words, practices that may affect the weight of a vote once cast. VRARAA §§ 2(a)(1), (2). They include such things as "annexation, at-large voting, and the use of multi-member districts," when "enacted to dilute minority voting strength." VRARAA § 2(a)(4).

Challenges to such practices are, of course, the bread and butter of litigation under Section 2 of the VRA. Section 2 establishes a nationwide remedy for any practice that "results in a denial or abridgement of the right of any citizen of the United States to vote," whether or not motivated by discriminatory intent. 42 U.S.C. § 1973. Because vote dilution claims are not concentrated in states and localities subject to Section 5, *see Nw. Austin*, 557 U.S. at 203-04; Pet. App. 49a-50a (discussing the Katz study of Section 2 cases), federal courts have routinely adjudicated such claims, on a case-by-case basis, under Section 2. This experience demonstrates that Section 2 provides an effective remedy for unlawful vote dilution.

1. Section 2 litigation has been proven to provide expeditious relief from voting practices challenged as violating Fourteenth and Fifteenth Amendment rights and, in particular, practices resulting in vote dilution. The *Arbor Hill* challenge to Albany County's legislative redistricting plan is typical in every respect but for the unusually extensive documentation of its procedural history. *See* Pet. App 51a (noting that many or most Section 2 claims are "settled or otherwise resolved without a published opinion"). Following the 2000 Census, the county legislature adopted a redistricting plan that created a single majority-minority district in the City of Albany and several additional districts containing minority populations of up to 48 percent. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 440 (N.D.N.Y. 2003). A coali-

tion of civil rights organizations brought suit, alleging that the plan diluted minority voting strength in violation of Section 2 of the VRA, and sought to enjoin the County from conducting elections—including those scheduled several months thence—until a lawful plan was adopted. *Id.* at 439. The district court conducted a hearing and then granted a preliminary injunction, after which the County submitted a revised plan that the court accepted as compliant with the VRA. *Arbor Hill Concerned Citizens v. County of Albany*, 357 F.3d 260, 262 (2d Cir. 2004). Ultimately, the district court oversaw a special election under the revised redistricting plan and later approved a consent decree among the parties making further modifications to district boundaries. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 419 F. Supp. 2d 206, 208 (N.D.N.Y. 2005). The total time from the complaint to approval of the revised plan was six months, and the entry of a preliminary injunction at the outset ensured that no voter suffered any degree of harm. *Id.* Having prevailed on the merits, the plaintiffs were awarded fees and costs. *Id.* at 212.

In those rare cases where courts have not had the luxury of *months* to act on Section 2 claims, they have done their work in *weeks* or even *days*. For example, within six weeks in 2003, federal courts issued three separate opinions in a Section 2 vote dilution challenge to the use of punch-card balloting machines in California's gubernatorial recall election. *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc). On August 7, the plaintiffs brought their claims seeking relief under Section 2 and the Fourteenth

Amendment's Equal Protection Clause. *Id.* The district court denied their motion for an injunction 13 days later, on August 20. *Id.* A three-judge panel of the Ninth Circuit reversed that decision on September 15, enjoining the election. *Id.* That same day, the appeals court voted to rehear the case en banc, vacating the panel opinion. *Id.* The case was reargued seven days later, and then decided in a published opinion affirming the district court's decision the very next day, September 23. *Id.* at 914. The election was held two weeks later, *id.* at 916, without reported incident.

District courts have not been shy about using preliminary injunctions and restraining orders to preserve the status quo and protect against suspect changes to voting practices. For example, it took all of three days for a district court to enter a temporary restraining order against a suspect change to Ohio election procedures, challenged under Section 2, that allowed election boards to bar observers during the in-person absentee voting period prior to election day. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360 (6th Cir. 2008). And it took the Sixth Circuit all of one day to stay that order as an abuse of discretion because the claim was unlikely to succeed on the merits. *Id.* at 362.

This kind of protective use of preliminary injunctions and restraining orders while the merits of Section 2 claims are considered on an expedited basis is typical. *See, e.g.*, *Tigrett v. Cooper*, 855 F. Supp. 2d 733 (W.D. Tenn. 2012) (district court granted preliminary injunction two weeks after plaintiffs filed Section 2 vote dilution claim); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (district court granted preliminary injunction against Georgia's voter identification requirement alleged to violate Section 2 twelve days after motion was filed); *United States v. Berks County, Pa.*, 2 Elec. L.J. 437 (2003) (district court granted preliminary injunction against treatment of Spanish-speaking voters alleged to violate Section 4(e) eight days after motion was filed); *St. Bernard Citizens for Better Government v. St. Bernard Parish Sch. Bd.*, No. 02-2209 (E.D. La. 2002), 2002 WL 2022589 (district court granted preliminary injunction against adoption of redistricting plan alleged to dilute black voting strength in violation of Section 2 five days after motion was filed and after two days of evidentiary hearings); *Page v. Bartels*, 248 F.3d 175, 181 (3d Cir. 2001) (district court entered a temporary restraining order on the same day that Section 2 vote dilution claim was filed); *United States v. Town of Cicero*, No. 00C-1530 (N.D. Ill. 2000), 2000 WL 3432276 (district court granted temporary restraining order against new candidate residency requirement alleged to violate Section 2 two days after complaint was filed); Section 2 and Section 5 Litigation Post 1982, 17 S. Cal. Rev. L. and Soc. Just. 540, 553 (2008) (describing preliminary injunction against New York's nonvoter purge law in *United Parents Ass'n v. New York City Bd. of Elections*, No. 89 Civ. 0612 (E.D.N.Y. 1989)); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982) (district court granted preliminary injunction against polling place placement alleged to violate Section 2 one day after motion was filed).

Claims that Section 2 actions are inadequate because they may take several years from start to finish miss the mark. *See* Pet. App. 45a-46a. Where preliminary relief is available, as it is in suits showing a likelihood of success and risk of imminent harm, "proponents of a discriminatory law" are not in fact able to "enjoy its benefits . . . before the law is overturned. *Id.* Section 2 prevents that.

2. Plaintiffs need not bear the financial burden of bringing meritorious voting rights litigation. The VRA provides for reimbursement of attorneys' fees, expert fees, and expenses to prevailing parties. 42 U.S.C. §1973*l*(e); *see also* 42 U.S.C. § 1988 (providing the same for § 1983 actions). In the *Arbor Hill* litigation described above, the district court awarded the plaintiffs substantial attorneys' fees and costs, amounting to over $160,000. 419 F. Supp. 2d at 212. This was based on an hourly rate of $210 for experienced attorneys, which was typical or even high for practice in New York's Middle District in 2005, and included $28,000 for an appeal that raised only "narrow issues." *Id.* at 211.

Far from unusual, such fee awards are routine for prevailing private parties in voting rights cases. Indeed, the lower courts have generally held, based on the policy considerations underlying § 1973*l*(e) and § 1988, that prevailing voting rights plaintiffs "are entitled to their attorneys' fees as a matter of course." *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 415 (7th Cir. 2005) (internal quotation marks omitted); *see also LULAC v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228 (5th Cir. 1997) (prevailing party "is entitled to an award of reasonable attorneys' fees"); *Love v. Deal*, 5 F.3d 1406, 1409-10 & n.4 (11th Cir. 1993) (district court's discretion to deny fees to prevailing party is "exceedingly narrow"); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1419

(9th Cir. 1988) ("Attorneys' fees should be awarded in vote dilution claims unless special circumstances make such an award unjust."); *cf. New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980) (holding that, under such fee-shifting statutes, "the court's discretion to deny a fee award to a prevailing plaintiff is narrow").

The court below ignored the availability of fee- and expense-shifting to Section 2 and Section 1983 plaintiffs. Instead, it simply repeated a witness's bare assertion from the legislative record that such litigation is "costly." Pet. App. 45a (quoting Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 96 (2006)). It also cited, without explanation as to its relevance, testimony mentioning a Federal Judicial Center study reporting that a panel of judges estimated that "voting" cases typically require about as much "judicial work" as antitrust, civil RICO, patent, and environmental cases. *Id.* (citing An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 141 (2006)); *see* Patricia Lombard, et al., Federal Judicial Center, 2003-2004 District Court Case-Weighting Study 5 (2005). In fact, this testimony states, on the very same page, that the chief barrier to bringing Section 2 claims is the expense of hiring expert witnesses, a problem that Congress addressed in 2006 by amending the VRA to entitle prevailing plaintiffs to "reasonable expert fees" and "other reasonable litigation expenses." VRARAA § 6 (amending 42 U.S.C. § 1973*l*(e)).

3. The Department of Justice ("DOJ") may assume the entire burden of Section 2 litigation either by bringing suit itself or by intervening in suits brought by private parties. 42 U.S.C. § 1973j(d); *see, e.g., United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004) (Section 2 vote dilution case brought by the Attorney General); *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983) (Section 2 vote dilution case in which Attorney General intervened). As the Court has recognized, this provision exists to compensate for the potential "inadequacy" of private-party litigation. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.21 (1969). Quite appropriately, the DOJ's Voting Section brings or intervenes in Section 2 litigation in every region of the nation. *See* DOJ, Cases Raising Claims Under Section 2 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php ("DOJ Section 2 Case List") (listing recent cases). "So far as Departmental resource constraints are concerned, narrowing § 5's reach would, as a matter of simple arithmetic, enable it to increase § 2 enforcement with whatever resources it stopped spending on § 5." Pet. App. 77a (Williams, J., dissenting). Regardless, the Court has never held that federal resource constraints justify abrogation of state sovereignty. *Cf. Printz v. United States*, 521 U.S. 898, 932 (1997).

4. Judicial decrees under Section 2 in vote dilution cases are generally not susceptible to evasion or circumvention. In redistricting challenges in which a plan is rejected for diluting minorities' voting strength, the district court supervises its replacement or, where necessary, "undertake[s] the 'unwel-

come obligation' of creating an interim plan" itself. *Perry v. Perez*, 132 S. Ct. 934, 940 (2012); *see also Arbor Hill*, 419 F. Supp. 2d at 208 (describing procedural history of replacement of invalidated redistricting plan). In either circumstance, there is simply no opportunity for a jurisdiction to evade the requirements of the law.

This is equally true for other practices potentially giving rise to Section 2 violations, such as "annexation, at-large voting, and the use of multi-member districts." VRARAA § 2(a)(4). For example, after the DOJ challenged a Florida county's at-large method of electing county commissioners, the district court enjoined an approaching election and, following a trial on the merits, ruled that the at-large method of election violated Section 2 and directed the parties to propose remedial plans within one month. *United States v. Osceola County, Florida*, 475 F. Supp. 2d 1220 (M.D. Fl. 2006). Finding the county's proposed plan insufficient to remedy the violation, the district entered a remedial order adopting the single-member district map proposed by DOJ and scheduling a special election under the court-approved plan. *United States v. Osceola County, Florida*, 474 F. Supp. 2d 1254 (M.D. Fl. 2006). DOJ's case records show that this is a typical course of events for Section 2 claims that are actually litigated; many, however, are simply settled by consent decree, prior to any adversarial proceedings and without any opportunity for evasion. *See* DOJ Section 2 Case List.

Section 2 litigation has also proven robust to address changes in voting qualifications. After Georgia amended its voter identification requirement in 2005 to require a government-issued photo identification, a coalition of civil rights groups brought suit, alleging, *inter alia*, a Section 2 violation, and obtained a preliminary injunction. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009). When the state amended its law to allow additional forms of identification, the plaintiffs amended their complaint and obtained a second injunction. *Id.* at 1347-48. Ultimately, following a bench trial, the district court allowed the law to go into effect, a decision affirmed by the Eleventh Circuit. *Id.* at 1348, 1355, *cert. denied*, *NAACP v. Billups*, 129 S. Ct. 2770 (2009). Although Georgia amended its law and adjusted its implementation procedures several times during the course of litigation, at all times the district court maintained control and saw that its rulings were enforced.

It should come as little surprise, then, that the legislative record contains no evidence of attempts to evade or circumvent judicial decrees in Section 2 vote dilution cases, only (as the court below noted) "examples of modern instances of racial discrimination in voting." Pet App. 29a-31a. There is simply no indication that jurisdictions today have the inclination or the ability to resist federal courts' decrees under Section 2.

5. Finally, it should not be overlooked that Congress's 1982 amendment of Section 2 substantially eased plaintiffs' burden of persuasion. In *Mobile v. Bolden*, 446 U.S. 55 (1980), this Court held that, "in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Thornburg v.*

Gingles, 478 U.S. 30, 35 (1986). The 1982 VRA amendments, however, "substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone." *Id.* In this way, Congress removed "an inordinately difficult burden for plaintiffs," who might otherwise be stymied by "the defendant's ability to offer a non-racial rationalization for a law which in fact purposefully discriminates." S. Rep. No. 97-419, at 36 (1982); *see generally* Abigail Thernstrom, More Notes from a Political Thicket, 44 Emory L.J. 911, 914 n.15 (1995) ("The revised § 2 was a gift to minority plaintiffs . . . .").

As Judge Williams observed, "it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay," Pet. App. 77a (Williams, J., dissenting), particularly when those inadequacies are stated in the abstract, divorced from federal courts' extensive experience conducting Section 2 litigation. *E.g.*, Pet. App. 45a-46a (doing just that). But decades of experience demonstrates that Section 2 provides a robust prophylactic remedy for the lingering "second generation barriers" identified by Congress as justifying its latest 25-year extension of Section 5's far more invasive preclearance regime.

B. The Section 3 "Pocket Trigger"

But the Court need not find that Section 2 could combat any hypothetical "unremitting and ingenious defiance of the Constitution" undertaken by jurisdictions now subject to Section 5 because the VRA contains an additional preclearance remedy in Section 3(c) targeted precisely at any such "pockets of discrimination." H.R. Rep. No. 89-439, at 13 (1965).

"A hybrid of sections 2 and 5, the pocket trigger combines an enforcement action with a prophylactic remedy." Travis Crum, The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance, 119 Yale L.J. 1992, 2006 (2010) ("Crum"). It authorizes a federal court to retain jurisdiction over a state or local jurisdiction found to have violated the Fourteenth or Fifteenth Amendment's protections of voting rights. 42 U.S.C. § 1973a(c). While the court retains jurisdiction, which it may do "for such period as it may deem appropriate," changes to voting practices are subject to the same preclearance requirement as under Section 5—that is, no change may go into effect until it has been submitted to the Attorney General and the Attorney general has had sixty days to interpose an objection. *Id.* By regulation, the Attorney General has provided that the same procedures apply as under Section 5. 28 C.F.R. § 51.8. Changes to which the Attorney General objects, or that are challenged by private parties, are reviewed by the court under the same standard that prevailed under Section 5 until its 2006 amendment—i.e., only a change that the jurisdiction can prove "does not have the purpose and will not have the effect of denying or abridging the right to vote" may go into effect. *Compare* § 1973a(c) *with* § 1973c(a) (1975); *see City of Rome*, 446 U.S. at 183 n.18.

Due to the heavy burden of this preclearance process, a Section 3(c) enforcement initiative, whether undertaken by DOJ or private litigants, could be expected to have a strong deterrent effect among jurisdictions at risk of coverage, in addition to (as with Section 5) the deterrent effect on jurisdictions that are already covered. See H.R. Rep. No. 109-478, at 22. The pocket trigger thereby offers the possibility of broader deterrence of constitutional violations than Section 5, which is all but irrelevant to jurisdictions outside of its static coverage formula.

Although the pocket trigger has been applied only sparingly to date—implying that Section 2 has been adequate to meet nearly all "barriers" to the right to vote outside of jurisdictions subject to Section 5—experience shows that it provides a flexible, targeted, and effective remedy to persistent discrimination, albeit one that is rarely needed. "Since 1975, section 3 has bailed-in two states, six counties, and one city: the State of Arkansas; the State of New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee." Crum, *supra*, at 2010. The New Mexico and Arkansas cases both began as redistricting challenges. A three-judge court held in 1982 that New Mexico's reapportionment plan of that year violated the Equal Protection Clause's one-person, one-vote standard and ordered the state to undertake a "good-faith effort to construct legislative districts on the basis of actual population." *Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982). The state's remedial plan, however, violated Section 2, and the state ultimately signed a consent decree that required it to preclear any redistricting plans for the next decade. Crum, *supra*, at 2010. The record reflects that New Mexico did so and that the Attorney General objected to one submission—a 1991 state senate plan—which the state subsequently remedied. *Id.*

Similarly, in *Jeffers v. Clinton*, 740 F. Supp. 585 (D. Ar. 1990), private litigants challenged Arkansas's apportionment plan as diluting the strength of black votes in violation of Section 2 and sought a preclearance remedy. Though the court did not find that the plan was motivated by conscious racial discrimination, it did identify a pattern of constitutional violations in the use of majority-vote requirements at the state and local levels. *Id.* at 594-95. It then considered several factors relevant to the imposition of preclearance:

> Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kinds of violations that would likely be prevented, in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments, independent of this litigation, make recurrence more or less likely?

Id. at 601. Based on those considerations, the court imposed a "limited preclearance remedy" applying only to majority-vote requirements in general elections and thereby tailored to the violations it had identified and the risk of future violations. *Id.* Subsequently, Arkansas has submitted changes to DOJ for preclearance, Crum, *supra*, at 2013, and DOJ has lodged no objections. *See* DOJ, Section 5 Objection Determinations, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php.

As these cases show, Section 3(c) "provides a targeted, flexible, and more responsive means of imposing preclearance" than the stale Section 4(b) formula that applies to Section 5. Crum, *supra*, at 2017; *see also* The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 188 (2006) (testimony of Pamela Karlan) (describing Section 3(c)'s effectiveness and "more surgical[]" application); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 275 (D.D.C. 2008) (same). Though identical in operation to Section 5 once triggered, Section 3(c) coverage has a direct nexus with recent or ongoing constitutional violations, is limited to such duration as the court finds appropriate, and can be limited in scope to the kinds of changes presenting the greatest risk of further violations. And unlike Section 5, it applies nationwide and so does not depart from the fundamental principle of equal sovereignty. *See Nw. Austin*, 557 U.S. at 203. Should case-by-case litigation under Section 2 prove unequal to a jurisdiction's determination to discriminate in voting, Section 3 provides a remedy no less powerful than Section 5, with broader deterrent effect.

C. State Law Remedies and State Court Litigation

In exercising its enforcement powers to enact prophylactic remedies under the Fourteenth and Fifteenth Amendments, Congress may not simply assume that federal intervention is necessary but must assess states' own actions and the remedies available under state law. *See supra* § I (discussing, *inter alia*, *Florida Prepaid*, 527 U.S. at 643). Yet the legislative record in support of the 2006 extension of the

Section 5 preclearance regime is bereft of any discussion of state courts' enforcement of voting rights under federal and state law. Such enforcement is, in fact, routine; following the 2000 Census, for example, state courts reviewed the merits of sixteen redistricting plans, struck down six, and adopted their own plans twice. Voting and Democracy: Trends in State Self-Regulation of the Redistricting Process, 119 Harv. L. Rev. 1165, 1170-71 & n.42 (2006) ("State Self-Regulation") (listing cases).

Governed by the Supremacy Clause, U.S. Const. art. VI, cl. 2, state courts regularly enforce the requirements of federal law protecting voting rights, particularly in the redistricting context. To begin with, a number of state supreme courts review legislative reapportionment plans as a matter of course for compliance with the Fourteenth Amendment, Fifteenth Amendment, and VRA. *See, e.g., In re 2011 Redistricting Cases*, 274 P.3d 466 (Alaska 2012); *In re Colorado General Assembly*, 828 P.2d 185, 190 (Colo. 1992); *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So.2d 276 (Fla. 1992); *In re Apportionment of State Legislature-1992*, 486 N.W.2d 639 (Mich. 1992). Others consider federal-law challenges to reapportionment brought by private plaintiffs alongside state law claims. *E.g.*, *Peterson v. Borst*, 789 N.E.2d 460 (Ind. 2003) (Section 2 and Fourteenth Amendment claims); *McNeil v. Legislative Apportionment Comm'n of State*, 828 A.2d 840 (N.J. 2003) (Section 2, Fourteenth Amendment, and Fifteenth Amendment claims); *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989 (Pa. 2002) (Section 2 and Fourteenth Amendment claims); *In re Legislative Districting of State*, 805 A.2d 292 (Md. 2002) (Section 2, Fourteenth Amendment, and Fifteenth Amendment claims); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (Section 2 claim); *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (Section 2 and Section 5 claims); *Legislative Redistricting Cases*, 629 A.2d 646 (Md. 1993) (Section 2 and Fourteenth Amendment claims); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992) (Section 2 claims).

There is no indication that state judges undertake the enforcement of federal requirements any less seriously than their counterparts on the federal bench. *See generally* State Self-Regulation, *supra*, at 1166 (describing how, as federal enforcement has flagged, "state supreme courts have become increasingly aggressive regulators of redistricting"). In the *Egolf* litigation, for example, New Mexico courts found that the state's house apportionment plan violated the Equal Protection Clause's one person, one vote requirement and risked diluting the voting strength of Native American and Hispanic populations. *Maestas v. Hall*, 274 P.3d 66, 74, 81 (N.M. 2012). Ultimately, the trial court devised its own map, based on the state legislature's and incorporating amendments proposed by the challengers, to remedy these defects. *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. 1st Dist-Santa Fe, Feb. 27, 2012). The same court addressed similar challenges regarding apportionment of the state senate, ultimately drawing districts to allow Native Americans an effective opportunity to elect candidates of choice under the VRA. *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. 1st Dist-Santa Fe, Jan. 16, 2012); *see also Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012) (addressing similar claims regarding Minnesota's congressional districts though judicial redistricting panel); *Burling v. Chandler*, 804 A.2d 471 (N.H. 2002) (addressing Equal Protection Clause claims with court-designed plan).

The state courts also enforce state constitutional and statutory requirements regarding voting rights that are coextensive with, or go beyond, the requirements of federal law. Some state constitutions, as interpreted by state courts, provide stronger equal protection guarantees than the U.S. Constitution. In *Stephenson*, for example, the North Carolina Supreme Court held that the use of both single- and multi-member districts within the same redistricting plan was subject to strict scrutiny under the state constitution. 562 S.E.2d at 395; *see also Kruidenier v. McCulloch*, 142 N.W.2d 35, 1147-48 (Iowa 1966) (same, under Iowa Constitution).

Some state law requirements serve to limit partisan gerrymandering, for which federal law provides no easy remedy. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). The majority of states require contiguous boundaries for at least some electoral districts, require some electoral-district lines to follow preexisting political boundaries, or require some districts to satisfy compactness requirements. Justin Levitt, Where are the lines drawn?, http://redistricting.lls.edu/where-state.php. These requirements serve "to establish 'fair and effective representation for all citizens'" by limiting burdens on representational rights. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964)). They are typically enforced by state courts. *See, e.g., Twin Falls County v.*

Idaho Comm'n on Redistricting, 271 P.3d 1202 (Idaho 2012) (holding that redistricting plan violated preexisting-boundary requirements); *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (holding that redistricting plans violated contiguity and preexisting-boundary requirements); *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002) (holding that redistricting plan violated preexisting-boundary requirements).

Many states additionally require that redistricting plans "preserv[e] wherever possible . . . communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors." *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 209, 211 (Colo. 1982). These requirements, too, are typically enforced by state courts. *E.g.*, *id.*; *Vandermost v. Bowen*, 269 P.3d 446 (Cal. 2012); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 121 P.3d 843 (Ariz. 2005); *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002); *Collins v. Bennett*, 684 So.2d 681 (Ala. 1995).

Recent litigation over states' voter identification law provides a powerful example of state courts' ability to protect voting rights under state law. Over the past decade, a number of states have enacted or strengthened voter-identification requirements, and, despite the potential for these practices to run afoul of federal law, the bulk of successful challenges to them have actually been in state courts. For example, in *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006), the Missouri Supreme Court affirmed a trial court decision enjoining the state's voter-identification law as violative of the state constitution. The court explained, "Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart." *Id.* at 212. As a result, the voter-identification law was subject to strict scrutiny, which the court found it came nowhere near satisfying. *Id.* at 217. This was so despite that the law was no more burdensome than those that subsequently have been upheld by other states' courts, *e.g.*, *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011), and by this Court. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Similarly, a Wisconsin court struck down that state's voter-identification law, holding it to be in violation of the state constitution. *League of Women Voters v. Walter*, No. 11-4669 (Wis. Cir. Mar. 12, 2012), 2012 WL 763586. The court's language was unequivocal, denying that the state had any authority to "disqualify an elector who possesses those qualifications on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained" in the state constitution. *Id.* The state supreme court declined to hear the state government's appeal. 811 N.W.2d 821 (Wis. 2012).

The Pennsylvania courts struck a middle-ground position in litigation over that state's voter-identification law. After the trial court denied a preliminary injunction, the state supreme court brushed aside the plaintiffs' constitutional challenge to address the practical reality that difficulties in implementation might prevent compliance with the law's policy of providing "liberal access" to acceptable identification. *Applewhite v. Pennsylvania*, 54 A.3d 1, 5 (Pa. 2012). Ultimately, the law was enjoined from going into effect in 2012, due to the likelihood that some individuals would be unable to obtain identification in time for elections, and the litigation continues. *Applewhite v. Pennsylvania*, No. 330-2012 (Pa. C. Oct. 2, 2012).

Whether or not the remedies available through state court litigation, standing alone, would suffice to protect Fourteenth and Fifteenth Amendment voting rights, they do call into question the necessity of so intrusive a federal remedy as the Section 5 preclearance regime. And taken together with more traditional and less invasive federal remedies, they are part of a robust system of overlapping protections that extend far beyond the Constitution's substantive requirements. It follows that the latest 25-year extension of Section 5 is not a proper exercise of Congress's Fourteenth and Fifteenth Amendment enforcement powers.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR. ATTORNEY GENERAL, *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF NATIONAL LATINO ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE VRA HAS EVOLVED AND BEEN EXTENDED BY CONGRESS TO PROTECT LATINO VOTERS ....

A. Limited Protection For Latinos In The Original VRA 5

B. Expansion Of Section 5 To Protect Latinos in the Southwest 10

II. THE 2006 REAUTHORIZATION WAS A LEGITIMATE RESPONSE TO CONTINUED INTENTIONAL DISCRIMINATION AGAINST LATINO VOTERS IN THE COVERED JURISDICTIONS 16

A. Disparities In Voting And Elected Officials 16

B. Intentional Efforts To Exclude Latinos From Voting 18

C. Intentional Efforts To Dilute Latino Voting Strength 21

D. Racially Polarized Voting By Non-Latinos 24

TABLE OF CONTENTS—continued

Page

III. THE COVERAGE FORMULA RATIONALLY AND FLEXIBLY IDENTIFIES JURISDICTIONS WITH THE WORST RECORDS OF DISCRIMINATION AGAINST LATINO VOTERS 25

IV. A CASE STUDY IN THE CONTINUED NEED FOR SECTION 5's PROTECTIONS: THE 2011 TEXAS REDISTRICTING 32

CONCLUSION 37

ADDENDUM: Charts

APPENDIX: List of *Amici Curiae*

EXHIBIT ONE: Expert Report of Dr. Andres Tijerina

EXHIBIT TWO: Expert Report of Dr. F. Arturo Rosales

TABLE OF AUTHORITIES

CASES Page

Alta Irrigation Dist. v. Holder, No. 1:11-CV-758-RJL-DAG-PLF (D.D.C. July 15, 2011) 31

City of Boerne v. Flores, 521 U.S. 507 (1997) 16, 35

City of Rome v. United States, 446 U.S. 156 (1980), *superceded on other grounds*, Voting Rights Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) 15

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) 20

Garza v. Smith, 320 F. Supp. 131 (W.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 1006 (1971) (mem.) 10

Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951) 7

Hernandez v. Texas, 347 U.S. 475 (1954) 6

Katzenbach v. Morgan, 384 U.S. 641 (1966) 2, 10

Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz. 1966) 9

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) .... *passim*

Lopez v. Monterey Cnty., 525 U.S. 266 (1999) 15

Mi Familia Vota Educ. Fund v. Detzner, No. 8:12-CV-1294-T-27MAP, 2012 WL 4086509 (M.D. Fla. Sep. 18, 2012) 21

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 26, 31

Page

Perez v. Perry, No. SA-11-CV-360, 2012 U.S. Dist. LEXIS 92479 (W.D. Tex. Mar. 19, 2012) 32, 34
Perry v. Perez, 132 S. Ct. 934 (2012) 32
Perez v. Texas, No. 11-CV-360 (W.D. Tex. filed May 9, 2011) 35
Perez v. Texas, No. 11-CV-360 (W.D. Tex. Mar. 19, 2012) 34
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 1, 16, 29, 36
Texas v. Holder, No. 12-CV-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012) 20
Texas v. United States, No. 11-CV-1303 (D.D.C. filed July 19, 2011) 32
Texas v. United States, No. 11-CV-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) .... *passim*
Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974) 10
United States v. Vill. of Port Chester, No. 1:06-CV-15173 (SCR) (S.D.N.Y. Dec. 22, 2009) 30
White v. Regester, 412 U.S. 755 (1973) 2, 13, 22

STATUTES

Voting Rights Act of 1965, Pub. Law No. 89-110, 79 Stat. 437 9
42 U.S.C. § 1973a(c) 4, 29
    § 1973b 2, 4, 15, 30
    § 1973c 1

TABLE OF AUTHORITIES—continued

LEGISLATIVE HISTORY Page

The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 23

Extension of the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 94th Cong. (1975) 12, 13, 14

Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 21

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. (2006) 28, 31

Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

The State of the Right to Vote After the 2012 Election: Hearing Before the S. Comm. on the Judiciary, 112th Cong. (2012), http://www.judiciary.senate.gov/pdf/12-12-19PeralesTestimony.pdf........... 20

To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) .... *passim*

Page

Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 22, 25, 28

Voting Rights Act: Evidence of Continued Need, Volume I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

Voting Rights Act: Evidence of Continued Need, Volume II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) 24, 25, 28

Voting Rights Act: Evidence of Continued Need, Volume III: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) 18, 19, 30

Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 3

Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Volume I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 16, 24, 35

Page

Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Volume II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 17, 20, 23

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H.R. Rep. No. 94-196 (1975) 14
No. 109-478 (2006) 18
S. Rep. No. 109-295 (2006) 3, 17, 29
121 Cong. Rec. 44 (1975) 36
16241 (1975) 12, 13, 14
16880 (1975) 15
9110 (1975) 11, 12, 13, 14

SCHOLARLY AUTHORITIES

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Page

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David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* (1987) 5, 6, 8

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TABLE OF AUTHORITIES—continued

Page

U.S. Census Bureau, *Population Estimates*, http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html (last accessed Jan. 31, 2013)....................... 26

INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations committed to eliminating racial discrimination against Latinos in the areas of education, employment, immigrant rights, and political access. *Amici* promote equal rights for Latinos through advocacy, communications, community education, and litigation. *Amici* include organizations that advocated in the 1970s and 1980s to expand the Voting Rights Act to address racial discrimination against Latino voters, and supported the Act's 2006 reauthorization given the persistence of this discrimination. A list and description of all *amici* appear in an Appendix, attached hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965 (the "VRA" or the "Act")[2] remains vital to protecting Latino citizens' right to participate on an "equal basis in the government under which they live." *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

The journey for Latinos toward equal voting rights has been beset by persistent and intentional racial discrimination. This Court previously has recognized this history of discrimination against Latino voters. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006) ("*LULAC*") ("'Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process'"); *White v. Regester*, 412 U.S. 755, 767-70 (1973) ("'[a] cultural incompatibility ... conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas'") (omission in original); *Katzenbach v. Morgan*, 384 U.S. 641, 644 (1966) (due to English literacy tests, "many of the several hundred thousand New York City residents who have migrated from the Commonwealth of Puerto Rico had previously been denied the right to vote").

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[1] Counsel for amici authored this brief in its entirety. No person or entity other than amici and their counsel made monetary contributions to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

[2] 42 U.S.C. § 1973c.

Latino voters continued to suffer racial discrimination in voting even after the VRA's passage, particularly in the Southwest and Northeast. Congress responded by gradually expanding Section 5's preclearance protections to areas with significant Latino populations subject to such discrimination. Congress did so by modifying the Section 4(b) coverage formula, most notably in 1975 when it expanded the list of proscribed "tests and devices" triggering Section 5 coverage to include English-only balloting in jurisdictions with over five percent Latino, Asian-American, Native American, or Native Alaskan voting-age populations.[3] These modifications to the coverage formula extended preclearance protections to Latino voters in Texas, Arizona, and parts of California, Florida, and New York.[4]

Section 5's preclearance requirements have blocked many changes that would have further impeded the ability of Latinos to exercise their right to vote and have contributed to incremental improvements in Latino political participation. When evaluating the need for reauthorization of these protections in 2006, however, Congress received evidence showing, as this Court found in *LULAC* (also in 2006), that "[i]t is exactly at the point at which Latino voters can exercise political power by electing their preferred candidate that many jurisdictions respond with discriminatory measures." *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 133 (2005) (letter from MALDEF, *et al.*);[5] *see LULAC*, 548 U.S. at 440 ("In essence the State took away [their] opportunity because [they] were about to exercise it."). Accordingly, the detailed Congressional record is replete with examples of State and local governments deliberately precluding and diluting Latino voting.

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[3] *See* 42 U.S.C. § 1973b(f)(3).

[4] *See Section 5 Covered Jurisdictions*, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last accessed Jan. 30, 2013).

Much of this discrimination occurred in the jurisdictions covered by Section 5 following the 1975 amendments. In 1975, 1982, and 2006, the record in Texas of purposeful racial discrimination was among the worst of any jurisdiction. There, "the history of discrimination against Latino voters since the 1982 extension has been a case history for the continued need for Section 5 protections." S. Rep. No. 109-295, at 115 (2006). Indeed, just last year, a federal court rejected three of Texas's statewide redistricting plans as variously retrogressive and "enacted with discriminatory purpose." *Texas v. United States*, No. 11-CV-1303, 2012 WL 3671924, at *18 (D.D.C.

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[5] After the initial citation, legislative hearings are referred to by date and topic.

Aug. 28, 2012). This finding is all the more shocking given that it came merely six years after this Court found that Texas's prior redistricting plan bore "the mark of intentional discrimination." *LULAC*, 548 U.S. at 440.

Given that voting discrimination continued to occur against Latino voters most prominently and perniciously in the covered jurisdictions, Congress's decision to reauthorize the coverage formula in 2006 was far from "throwing a dart backwards over [its] shoulder." Pet. App. 70a (Williams, J., dissenting). Rather, it confirmed Congress's adherence to a measured approach, respectful both of federalism principles and the need to enforce the Fourteenth and Fifteenth Amendments. Congress has limited burdens on federalism by adding and keeping covered those jurisdictions with the most egregious records of discrimination against Latino voters, while allowing the Act's bail-in and bailout mechanisms to continue to serve their historic and important purpose of tailoring Section 5 coverage to jurisdictions where it is most needed.[6]

This measured approach is well within Congress's power to implement the Fourteenth and Fifteenth Amendments. It provides Latino voters in the covered jurisdictions with critical protection against these jurisdictions' continuing and intentional efforts to undo Latinos' progress toward equal electoral participation.

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[6] *See* 42 U.S.C. §§ 1973a(c), 1973b(a).

ARGUMENT

I. THE VRA HAS EVOLVED AND BEEN EXTENDED BY CONGRESS TO PROTECT LATINO VOTERS.

A. Limited Protection For Latinos In The Original VRA.

Throughout the 20th Century, Latino citizens faced pernicious racial discrimination impinging on all aspects of their lives.

The discrimination against Mexican-Americans in the Southwest was particularly severe. In Texas, the period "around the turn of the century also saw an attack on the Tejano's socio-economic status, as Anglo-American commercial farmers from Midwestern states swept into South Texas."[7] There were numerous accounts of vigilante groups inflicting indiscriminate violence and murder on Mexican-Americans under the guise of law enforcement.[8] Economically, "state officials condoned minimal education of 'the lower element' [Mexican Americans] specifically to control them in the labor force" under the view that "'[w]e don't need skilled or white-collared Mexicans.'"[9] In larger cities, Mexican-Americans were "[s]egregated into barrios" and "commonly denied access to business, to neighborhoods, to education, and to city services."[10] A mere decade before the VRA's passage, this Court recognized the continued pervasiveness of intentional segregation in Texas:

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[7] *See* Expert Report of Dr. Andres Tijerina at 7, *Texas v. United States*, No. 11-CV-01303-RMC, (D.D.C. Aug. 8, 2011) (Dkt. No. 67-9) ("*Tijerina Report*") (attached hereto as Exhibit 1); David Montejano, ***Anglos and Mexicans in the Making of Texas, 1836-1986***, at 104 (1987).

[8] *See Tijerina Report* at 7-8.

[9] *Id.* at 14 (alteration in original).

> Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").

Hernandez v. Texas, 347 U.S. 475, 479-80 (1954) (footnote omitted).[11]

Likewise, in Arizona, racial discrimination against Mexican-Americans has persisted since before its statehood.[12] There was an early record "of Mexicans hung by Anglo lynch mobs without the benefit of a trial or representation."[13] After Arizona attained statehood in 1912, "Anglos waged an anti-immigrant campaign which 'was characterized by increasingly racist rhetoric and a series of proposals that would restrict Mexican immigrants' political rights and the right to work.'"[14] *De jure* employment discrimination against Latinos was common.[15] Meanwhile, public schools and services remained segregated through much of the century. *See Gonzales v. Sheely*, 96 F. Supp. 1004, 1008 (D. Ariz. 1951) (finding Tolleson, Arizona's "conduct of segregating public school children of Mexican descent or extraction is discriminatory and is illegal").

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[10] *Id.* at 18; *see also* Montejano, *supra*, at 160 ("The modern order framed Mexican-Anglo relations in stark 'Jim Crow' segregation.").

[11] In *Hernandez*, the Court also made clear for the first time that the Equal Protection Clause protects Latinos from racial discrimination, emphasizing that "[t]he Fourteenth Amendment is not directed solely against discrimination due to a 'two class theory'—that is, based upon differences between 'white' and Negro." 347 U.S. at 478.

[12] *See* Expert Report of Dr. F. Arturo Rosales at 32, *Gonzalez v. Arizona*, 06-CV-01268-ROS (D. Ariz. Dec. 5, 2007) ("*Rosales Report*") (attached hereto as Exhibit 2).

[13] *Id.* at 14.

Puerto Ricans in New York City also faced egregious racial discrimination following a wave of migration in the early- to mid-1900s:

> "As the numbers grew in the 1950s, [Puerto Ricans] were increasingly portrayed as unwilling to work, welfare leeches, drug addicts and juvenile delinquents. As a consequence of this public view, business and government leaders were able to get away with policies and practices that exploited and demeaned Puerto Ricans in jobs, housing, and education."[16]

The racial discrimination against Latinos was not limited to such areas as employment, housing, education, or public accommodations; it also manifested itself in deliberate efforts to exclude Latinos from political participation. In the early 1900s, Texas's Democratic Party adopted a "'White Man's Primary,'" "which in a one-party state, pre-empted the general election," and achieved the party leaders' design of "'absolutely eliminat[ing] the Mexican vote as a factor in nominating county candidates.'"[17] Officials also sanctioned intimidation to deter Latino voters from the ballot box. In 1928, during the "'Hidalgo County [Texas] Rebellion,'" several thousand Whites led by the "'Good Government League'" assailed a polling place "shout[ing] 'Don't let those Mexicans in to vote. Throw them out' while men with shotguns protected the crowd."[18] In 1964, Arizona adopted "Operation 'Eagle Eye,'" a program under which officials made citizenship challenges at polling sites to intimidate Latino voters.[19]

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[14] *Id.* at 9 (internal citation omitted).

[15] *Id.*

[16] Katherine Culliton-Gonzalez, *Time to Revive Puerto Rican Voting Rights*, 19 Berkeley La Raza L.J. 27, 32 (2008).

Some methods of voting discrimination employed by these jurisdictions exploited socio-economic disadvantages suffered by Latinos resulting from the racial discrimination in other aspects of society. "One of the main devices created specifically to disfranchise Mexican Americans in Texas was the poll tax," which "'curtail[ed] the voting of impoverished, illiterate blacks and Mexican Americans.'"[20] After successful court actions, Texas immediately "replaced the poll tax with what was considered to be [the] most restrictive voter registration system in the country, requiring annual voter registration months in advance of Election Day."[21]

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[17] *Tijerina Report* at 12.

[18] *Id.* at 13; Montejano, *supra*, at 147.

[19] *Rosales Report* at 12.

[20] *Tijerina Report* at 12.

[21] Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 Nat'l Black L.J. 201, 213 (2005) (footnote omitted).

Similarly, jurisdictions relied on literacy tests to prevent Latinos from voting.[22] Educational segregation had resulted in high illiteracy rates and limited-English proficiency even among native-born Latino citizens, thus rendering the use of literacy tests against Latinos "one of America's most successful disenfranchisement schemes."[23]

Later in the 20th Century, "[g]errymandering became a method used by Texas policy makers at the highest levels to segregate Mexican American voter groups." *Tijerina Report* at 11; *see also Klahr v. Goddard*, 250 F. Supp. 537, 541 (D. Ariz. 1966) (redistricting plan "accomplishes an unconstitutional and invidious discrimination in the apportionment of the seats in the State Senate," and "bears evidence of having been thrown together as a result of considerations wholly apart from those laid down as compulsory by the decisions of the Supreme Court").

In 1965, Congress largely failed to address the widespread voting discrimination against Latinos. An exception was Section 4(e), which prohibited jurisdictions from denying the right to vote on the basis of English literacy tests for persons educated in American-flag schools where the predominant language was not English, and responded to the concerted and nationally visible racial discrimination against Puerto Rican voters in New York City.[24] In

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[22] *See, e.g.*, *Rosales Report* at 10 (describing 1909 Arizona law requiring "'every citizen of Mexico who shall have elected to become a citizen of the United States,'" to be "'able to read the Constitution of the United States in the English language'").

[23] James Thomas Tucker, *The Battle Over Bilingual Ballots: Language Minorities and Political Access Under the Voting Rights Act* 4 (2009).

[24] Pub. L. No. 89-110, 79 Stat. 437, 439 (1965); Tucker, *supra*, at 31 (1959 U.S. Commission on Civil Rights found that, due to

Morgan, 384 U.S. at 651-52, the Court held Section 4(e) was a valid enforcement of the Fourteenth Amendment because "[t]he practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community." *Id.* at 652-53.

The original Section 5, however, did little to help Latino voters fight back against persistent racial discrimination because Congress did not extend preclearance requirements to the jurisdictions that otherwise discriminated against their large Latino populations.

B. Expansion Of Section 5 To Protect Latinos in the Southwest.

By 1975, Congress recognized that Section 5, including modest incremental changes in the intervening years, had failed to address persistent voting discrimination against Latinos in the Southwest.[25] In 1975, Congress fortified its efforts to redress *racial* discrimination against Latinos,[26] which was recognized as equivalent to the

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literacy tests, "'Puerto Rican American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York'"); Cartagena, *supra*, at 203-04.

[25] The incremental steps included modifications to the coverage formula in 1970, which extended preclearance requirements to subdivisions of New York, California, and Arizona. *See Section 5 Covered Jurisdictions*, *supra*. Moreover, courts began declaring that English-only election requirements were prohibited "tests or devices." *See Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970); *Torres v. Sachs*, 381 F. Supp. 309, 312-13 (S.D.N.Y. 1974).

[26] Congress referred to Latinos and other racial minorities, including Asian-Americans, Native Americans, and Native Alaskans, as "language minorities."

discrimination against African-Americans targeted by the original VRA:

> Across the American Southwest in recent months a complaint has been made that is striking in familiarity. The complaint is that American citizens are being systematically denied the right to vote *because of their ethnic background*....
>
> The reason all this has a familiar ring is that the complaints of the Mexican-Americans of the Southwest sound remarkably like the complaints of the black people of Alabama and Mississippi only 10 years ago, when after much national anguish, the remedy for the Deep South situation was found.[27]

Nationally, the statistical evidence in 1975 "clearly document[ed] the extent of the discrimination and the need for Federal standards."[28] In the 1972 general election "only 44 percent of eligible Spanish-surnamed citizens were registered to vote. That compared with 73 [percent] for Anglos."[29] And "[o]f those registered, only 38 [percent] of the Spanish surnamed actually voted, compared with 68 [percent] for Anglos."[30] In 1974, "only 22.9 percent of the total voting age population of Americans of Spanish descent were registered."[31]

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[27] 121 Cong. Rec. 9110, 9114 (1975) (emphasis added) (quoting Washington Post, *Expanding the Right to Vote*); *see also* Culliton-Gonzalez, *supra*, at 46.

[28] 121 Cong. Rec. at 9110 (statement of Sen. Bayh).

[29] *Id.* at 9113 (quoting Washington Post, *Mexican Americans Charge Subtle Vote Discrimination*).

[30] *Id.*

The absence of Latino elected officials, particularly in the Southwest, further attested to the need for a remedy. In Texas, "Mexican Americans comprise[d] over 18% of the total population and over 16% of the voting age, but only [held] 2.5% of the elected offices."[32] Statewide, there were *no* Mexican-American mayors.[33] In Arizona, "Mexican Americans still represent[ed] only 4.4% of the elected officials, even though they comprise[d] 18% of the total population and 15% of the voting age."[34] In several rural California counties, "Mexican Americans had a combined total of 1.2% of the government officials although their population in these counties ranged from 16.7% to 44.9%."[35]

The root cause of these starkly unequal rates of voter participation and representation was the continued use of tactics to discourage and impede Latinos from voting. The 1975 record made this clear, detailing reports of:

> uncooperative registrars, inadequate or non-existent bilingual materials relating to elections, fear of economic reprisal for political activity, inadequate and inconvenient polling facilities,

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[31] 121 Cong. Rec. 16241, 16291 (1975) (statement of Rep. Anderson).

[32] 121 Cong. Rec. at 9115 (statement of Sen. Roybal).

[33] *Extension of the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 467 (1975) ("*1975 Hearings*") (testimony of George Korbel).

[34] 121 Cong. Rec. at 9115 (statement of Sen. Roybal).

[35] *Id.* at 9114 (statement of Sen. Roybal).

> location of polling places where Chicanos are not usually welcomed, the presence of police at the polls, the lack of adequate bilingual assistance, and the difficulty in obtaining lists of registered voters.[36]

The record showed that Latino voters in certain regions faced particularly egregious misconduct. In Texas, "law-enforcement officials patrol Mexican American, but not Anglo, precincts on election days: sheriffs reportedly walk around polling places brandishing guns and billy clubs."[37] The U.S. Civil Rights Commission "uncovered widespread economic threats and coercion directed at citizens who become involved with insurgent political forces" in that State.[38] Likewise in California, "[o]f particular concern is the rural experience" where there was evidence of "voting obstacles, including intimidation."[39]

Congress also relied on evidence of these jurisdictions' intentional efforts to dilute Latino votes. Shortly before the 1975 reauthorization, this Court affirmed an order striking down Bexar County, Texas's multimember districting plan as having "invidiously excluded Mexican-Americans from effective participation in political life." *White*, 412 U.S. at 769. The 1975 legislative record demonstrated that the problems identified in *White* were systemic. "Election law changes which dilute minority political power in Texas are widespread in the wake of recent emergence of minority attempts to exercise the right to vote."[40] Such dilution schemes were identified in other heavily-Latino areas, such as rural California.[41]

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[36] *See 1975 Hearings* at 97 (statement of Arthur Fleming).

[37] 121 Cong. Rec. at 16243 (statement of Rep. Young).

[38] 121 Cong. Rec. at 9117 (testimony of Vilma Martinez).

[39] *Id.* at 9114 (statement of Sen. Roybal).

Petitioner's argument that Congress did not focus on "second generation" discrimination such as vote dilution until 2006 is therefore factually incorrect. By 1975, Congress already recognized that "[t]he *central problem* documented is that of dilution of vote—arrangements by which the votes of minority electors are made to count less than the votes of the majority."[42]

Equally important, Congress learned that it would be futile for Latinos to battle discrimination piecemeal through after-the-fact lawsuits under Section 2, rather than with Section 5's prophylactic protection:

> We have all of these cases, but we are in the same situation in Texas that we were in the other States prior to 1965.... [W]e cannot continue to rely on the case-by-case approach. We have to include the State of Texas fully within the coverage of the act so that the burden of proof shifts to the State of Texas when it tries to

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[40] H.R. Rep. No. 94-196, at 19 (1975); *see also 1975 Hearings* at 758 (testimony of Vilma Martinez) ("One of the most severe problems we have faced ... is the at-large election or the multimember district election."); 121 Cong. Rec. at 9115 (statement of Sen. Roybal) ("[s]ome of the worse [sic] practices affecting Chicano participation have been statewide gerrymandering schemes"); 121 Cong. Rec. at 16246 (statement of Rep. Edwards) (describing "annexations which add only white or Anglo voters to the city rolls").

[41] *See* 121 Cong. Rec. at 9114-15.

[42] 121 Cong. Rec. at 16251 (statement of Rep. Edwards) (emphasis added).

> carry out the kind of gerrymandering procedure that it has been carrying out ....[43]

Congress therefore revised the coverage formula to extend preclearance protection to Latino voters in Texas, Arizona, rural California and other jurisdictions. Congress did so by following judicial opinions protecting Mexican-American and Puerto Rican voters in Texas and New York,[44] designating English-only balloting in jurisdictions with significant Latino, Asian-American, Native American, or Native Alaskan populations as a proscribed "test or device" triggering Section 5 coverage.[45]

Following the 1975 amendments, this Court found that Section 5 remained a valid exercise of Congress's Fifteenth Amendment authority, *City of Rome v. United States*, 446 U.S. 156, 182 (1980), and reached the same conclusion after the 1982 reauthorization, which continued Section 5's protections for 25 years. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283-84 (1999).[46]

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[43] *See* 121 Cong. Rec. 16880, 16881 (1975) (statement of Rep. Badillo).

[44] *See, supra*, Footnote 26.

[45] *See* 42 U.S.C. § 1973b(f)(3).

[46] In *Lopez*, in the context of a challenge by Latino voters to at-large elections in Monterey County, the Court rejected the county's claim that it need not submit changes for preclearance because it was within a non-covered State. The Court reaffirmed that "Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions." *Lopez*, 525 U.S. at 283. Petitioner notably fails to cite *Lopez*.

II. THE 2006 REAUTHORIZATION WAS A LEGITIMATE RESPONSE TO CONTINUED INTENTIONAL DISCRIMINATION AGAINST LATINO VOTERS IN THE COVERED JURISDICTIONS.

The voluminous 2006 Congressional record regarding reauthorization included detailed state-by-state analyses of the continued voting discrimination in the jurisdictions covered after the 1975 amendments.[47] These reports overwhelmingly demonstrated the persistence of such discrimination against Latinos, despite Section 5's intended deterrent effects. This evidence, examples of which are discussed below, confirmed that the prophylactic remedy of Section 5 preclearance remained congruent and proportional to continued purposeful discrimination against Latino voters in the covered jurisdictions. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

A. Disparities In Voting And Elected Officials.

In 2006, Congress heard that "Latino voters have not yet closed the gap in voter registration and turnout in the Southwest"[48]—concerns similar to those that justified the VRA's initial passage and the subsequent 1975 amendments. *See South Carolina*, 383 U.S. at 313. In the 2004 election, Latino voter turnout lagged behind White voter turnout by

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[47] *See Voting Rights Act: Evidence of Continued Need, Volume I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 45 (2006) ("***2006 (Continued Need) Hearing***").

[48] *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Volume I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 87 (2005) ("***2005 (History) Hearing***") (testimony of Nina Perales).

30.3 percent in Arizona and 21.3 percent in Texas. *See* S. Rep. No. 109-295, at 11. Similar disparities were evident in the other heavily-Latino jurisdictions covered by Section 5. *See Volume II 2005 (History) Hearing* at 3113 (Florida Report) ("Florida Latinos vote at lower rates than do either African-Americans or Anglos," with only 34 percent turnout in the 2004 general election); *Voting Rights Act: Section 203–Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 146 (2005) (statement of Juan Cartagena) ("A million and a half voting age Latinos live in New York City, but only about 700,000 Latinos are registered to vote and only about 455,000 regularly participate in elections") (internal citation omitted).

Congress heard similarly troubling data about how in Texas, "Latinos and African Americans continue to be vastly underrepresented at every level of federal, state, and local government."[49] In Arizona, *no* Latino served in any statewide office between 1985 and 2005.[50] Likewise, *no* Latino had ever served on Los Banos's City Council in Merced County, California despite a 50.4% Latino population.[51]

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[49] Nina Perales, Luis Figuero, & Criselda Rivas, *Voting Rights in Texas, 1982-2006*, at 6 (2006) ("*Texas Report*"), *available at* http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf. The Texas Report was submitted into the 2006 Congressional record. *See Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 446 (2006) ("*2006 (LULAC) Hearing*").

[50] *Volume I 2006 (Continued Need) Hearing*, at 1443 fig.103 (Arizona Report).

[51] *2006 (LULAC) Hearing* at 113.

B. Intentional Efforts To Exclude Latinos From Voting.

The 2006 record evidenced the myriad discriminatory causes of these disparities. For one, the record reflected continued deliberate efforts to preclude Latinos from voting altogether in the covered jurisdictions.

Congress received evidence of continued intimidation and harassment of Latino voters in the covered jurisdictions. Federal observers reported "instances in which language minority voters fell victim to the harassment and intimidation of polling officials" in covered jurisdictions including Texas, Georgia, and Alabama. *See* H.R. Rep. No. 109-478, at 45 (2006). In 2004, San Antonio used the historically prevalent intimidation tactic of stationing police officers outside polling sites in a largely Latino area of the city.[52] There were also numerous examples of intimidation by non-governmental actors, which, although not within Section 5's purview, nevertheless attest to the persistence of unchecked anti-Latino animus in the covered jurisdictions.[53]

Congress also heard of continued efforts to deprive Latinos equal access to polling places. For example, in 2003, MALDEF filed a successful Section 5 action to prevent Bexar County, Texas—the same county at issue in *White*—from shutting down all early voting polling places in Latino neighborhoods of San Antonio.[54] Similarly, the record described obstacles Latinos in Texas confronted even if they found their polling places, including admonishments not to speak Spanish at the polling site,[55] understaffing of poll workers in Latino precincts,[56] and denying Latinos provisional ballots.[57]

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[52] *Texas Report* at 30.

[53] *See, e.g., Volume III 2006 (Continued Need) Hearing* at 3976 (Arizona Report) ("in Pima County [Arizona], men wearing black t-shirts that said 'U.S. Constitutional Enforcement' and military or tool belts and carrying a variety of equipment harassed Latinos waiting in line to vote. These men would approach potential voters with video and photo cameras and harass them for proof of citizenship") (footnote omitted).

The record also reflected that the covered jurisdictions increasingly relied on discriminatory citizenship inquiries to exclude or otherwise harass Latino voters. There were many accounts of officials imposing heightened identification burdens on Latino voters compared to White voters.[58] Moreover, there were several incidents in Georgia where officials deterred validly-registered Latinos from voting through discriminatory mass challenges of Spanish-surnamed voters.[59]

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[54] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 245 (2005) ("*2005 (Impact) Hearing*"); *see also 2006 (LULAC) Hearing* at 12 (testimony of Professor Joaquin Avila) (describing DOJ objection to Monterey County, California's planned reduction of polling places, where all of the "newly consolidated voting precincts [were] in the non-minority area, where you had the least number of Latinos," and a fraction of the total population).

[55] *See Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 34 (2005).

[56] *See Texas Report* at 30.

[57] *See id.*

[58] *See, e.g., Volume III 2006 (Continued Need) Hearing* at 3040-41 (Houston); *id.* at 3979 (Maricopa County, Arizona); *2005 (Impact) Hearing* at 331 (Brooklyn).

Such discriminatory requests for additional documentation appear to be a tactic of the future, not just the past.[60] A court recently rejected Texas's 2011 photo identification law, SB 14, calling it "the most stringent in the country," and concluding it would "likely" render many Latinos "unable to vote in the next election." *Texas v. Holder*, No. 12-CV-128, 2012 WL 3743676, at *29, 33 (D.D.C. Aug. 30, 2012). Contrary to *amicus curiae* Texas's arguments, the D.D.C. found Texas contributed to a protracted preclearance process, and ruled that *Crawford v. Marion County Election Board*, 553 U.S. 181, 194 (2008) (plurality), did not save Texas's law. *Texas*, 2012 WL 3743676, at *6-7, 11-13. The court also rejected Texas's "burden" argument, concluding "Texas's lawyers have only their client to blame." *Id.* at *33.

Discriminatory efforts to purge voter rolls have created yet further electoral obstacles for Latinos. In 2000, Florida purged registration lists of thousands of voters based on a flawed list of alleged felons, with the errors disproportionately affecting minorities, including Latinos.[61] More recently, a federal court permitted a Section 5 action to proceed based on allegations that Florida planned to implement a flawed "database-matching program to develop lists of registered voters that it classified as suspected non-citizens," and potentially "remove them from the voter rolls." *Mi Familia Vota Educ. Fund v. Detzner*, No. 8:12-CV-1294-T-27MAP, 2012 WL 4086509, at *2 (M.D. Fla. Sep. 18, 2012). In another case brought on behalf of Latino and Haitian voters, Florida agreed to restore voters to the rolls if the sole reason for their purge was the presence of their names on a flawed database matching list. Stipulation at 3-4, *Arcia v. Detzner*, 12-CV-22282(WJZ) (S.D. Fla. Sep. 12, 2012) (Dkt. No. 83-1).

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[59] *See 2005 (Impact) Hearing* at 200-01, 474-75 (Long County); *see also id.* at 476-77 (Atkinson County).

[60] *See, e.g., The State of the Right to Vote After the 2012 Election: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012), http://www.judiciary.senate.gov/pdf/12-12-19 PeralesTestimoney.pdf (testimony of Nina Perales).

[61] *See Volume II 2005 (History) Hearing* at 3279.

Finally, the covered jurisdictions continued to erect language-based barriers by targeting discrimination against Latino citizens who are limited-English proficient.[62] Congress heard evidence of "strategic efforts" in Texas to exclude Spanish-speaking citizens from registering in 2004 by refusing to deputize Spanish-speaking registrars.[63] Similarly, there was evidence that officials knowingly gave Latino voters flawed Spanish-language balloting materials.[64]

C. Intentional Efforts To Dilute Latino Voting Strength.

In addition to the substantial evidence of jurisdictions implementing outright voting barriers, the 2006 legislative record was replete with examples of jurisdictions purposefully diluting Latinos' votes. As noted, since at least 1975, Section 5 has targeted vote dilution, evidence of which further supports the constitutionality of Section 5. *See* Pet. App. 28a ("Consideration of this evidence is especially important given that so-called 'second generation' tactics like intentional vote dilution are in fact decades-old forms of gamesmanship"); *White*, 412 U.S. at 769 (describing how multimember-districting plan "invidiously excluded Mexican-Americans from effective participation in political life").

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[62] *Cf. Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16 (2006) (statement of Juan Cartagena) (among Latino citizens, "75 percent, compared to 18 percent nationwide, speak a language other than English at home").

[63] *2005 (Impact) Hearing* at 181-82.

[64] *See id.* at 244 (testimony of Nina Perales) (discussing Tarrant County, Texas's unwillingness to correct "utterly incoherent" translated materials).

Congress received significant evidence that the covered jurisdictions continued to manipulate redistricting plans with "calculations that are actually made in ways that are intended to keep Latino voters from electing their preferred candidates."[65]

In 2006, Texas had—and, as discussed in Section IV, *infra*, continues to build—an egregious record of purposefully discriminatory redistricting, with many of the redistricting plans enacted by the State or its subdivisions barred by DOJ objections or litigation. *See, e.g.*, *Texas Report* at 18, 20-21. Texas's redistricting abuses were highlighted during a hearing regarding this Court's *LULAC* opinion, which the Senate called "strong evidence in favor of reauthorization." *2006 (LULAC) Hearing* at 1 (statement of Sen. Kennedy). The hearing underscored that the statewide 2003 congressional redistricting plan at issue in *LULAC* "shifted 100,000 Latino voters from a district where they were on the verge of electing a candidate of their choice to another district in which Latinos already controlled election outcomes." *Id.* at 2. As testimony explained, "Latinos were divided by the State, pulled out of this district, just at the point at which they were going to unseat the disfavored candidate." *Id.* at 9 (testimony of Nina Perales); *see also LULAC*, 548 U.S. at 440 ("The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo").

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[65] *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 103 (2005) ("*2005 (Scope and Criteria) Hearing*") (response of J. Gerald Hebert).

Texas was not alone in its discriminatory use of redistricting plans. In 2002, DOJ objected to Arizona's State House redistricting plan, because it would have "diminished the districts where Hispanics could elect their candidate of choice from eight districts to five districts," and would have "made it so the Hispanic population, which constituted over 25 percent of the state's population, would only have been able to elect 16 percent of the state's congressional delegation." *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 61 (2006) (response of Professor Anita Earls). Likewise, in 1992, DOJ objected to a New York State Assembly redistricting plan because it "knowingly fractured the Latino community with the intent and effect of reducing the community's ability to elect candidates of choice." *Volume I 2006 (Continued Need) Hearing* at 67 (statement of Wade Henderson).

The covered jurisdictions continued to use a variety of other election changes to consciously dilute Latino votes. In 2000, DOJ rejected Monterey County, California's plan to return an elementary-school district to an at-large election system, finding the county's petition "'was motivated, at least in part, by a discriminatory animus.'" *Volume II 2005 (History)*

Hearing at 3326 (testimony of Robert Rubin). In 2002, once "the growing Latino population in Seguin [Texas] comprised the majority of five of the eight city council seats," the city "responded by dismantling the fifth Latino majority district in its new redistricting plan." *Volume I 2005 (History) Hearing* at 86 (testimony of Nina Perales). After DOJ expressed a likely objection, Seguin restored the fifth district, but "promptly closed the candidate filing period so no Latino could run." *Id.* Only after MALDEF enjoined the election timetable under Section 5, and DOJ precleared the restored district plan, did Latinos "elect[ ] their candidate of choice to a majority of seats on the Seguin city council." *Id.*[66]

D. Racially Polarized Voting By Non-Latinos.

Congress heard that the foregoing devices for precluding and diluting Latino voting were exacerbated by the persistence of "racially polarized voting" by non-Latinos. *Volume I 2006 (Continued Need) Hearing* at 209 (report by The National Commission on the Voting Rights Act ("NCVRA")). "Latino elected representation may not keep pace with growth of Latino voters in the presence of racially polarized voting by non-Latinos." *Volume II 2005 (Continued Need) Hearing* at 2416 (study by Professor Yishaiya Absoch).

Racially polarized voting was observed in the covered jurisdictions with large Latino populations.

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[66] There were also examples of purposefully discriminatory annexations and de-annexations in the record. *See 2005 (Impact) Hearing* at 880 (testimony of Professor Rick Valelly) (describing "evidence of a discriminatory purpose" against Latinos associated with Lamesa, Texas's planned de-annexation in the late 1990s).

See 2005 (Scope and Criteria) Hearing at 13 (testimony of Jose Garza) ("Racial bloc voting ... is still alive and well in Texas."); *Volume II 2006 (Continued Need) Hearing* at 1489-90 (Florida Report) (in central Florida, "'[r]acially polarized voting patterns prevail in elections for the Board of Commissioners, and white voters have voted sufficiently as a bloc to enable them usually to defeat the Hispanic voters' preferred candidates'"); *Volume II 2006 (Continued Need) Hearing* at 1863 (New York Report) (New York City "has a long road ahead to overcome the episodic, but still critically important and debilitating, episodes of polarized voting today"); *id.* at 2416 (study by Professor Yishaiya Absoch) (describing racially polarized voting in rural California).

Indeed, "Anglo voters and Anglo elected officials acknowledged they were apprehensive about supporting a Latino candidate purely based upon their ethnicity or surname." *2006 LULAC Hearing* at 288 (report by National Association of Latino Elected and Appointed Officials).

III. THE COVERAGE FORMULA RATIONALLY AND FLEXIBLY IDENTIFIES JURISDICTIONS WITH THE WORST RECORDS OF DISCRIMINATION AGAINST LATINO VOTERS.

Even with Section 5's prophylactic remedy in place, the foregoing evidence shows that in 2006, purposeful racial discrimination against Latino voters in the covered jurisdictions remained widespread and systematic. For Latino voters, the 2006 reauthorization preserved a coverage map well-tailored to areas of persistent abuse—at a minimum, the "disparate geographic coverage is sufficiently related to the problem" of intentional abridgment of Latinos' voting rights. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

The comparative record of successful Section 2 litigation involving Latino plaintiffs in the covered jurisdictions versus non-covered jurisdictions further illustrates why the coverage formula rationally identifies jurisdictions with the most egregious records of abuse against Latino voters. *See 2005 (Impact) Hearing* at 986 (report by Professor Ellen Katz) (analyzing Section 2 data); Pet. App. 49a (describing Professor Katz's data as "[t]he most concrete evidence comparing covered and non-covered jurisdictions in the legislative record"). Most notably, Texas accounted for seven of 23 published decisions in successful Section 2 lawsuits involving Latino plaintiffs between 1982 and 2005.[67] That total more than doubled the next highest number of successful Section 2 actions by Latino plaintiffs in any other jurisdiction—indeed, the State had 30% of all successful Section 2 litigation involving Latinos.[68] These percentages are significant because Texas had only 7.4% of the nation's total voting-age population and 18.8% of the Latino population in 2004.[69]

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[67] *See* Ellen Katz, *VRI Database Master List* (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls (sorting by columns titled "Success" and "Minority Group").

[68] *See id.*; *see also*, *infra*, Addendum.

[69] U.S. Census Bureau, *Population Estimates*, http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html (last accessed Jan. 30, 2013) (*Annual Estimates of the Population by Race Alone and Hispanic or Latino Origin for the United States and States: July 1, 2004* and *Estimates of the Resident Population by Selected Age Groups for the United States and States and for Puerto Rico: July 1, 2004*); *see also*, *infra*, Addendum. *Amicus curiae* Texas points to a "declin[e]" in its Section 2 losses, but overlooks that this Court made an adverse ruling in *LULAC* on the eve of Section 5's

As Professor Katz explained, the Section 2 findings bear on the effectiveness of Section 5 because the two provisions "are not wholly distinct, and a large number of electoral practices run afoul of both provisions. Where they do, preclearance should block such practices as retrogressive."[70] That is, there should be "fewer successful Section 2 cases in covered jurisdictions than in non-covered" since Section 5 deters many discriminatory laws in the covered jurisdictions "before they can ever take effect and become the target of Section 2 litigation." Pet. App. 55a. Accordingly, "[t]his comparison shows that distinct vestiges of discrimination persist in covered jurisdictions such that the elimination of Section 5 would hardly be inconsequential," or supported by the Congressional record. [71]

Professor Katz's study merely scratched the surface of actual discrimination, because it included only Section 2 cases resulting in published adverse decisions. *Id.* at 58a-59a. The record before Congress, which included unpublished decisions, showed that since 1982, plaintiffs in Texas prevailed outright or successfully settled more than *200* Section 2 cases—more than in any other state—altering discriminatory voting procedures in 274 of the State's political subdivisions. *See Volume I 2006 (Continued Need) Hearing* at 251 tbl.5 (NCVRA Report). The

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reauthorization. *Amicus* Br. of Texas at 23; *LULAC*, 548 U.S. at 440-41 (finding indicia of "intentional discrimination that could give rise to an equal protection violation").

[70] Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power* 183, 211 (Anna Henderson ed., 2007).

[71] *Id.* at 210-11.

legislative record revealed similarly significant numbers of successful Section 2 lawsuits in other covered jurisdictions with large Latino populations. *See Volume II 2006 (Continued Need) Hearing* at 1875, 1878 (New York Report) (describing successful Section 2 litigation involving Latino plaintiffs in New York City).

The covered jurisdictions with high Latino populations also had abysmal records of Section 5 violations and compliance, confirming that even Section 5's deterrent effect has not curtailed abuses against Latino voters in these jurisdictions. Texas had the "second highest number of Section 5 objections interposed by the DOJ," the majority of which were filed in counties "where 71.8 percent of the State's non-white voting age population resides."[72] The State's "repeated Section 5 violations are not limited to local jurisdictions," with ten post-1982 objections involving statewide changes. *Texas Report* at 16. Forty percent of the 72 Texas counties cited by DOJ were "repeat offenders." *Id.*[73] Arizona and rural California had similarly poor records. *See Volume I 2006 (Continued Need) Hearing* at 1416 (Arizona Report) (80% of objections to Arizona's election changes occurred after 1982, and three of them concerned statewide redistricting plans after 1990 where there were findings of purposeful discrimination); *2005 (Impact) Hearing* at 748 (testimony of Professor Joaquin Avila) ("In California we have documented many instances where covered jurisdictions ... have not submitted voting changes for decades.").

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[72] *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 149-50 (2006) ("*2006 (Views From the Field) Hearing*") (testimony of Debo Adegbile).

[73] *See also 2005 (Scope and Criteria) Hearing* at 15-78 (statement of Jose Garza) (cataloguing 20 years of Section 5 litigation and objections in Texas).

To be sure, discrimination against Latino voters exists in non-covered jurisdictions. *See Amicus* Br. of Arizona, at 8.[74] But that has never been proof of the formula's irrationality. *See South Carolina*, 383 U.S at 330-31 ("It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means."). Partly on the basis of the bail-in mechanism, this Court has rejected claims that "underinclusiveness" renders the formula constitutionally infirm. *Id.* at 331 (noting bail-in as part of complementary efforts to "strengthen[ ] existing remedies for voting discrimination in other areas of the country"). Under the current bail-in provision, a court may require preclearance of a jurisdiction after a finding of constitutional violations.[75] This allows for a dynamic coverage regime, extending the preclearance remedy to jurisdictions not covered by Section 5 but that "nonetheless have serious, recent records of voting discrimination." Pet. App. 49a.

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[74] Indeed, as the Senate Report highlighted, nationally, "in the 2000 election, 45 percent of Hispanic voting age citizens ... participated, as compared to 62 percent of non-Hispanic white voting age citizens." S. Rep. No. 109-295, at 96; *see also id.* at 97. The statistics were similar in the 2004 election, when "nationwide, Latinos registered and turned out at rates significantly lower than white voters ... roughly 30 percentage points lower." *Id.* at 11.

[75] 42 U.S.C. § 1973a(c).

Recent use of the bail-in mechanism to target abuses against Latinos further undercuts *amicus curiae* Arizona's underinclusiveness argument. In 2009, a federal court imposed preclearance requirements on the Village of Port Chester, New York, after finding the village's at-large method of election barred Latinos from equal participation in the electoral process.[76] The bail-in mechanism thus works not just in theory, but in practice, to extend preclearance obligations to jurisdictions whose discriminatory conduct warrants federal supervision. The claim that Congress transgressed principles of federalism in reauthorizing Section 5 without altering its coverage formula is unfounded. American federalism is less offended when coverage expands incrementally and where deemed necessary, either by the courts as with Port Chester in 2009, or by Congress as with Arizona and Texas in 1975.

Likewise, the bailout provision has "always been the lynchpin of the Act's tailoring."[77] A covered jurisdiction may terminate preclearance requirements upon a showing of non-discriminatory voting practices over the preceding ten years and "constructive efforts" to prevent harassment and increase minority participation in the electoral process.[78] Congress heard that "[f]or the vast majority of jurisdictions," the bailout process is "relatively straightforward," "easy" and "cost-effective." *Volume III 2006 (Continued Need) Hearing* at 2684 (testimony of J. Gerald Hebert).

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[76] *See United States v. Vill. of Port Chester*, No. 1:06-CV-15173 (SCR), slip op. at 1, 3-6 (S.D.N.Y. Dec. 22, 2009) (Consent Decree) (Dkt. No. 119).

[77] J. Gerald Hebert, *The Future of the Voting Rights Act*, 64 Rutgers L. Rev. 953, 965 (2012).

[78] 42 U.S.C. § 1973b(a)(1)(A-F).

"Obviously, many jurisdictions are not and should not be eligible for bailout based upon their track records in the last ten years." *2006 (Views from the Field) Hearing* at 115 (response of Don Wright). But where bailout is warranted, jurisdictions have successfully done so. Indeed, political subdivisions have bailed-out with increasing frequency since the *Northwest Austin* decision, including subdivisions with significant Latino populations. *See Nw. Austin*, 557 U.S. at 211.[79] DOJ recently consented to the bailout of Alta Irrigation District in California, parts of which fall within Kings County, a jurisdiction covered after the 1975 amendments.[80] Alta had submitted most electoral changes for preclearance (those changes did not result in DOJ objection), and had a good-faith belief of non-coverage for several other changes. DOJ stipulated to the presence of efforts towards increasing minority participation, including Spanish-language outreach and registration drives in the Latino community. *See also Amicus* Br. of Merced County, California at 2-3, 34-35 (describing successful bailout of county covered following 1975 amendments).[81]

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[79] *See also* Dep't of Justice, *Section 4 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last accessed Jan. 30, 2013) (listing 20 bailouts since November 2009).

[80] *See Alta Irrigation Dist. v. Holder*, 11-CV-758-RJL-DAG-PLF, slip op. at 1, 8-9 (D.D.C. July 15, 2011) (Consent Decree) (Dkt. No. 9).

[81] Merced County's protracted process for bailout reflects the county's previously flawed compliance record, not deficiencies in the mechanism. In June 2006, Merced was "[a] [m]odel of Section 5 [n]on-[c]ompliance," having failed to submit 226 voting changes for Section 5 review. *See 2006 (LULAC) Hearing* at 123-25, 134 (report by Professor Joaquin Avila).

Thus, the coverage formula, in tandem with the bail-in and bailout mechanisms, continues to focus on the jurisdictions with the worst records of purposeful discrimination against Latinos.

IV. A CASE STUDY IN THE CONTINUED NEED FOR SECTION 5's PROTECTIONS: THE 2011 TEXAS REDISTRICTING.

"In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas v. United States*, 2012 WL 3671924, at *20. On the eve of the 2006 reauthorization, this Court found the State's 2003 congressional redistricting plan bore "the mark of intentional discrimination." *LULAC*, 548 U.S. at 440, 442. Despite this history, in 2011, Texas enacted yet another series of intentionally discriminatory redistricting plans. These actions underscore the critical importance that Section 5 continues to play today.

Between 2000 and 2010, the population of Texas increased by over four million people, 65% of whom were Latinos. *See Perez v. Perry*, No. SA-11-CV-360, 2012 U.S. Dist. LEXIS 92479, at *15, 16 n.2 (W.D. Tex. Mar. 19, 2012). This growth required Texas to redraw its electoral districts for the U.S. Congress, State Senate, and State House of Representatives. *See Perry v. Perez*, 132 S. Ct. 934, 939 (2012) (per curiam). On July 19, 2011, Texas filed suit in the D.D.C. to preclear its enacted plans pursuant to Section 5 of the VRA. *See Texas v. United States*, No. 11-CV-1303 (D.D.C.).

Following a trial in Texas's preclearance action, the D.D.C. found overwhelming evidence of intentional race-based discrimination, a finding in keeping with "Texas's history of failures to comply with the VRA." *Texas*, 2012 WL 3671924, at *20. First, discriminatory purpose lay behind irregularities in the plans' drafting processes. With respect to the congressional plan, African-American and Latino members of Congress "were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored." *Id.* at *21. The plan was then hurriedly enacted after being made public, "severely circumscrib[ing] the opportunity for meaningful public scrutiny and comment, including by minority citizens and their elected officials." *Id.* at *53. Similarly, the drafts of the state senate plan were kept in a secretive "anteroom" off the Senate floor, to which senators representing minority-ability districts were refused entry. *Id.* at *24.

Second, the D.D.C. found overwhelming evidence of discriminatory intent in the plans' details. *Id.* at *21 n.32. The court noted Texas's numerous attempts in its congressional plan "to draw a district that would look Hispanic, but perform for Anglos." *Id.* at *31. Perhaps most brazenly, emails to and from counsel for the Texas House Speaker showed how officials sought race-based demographic data from the Texas Legislative Council, including Spanish-surname voter registration data, for use as a "metric" in redrawing district boundaries. *Id.* at *16, 59. The goal, according to the emails, was to "'help pull the district's Total Hispanic Population and Hispanic [Citizen Voting Age Population] up to majority status, but leave the Spanish Surname Registered Voter and turnout numbers the lowest.'"[82]

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[82] *Texas*, 2012 WL 3671924, at *16 (alterations in original omitted) (quoting Defendants' Exh. 304). Texas's race-based gerrymandering of Congressional District 23 in particular, *see id.*, is appalling in light of this Court's determination that

In this way, Texas "suppress[ed] the minority vote" by substituting "low-voting minorities" for "politically-active minorities" while retaining the same overall level of voting-age Latinos, thereby "maintain[ing] the semblance of Hispanic voting power in the district while decreasing its effectiveness." *Id.* at *16, 82; *see also id.* at *37 (expressing concern about State's use of "a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote").[83]

The D.D.C. found an invidious racial purpose behind other district boundary changes as well. Texas performed "substantial surgery" on minority districts in the congressional plan, excising economic generators like convention centers or stadiums, and even cutting out the district office of a Latino Representative. *Id.* at *19, 68 (revisions to Congressional District 20 removed Congressman Gonzalez's district office and a convention center named after his father). "No such surgery was performed on the districts of Anglo incumbents." *Id.* at *20 (affirming that boundary revisions disparately impacted minority districts, a fact Texas did not even dispute). Indeed, "Anglo district boundaries were redrawn to include particular country clubs and, in one case, the

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Texas's 2003 changes to this *same* district bore "the mark of intentional discrimination." *LULAC*, 548 U.S. at 439-40.

[83] The Western District of Texas, in crafting interim maps for the 2012 elections while the D.D.C. litigation was pending, presaged the D.D.C.'s findings, concluding that Texas likely engaged in racial gerrymandering. *See Perez*, 2012 U.S. Dist. LEXIS 92479, at *65 (plan for U.S. House); *Perez v. Texas*, No. 11-CV-360, slip op. at 11 (W.D. Tex. Mar. 19, 2012) (Dkt. 690) (plan for Texas House).

school belonging to the incumbent's grandchildren." *Id.*

The D.D.C. refused to preclear Texas's redistricting plans, and as a result those plans were never allowed to shape the 2012 election results. The elections proceeded instead using the Western District of Texas's interim plans. This would not have been possible without Section 5. Absent preclearance requirements, Texas's discriminatory plans likely would have been used in the 2012 elections. That is true even though plaintiff groups also challenged the redistricting plans in separate litigation under Section 2 and the Constitution. *See Perez v. Texas*, No. 11-CV-360 (W.D. Tex. filed May 9, 2011). Given the protracted nature of Section 2 lawsuits and the scarce resources available to prosecute them, the *Perez* suit could not be counted upon to provide Latino voters with relief prior to the 2012 election. *See Volume I 2005 (History) Hearing* at 92 (testimony of Nina Perales) ("Section 2 requires costly and time-consuming litigation. It also requires the bad change to go into effect and even be implemented for several election cycles before challengers can gather enough evidence to mount a successful court challenge, which is also incredibly costly ...."); ***Boerne***, 521 U.S at 526 (noting "slow, costly character of case-by-case litigation" under Section 2). Had Section 5 not been available to block the implementation of Texas's intentionally discriminatory redistricting, the discriminatory results of an election designed to disenfranchise Latino voters would have embedded incumbents and locked in that discrimination for years.[84]

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[84] *See Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) (statement of

In short, Texas's most recent purposefully discriminatory redistricting plans provide a painful reminder of precisely the type of racial discrimination that Section 5 was designed to prevent—and of the continued need for Section 5 to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina*, 383 U.S. at 328.[85]

* * *

Even as the Nation elected its first African-American President, Latino voters continue to face intentional efforts to deny them equal electoral participation. In the covered jurisdictions in particular, as was the case in 1975, "a fair and accurate reading of the evidence leaves us no choice but to conclude that too much rejoicing at this juncture would be none other than premature."[86] Latino voters in the covered jurisdictions still require the protections of Section 5 to fulfill the Fifteenth Amendment's directive that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Rep. Scott) ("incumbency is a huge and, more often than not, dispositive advantage in an election").

[85] Notably, *amicus curiae* Texas's brief fails altogether to discuss the findings regarding these redistricting plans.

[86] 121 Cong. Rec. 44, 47 (1975) (statement of Rep. Rodino).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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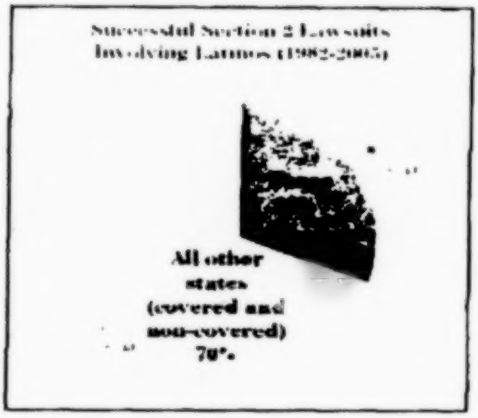
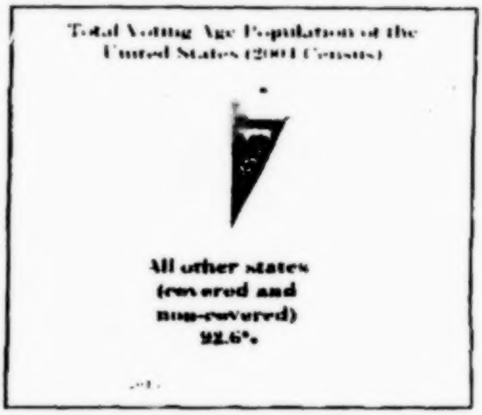
ADDENDUM





Ellen Katz, *VRI Database Master List* (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls

U.S. Census Bureau, *Population Estimates*, http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html *Estimates of the Resident Population by Selected Age Groups for the United States and States and for Puerto Rico: July 1, 2004*

APPENDIX

LIST AND DESCRIPTION OF *AMICI CURIAE*

ASPIRA

ASPIRA is the only national organization dedicated exclusively to the education of Latino youth. Its mission is to promote the development of the Latino community through advocacy and the education and leadership development of its youth. ASPIRA has ASPIRA Associates and Affiliates in eight states (DE, IL, FL, MA, NC, NJ, NY, PA) and Puerto Rico, as well as formal partnerships with over 30 regional and local organizations across the country.

Dominican American National Roundtable (DANR)/National Dominican American Council (NDAC)

The Dominican American National Roundtable (DANR) is a nonprofit, charitable, members organization which brings together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. It aims to ensure for U.S. Dominicans the full exercise of the rights and freedoms guaranteed in the Constitution of the United States of America. The National Dominican American Council (NDAC) is the national civic-engagement-community relations organ of the Dominican American National Roundtable. It oversees 120 local councils in 85 cities across the United States with significant Dominican population. With a membership, which includes local councils, grassroots community organizations, educational, legal, health and civic organizations, DANR has evolved into a powerful research and advocacy organization on issues affecting the immigrant community.

Hispanic Federation

The Hispanic Federation provides grants to a broad network of Latino nonprofit agencies serving the most vulnerable members of the Hispanic community and advocates nationally with respect to the vital issues of education, health, immigration, economic empowerment, civic engagement, and the environment.

Hispanic National Bar Association (HNBA)

The Hispanic National Bar Association (HNBA) is a nonprofit, nonpartisan, national professional association that represents the interests of over 100,000 attorneys, judges, law professors, and other legal professionals of Hispanic descent in the United States. The HNBA has thirty-eight affiliated bars in various states across the country. The continuing mission of the HNBA is to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. Since its inception 40 years ago, the HNBA has served as the national voice for Hispanics in the legal profession and has promoted justice, equity, and opportunity for Hispanics.

Labor Council for Latin American Advancement (LCLAA)

The Labor Council for Latin American Advancement (LCLAA) is a national organization representing the interests of approximately 2.2 million Latino trade unionists in the United States and Puerto Rico. Founded in 1973, LCLAA builds coalitions between the Latino community and Unions in order to advance the civil, economic and human rights of all Latinos.

LatinoJustice PRLDEF

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. It has worked to secure the voting rights and political participation of Latino voters since 1972 when it initiated a series of suits to create bilingual voting systems throughout the United States.

MANA

MANA, a National Latina Organization, is a nonprofit, advocacy organization established in 1974 whose mission is to empower Latinas through leadership development, community service, and advocacy. MANA fulfills its mission through programs designed to develop the leadership skills of Latinas, promote community service by Latinas, and provide Latinas with advocacy opportunities.

Mexican American Legal Defense and Educational Fund (MALDEF)

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF advocated in Congress for the 1975 and 1982 expansions of section 5 of the Voting Rights Act and MALDEF supported the 2006 reauthorization of the Voting Rights Act, testifying to the continuing, persistent purposeful discrimination against Latino voters before the U.S. Senate and House of Representatives. MALDEF has also successfully litigated landmark cases on behalf of Latino voters, including *White v. Regester*, 412 U.S. 755 (1973), and *LULAC v. Perry*, 548 U.S. 399 (2006).

National Association of Hispanic Federal Executives (NAHFE)

The National Association of Hispanic Federal Executives (NAHFE) helps to identify, encourage, prepare and promote the advancement of Hispanics into the SES (Career Senior Executive Service) ranks within the Federal Government.

National Association of Hispanic Publications (NAHP)

The National Association of Hispanic Publications, Inc. (NAHP) is a non-partisan trade advocacy organization, founded in 1982, representing the leading Spanish language publications serving 41 markets in 39 states, the District of Columbia and Puerto Rico, with a combined circulation of over 23 million readers.

National Association of Latino Elected and Appointed Officials (NALEO) Education Fund

The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituents include the more than 6,000 Latino elected and appointed officials nationwide who serve on bodies including local and state school boards, municipal councils, state legislatures, and the U.S. Congress. For several decades, the NALEO

Educational Fund has actively supported the reauthorization and strong enforcement of the Voting Rights Act as a whole, and Section 5 in particular. Section 5's preclearance procedures have played a key role in safeguarding Latino voters' ability to elect the candidates of their choice in jurisdictions in states including Arizona, Texas, California, Florida, and New York.

National Conference of Puerto Rican Women (NACOPRW)

NACOPRW was founded in Washington, D.C., in 1972, as a nonprofit, non-partisan organization to promote the full participation of Puerto Rican and other Hispanic women in their economic, social and political life in the United States and Puerto Rico. NACOPRW provides training, mentorship and leadership development at the local and national level through workshops and institutes during the annual convention, and through chapter programs. We preserve our Puerto Rican and Latino heritage through cultural activities and events. We seek justice and give voice to the preservation of civil, health, educational and other rights through the dissemination of information, networking, collaboration and advocacy with other national and local groups, and through education, celebration, community and civil involvement.

National Council of La Raza (NCLR)

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the

District of Columbia. NCLR works through two primary, complementary approaches: (1) Capacity building assistance to support and strengthen Hispanic CBOs—especially those that serve low-income and disadvantaged Latinos; and (2) applied research, policy analysis, and advocacy to encourage adoption of programs and policies that equitably serve Hispanics.

National Hispanic Media Coalition (NHMC)

The National Hispanic Media Coalition (NHMC) is a nonpartisan, nonprofit, media advocacy and civil rights organization established in 1986 in Los Angeles, California. NHMC educates and influences media corporations on the importance of including U.S. Latinos at all levels of employment. It augments the pool of Latino talent with its professional development programs. It challenges media that carelessly exploit negative Latino stereotypes. It scrutinizes and opines on media and telecommunications policy issues.

National Hispanic Medical Association (NHMA)

Established in 1994 in Washington, DC, the National Hispanic Medical Association is a nonprofit association representing the interests of 45,000 licensed Hispanic physicians in the United States. NHMA is dedicated to empowering Hispanic physicians to be leaders who will help eliminate health disparities and improve the health of Hispanics. NHMA's vision is to be the national leader to improve the health of Hispanic populations.

National Institute for Latino Policy

National Institute for Latino Policy is a nonpartisan policy center established in 1982 that focuses on Latino policy issues. Among our concerns are the rights of immigrants in the United States and the promotion of full civic participation by the Latino community. The Voting Rights Act is essential in combating continuing obstacles being placed to deter Latinos ability to vote that results in the disenfranchisement of a significant percentage of our community. We vehemently oppose any efforts to curtail or eliminate the protections provided by the VRA.

National Latina Institute for Reproductive Health (NLIRH)

The National Latina Institute for Reproductive Health (NLIRH) is a reproductive justice and human rights organization based in New York City, with a policy office in Washington, D.C. and grassroots Latina Advocacy Networks (LANs) in various states. NLIRH is the only national organization working to advance the reproductive health and justice of the 24 million Latinas, their families, and communities in the United States through public education, community mobilization, and policy advocacy. As an organization that encourages and fosters Latina leadership and civic engagement, the issue addressed in this case is a central concern to NLIRH.

National Organization for Mexican American Rights (NOMAR), Inc.

NOMAR, Inc., a national nonprofit organization with the mission to protect the civil rights of Hispanic Americans and to promote equal opportunity for Hispanic Americans in employment and education, supports the respondents in the above mentioned case before the Supreme Court of the United States. A critical mission of NOMAR, Inc. is to protect the civil rights of Hispanic Americans, which include the fundamental right of all United States citizens to vote. We believe that this right extends to all citizens whether born in the United States, or naturalized after migrating to the United States.

National Puerto Rican Coalition, Inc. (NPRC)

NPRC is a national nonprofit organization representing the interests of over 8 million Puerto Rican U.S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political, and economic wellbeing of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

Service, Employment, and Redevelopment (SER)

Service, Employment, and Redevelopment (SER) is a national network of Community Based Organizations (CBOs) that formulates and advocates initiatives resulting in the increased development and utilization of America's human resources, with special emphasis on the needs of Hispanics, in the areas of education, training, employment, business and economic opportunity. SER National aims to develop the capacity of the SER network through the provision of technical assistance, research and planning, program and policy development, and fundraising.

United States Hispanic Chamber of Commerce (USHCC)

The United States Hispanic Chamber of Commerce (USHCC) advocates, promotes, and facilitates the success of Hispanic businesses throughout the United States and Puerto Rico.

United States Hispanic Leadership Institute (USHLI)

The United States Hispanic Leadership Institute (USHLI) is a national, nonprofit organization that promotes education, civic participation, and leadership development for Latinos and other similarly disenfranchised groups. USHLI was honored at the White House by then-President Bill Clinton for "the performance of exemplary deeds of service for the nation in promoting leadership and civic participation." USHLI's mission is to fulfill the promises and principles of democracy by empowering minorities and similarly disenfranchised groups and by maximizing civic awareness and participation in the electoral process.

EXHIBIT ONE

Expert Report of Dr. Andres Tijerina
Texas v. United States,
No. 11-CV-01303 (D.C.C. Aug. 8, 2011)

[1] REPORT OF DR. ANDRES TIJERINA

(Aug. 8, 2011)

1. I submit this report on the history of the violation of civil rights of Latinos in Texas with emphasis on the electoral process and voting. In writing this report, I have relied on my extensive knowledge and readings of archives and bibliography. As a member and fellow of the Texas State Historical Association and a member of the American Historical Association, I regularly attend professional conferences where I present formal papers for peer review and where I exchange the latest information on historical sources, methods, and data. I draw my conclusions in the present report based on my extensive knowledge of Texas History and Mexican American History from the readings and archival research that I have conducted for the better part of four decades. From my broad professional experience, I have been able to use accepted methods of analysis to compare the Mexican American experience in Texas with other groups in history. My conclusion is that they have a legacy of exploitation and abuse by Anglo-Americans who have used government, financial, and technological advantages to appropriate Mexican American lands, labor, and resources, and that Mexican Americans in Texas today bear the effects of this discrimination which hinders their ability to participate effectively in the democratic process.

2. I have utilized my research and writing skills to produce new information and interpretations to

critical areas of Texas history. My Ph.D. is in U.S. history. Indeed, I was the first Mexican American to receive a Ph.D. in U.S. History from the University of Texas at Austin in 1977. My specialty is Tejano or Latino history in Texas. I have written four books on Mexican American history, two of them published by a major university press. One of my books won the three most prestigious awards in Texas History, and two national awards. I am a Professor of history at Austin Community College, and I have taught at the University of Texas at Austin, the University of Texas at San Antonio, and Texas Tech University. I have edited and published four books by other writers in order to spread knowledge of Tejano history. My most widely read work is the publication of my combat memoirs as a USAF pilot with over 100 combat missions in the Time/Life Books series on the Vietnam War. I have practical experience as a former military commander, a former corporate executive with Motorola, Inc., and as a former state agency executive director with the Texas state [2] government. As the only Mexican American state agency director at the time, the position gave me a rare glimpse into the workings of state agency administration.

3. I conduct research regularly at the archives of the University of Texas at Austin to support my publication schedule. There, I have conducted years of research in the Spanish and Mexican archives, as well as in newspaper collections, personal collections, and government depositories. I frequent the Briscoe American History Center and the Benson Latin American Collection, which also houses one of the most extensive Mexican-American collections in the United States. I have also conducted extensive research in numerous county land records across

Texas, as well as at the University of California at San Diego, the U.S. National Archives, the Library of Congress, the State Archives of Coahuila, and the National Archives of Mexico.

4. I have been a consultant to historical museums across Texas, writing the text, and reviewing the accuracy of their displays. I also once consulted a major federal archeological project in Texas. I am a regular speaker and curriculum consultant to civic groups, universities, and independent school districts. I have delivered keynote addresses to federal agencies in Washington, D.C. and in every major city in Texas, the largest of which was at Texas A&M University to over 3,000 in a special events center and a worldwide satellite TV audience.

5. My expertise as a U.S. historian is in the social, cultural, economic, and political interaction of various groups in Texas history. My specialty historical period is the nineteenth century and early 20th century. I have used traditional historical archival documents like period newspapers, court records, city council minutes, state legislative committee proceedings, government documents, 18th century Spanish documents, 19th century Mexican archives, and personal collections. I have also been a trailblazer in developing new historical methods to access the unwritten historical transcripts of non-literate societies by referring to inter-disciplinary methods in archeology and anthropology. Likewise, I have been named as Series Editor for the Spencer Series of Texas A&M University Press for their history books on Texas and the Southwest.

6. The summary of my findings of discrimination against Latinos in Texas is that discrimination has been a pervasive and constant phenomenon since 1836, when Anglo-Americans took control of Texas

government. Anglo-American government control was expanded by the defeat of Mexico in [3] the U.S.-Mexico War of 1846-1848, which ended in the taking of present-day South Texas as well. The traumatic manner in which those Mexicans became U.S. citizens through defeat placed them at a great disadvantage in knowledge and access to the laws, economic power, and government. Another theme in my conclusion is that racist and discriminatory treatment has been a major characteristic and a consistent thread in the relationship between Latinos and Anglo-Americans especially in Texas. Another theme is that Anglo-Americans have consistently used Texas government agencies, police agencies, and laws to appropriate lands, labor, and cultural heritage from Latinos. This phenomenon of domination has manifested itself since 1836 after which the bulk of the Mexican American lands throughout Texas were taken along with government control. It was reinforced in South Texas when Anglo-Americans established large commercial farming estates which have used violence and labor controls to appropriate Mexican American labor until the mid-20th ceutury. During the period between 1900 and 1920 the state government established Anglo-controlled legislative districts and a statewide subtractive school system as major obstacles to Latino education and equal access to the democratic process. Although Latinos have challenged the political, economic, and educational subordination, they have done so at tremendous disadvantage, which is manifested in the persistent racism and their current subordinate status.

Historical Background

The Spanish and Mexican pioneer ancestors of modern Mexican Americans were the founders of

Texas under a European type of government. These original Latino settlers are called Tejanos, which is simply the Spanish word for Texan. Tejanos had come initially under the flag of Spain, as Mexicans after Mexican independence, and they continued to settle in Texas under the Republic of Texas. They claimed lands under the various land grant programs of the succeessive governments of Texas, and they were citizens of the successive republics. They established large ranches, and several towns such as San Antonio, Victoria, Laredo, Nacogdoches, and Corpus Christi. Over 2,000 Tejanos claimed headrights or land grants in Texas along with Sam Houston and Mirabeau B. Lamar as a reward for defending Texas from the Mexican government of President Santa Anna. Even though thousands fought for Texas, incoming Anglo-Americans made no distinction between the Tejanos who were citizens of the Republic of Texas, and the Mexicans who fought against the Republic. As an example, Juan N. Seguin of San Antonio, had fought for Texas Independence. He is the only Texan who fought against Mexican General Santa Anna at the Alamo and at the Battle of San Jacinto. Seguin [4] was the victim of several assassination attempts in San Antonio by Anglo Americans because they made no distinction except their concept of the Mexican "race." (Williams and Barker 1943, IV, pp. 63, 64; Friend 1969, pp. 66, 73) Tejanos had established the legitimate government of Texas under Spain and Mexico, but they quickly found themselves isolated by the Anglo-American wave of settlers who greatly outnumbered them. As Anglo-Americans entered Texas, they took a dominant position, isolating the Tejanos from any viable role in government and the economy.

As prominent Tejano leaders like Juan N. Seguin, Carlos de la Garza, and Vicente Cordova were eventually forced to defend themselves against raids and attacks by Anglo Texans,

Tejano families began an evacuation of Texas. Hundreds of Tejano families fled to Tamaulipas and Nuevo Leon, Mexico while others fled into Louisiana. During these years, the Texas government played a direct role in dispossessing Tejanos from their lands. In many cases, the Texas Army had actually ordered loyal Tejanos off their lands, ostensibly to preclude collusion with the enemy. In 1842, Col. Clark L. Owen declared martial law in the Goliad-Victoria area, and ordered "all Mexicans" to move south of the Nueces. Prominent and loyal Tejano families lost their ranches and lands as they left many of their settlements in what was called a "virtual state of abandonment." (O'Connor 1966, pp. 10, 126, 253; Huson 1953, I, 471)

As the 1840s progressed, Anglo and European immigrants flooded in and took many of the ranches, the livestock, and indeed the livelihood of many of the old Tejanos around Bexar, Goliad, and Nacogdoches. By 1845, for example, 40 of the 45 Goliad Tejano ranches had passed into Anglo hands for a pittance of their value. Many of these emigree Tejanos returned years later to reclaim their lands after the revolution—some successfully, and some not. (Goliad County, Records) After the U.S.-Mexico War, the Treaty of Guadalupe Hidalgo in 1848 incorporated the land south of the Nueces into Texas, and guaranteed full citizenship to the Tejanos as Mexican Americans. Historians like David Montejano and Walter Prescott Webb have suggested that South Texas counties like Nueces, Kleberg, Cameron, and Hidalgo experienced an economically driven pattern of Tejano land dispossession, which characterized the transfer of lands as one-way and irreversible. These basic books of Texas history state that Tejanos lost their lands through "ficticious suits," sheriff's auctions, and dubious transfers of title. Anglo newcomers like Stephen Powers, Charles Stillman, Richard King, and Mifflin Kenedy remained after the U.S.-Mexico War, and, to use Webb's expression, "bamboozled" or deceived the Mexicans in South Texas. Webb added that "The old landholding Mexican families [5] found their titles in jeopardy and if they did not lose in the courts they lost to their American lawyers." (Montejano 1987, 72; Webb 1991)

Many historians have indicated the major role played by the racism of the incoming Anglo Texans during and after the Texas Revolution. Anglo-Texans often cited a distorted version of Texas history to rationalize their economic claims against Tejanos. For example, during the Texas Revolution, Edward Dwyer, an Irish merchant in San Antonio encouraged Texas Army Gen. Thomas Jefferson Green to expedite the army into Bexar. ". . .the people [of San Antonio de Bexar] . . . are not sufficiently scared to make an advantigius [sic] sale of their Lands. In case two or three hundred of our troops should be stationed there, I have no doubt but a man could make some good speculations with Gold and Silver. Bank notes will not do to purchase Land from Mexicans," he added. And in Victoria , John Linn described a similar situation during that same period in which "Fernando de Leon was subsequently persecuted by the presentation of unjust claims against him, and, owing to the prejudice then existing against the Mexicans, many illegal and unfair judgements were rendered against him." De Leon, the largest landowner in Victoria County, lost about half of his lands to those judgements. And during the U.S.-Mexico War, a U.S. Army officer, General William North boasted "our Anglo-Saxon race [have] been land stealers from time immemorial, and why shouldn't they [be]?" (Crisp 1976, 343; Foley 1997, 21; Crimm 1998, 170) Thus racism was an openly avowed motive and a justification for land theft.

In the mid- to late-1840s, however, incoming Anglo squatters openly began to use brutal atrocities against many Tejano families. One specific case in 1843, was recorded in Karnes County, where according to the *The Kennedy Times*, the Carlos Martinez ranches were raided by "companies of white people, who came to the rancho from the Guadalupe and Colorado rivers, and killed the people at the rancho and stole their stock." The newspaper added that no arrests were made as the murderers moved into the ranches. Another murder on the nearby Becerra land grant also drove the Tejano families off their lands. The Tejano families fled to Goliad after their livestock were killed and their barns burned by mounted Anglo marauders. Tejanos lost many relatives in the killings, and they lost their legitimate claims to the lands. (Crimm 1998, 141; Kenedy, Texas 1963, Sect. 1; Rubio 1986, 136)

To the north of Karnes County, Anglo city officials began a coordinated campaign to drive Mexican American citizen and Mexican immigrant settlers out of the cities between Austin and San Antonio. The campaign took the form of vigilante raids incited by newspaper rhetoric [6] and conducted by the town's most "excellent citizens." In 1850, the Austin City Council established "city watch" authorizing a Vigilante Committee "to inflict punishments without resorting to trials. . ." on Negro slaves for violating the curfew or for associating with Mexican immigrants and Mexican American citizen residents. Blaming the Mexican Americans for inciting runaway slaves by associating on an equal basis with them, local newspapers developed a rationale for not only persecuting the recalcitrant slaves, but also for punishing the Mexican American citizens in Austin. The *State Gazette* referred to "the local Mexican residents who were permanent citizens" of Austin as "half-negro, half Indian greasers" and called for "exertion in clearing our country of rascally peons." The newspaper rationalized that this "clearing" of the city was justified because Mexicans were peons "incapable of acquiring the rights of citizenship." The City Council and the newspapers agreed that the Vigilante Committee should be comprised of Anglo-Saxon "excellent citizens" in order to legitimize the "clearing" campaign as had been done in Seguin County and eight other neighboring counties. As a result, the Austin committee included elected officials, Democratic Party officials, veterans of the Texas Revolution, and members of the nativist Knownothing Party. The Austin Vigilante Committee was led by the well-known Texas Ranger and Mayor of Austin, John S. "Rip" Ford, a Chief Justice, a city alderman, the city marshall, and the county sheriff. After a few years of persecution, Austin had burned out all settlements of Mexican immigrants and local Mexican American citizens. By the 1860 census, only 20 Spanish-surnamed residents were left in Travis County, and *State Gazette* rationalized the raids because Mexicans were "a bad element of society . . . [that] sooner or later would be extinguished." The newspaper boasted that Mexicans had also been driven out by vigilante raids in Uvalde, Bexar, Austin, Colorado, Matagorda, and Guadalupe Counties. (Lack 1981, pp. 2 – 19)

According to historian David Montejano, native Tejanos eventually established a "Peace Structure" with incoming Anglo-Texans in order to escape the violence. In the "Peace Structure," Anglos were allowed to dominate the government and economy, while Tejanos collaborated with them in exchange for protection from land theft and violence. In many cases, these incoming Anglo-Texans nevertheless used their dominant position to acquire Tejano lands. Following the 1850s, in Hidalgo County, Judge Thaddeus Rhodes, Sheriff John Closner, and land lawyer Jim Wells began to press sheriff's auctions on Tejano land grants. The judge targeted the fertile lands of Spanish Porcion 69 land grant, owned by descendants of Juan Jose Hinojosa along the Rio Grande. In June of 1877, the sheriff sold over 7,000 acres of the grant [7] for $17.75 to Anglo-Texans. Also in 1878, Judge Rhodes personally bought 30 acres of Porcion 69, and then held a sheriff's auction on an additional 668 acres of the land grant. (Hidalgo County, A:149; Crimm1998, 175; Mexico 1874, h; Rubel 1966, 36)

The period after Reconstruction and around the turn of the century also saw an attack on the Tejano's socio-economic status, as Anglo-American commercial farmers from Midwestern states swept into South Texas. The incoming Anglo-American squatters launched large-scale vigilante raids against legitimate and prominent Tejano land grantees during the Reconstruction period after the Civil War. One raid in 1874 swept from Victoria down to Refugio and another in the next year, the Peñascal Raid, swept from Corpus Christi down to present-day Raymondville. The Victoria-Refugio region had also been the scene of racial and economic conflict between Anglo ranchers and Tejano landholders for years. The conflict culminated in a vigilante raid in 1874 after a heinous crime against an Anglo rancher and his wife. According to land lawyer and historian Hobart Huson, "Several hundred ranchmen and cowboys from Refugio and Goliad Counties met on Rosilla Prairie with the view of exterminating all Mexicans in the section, commencing at Goliad." To begin with, they shot prominent Tejanos Marcelo and Antonio Moya, and slit the throat of their father, the Moya family patriarch. In the dispossession, Huson reported a mass exodus of the surviving Tejano widows and children to Mexico after the incident, saying "The roads were lined with ox-carts and wagons headed west." Goliad County Sheriff Phil Fulcrod, judges, and other militia and government officials were directly involved in the above mentioned raids. The perpetrator of the initial murder was later identified and hanged, but the vigilantes admitted that they still "were desperate for revenge." When they later heard another rumor that Mexicans had committed a murder a few miles south on the Nueces River, they rode overnight the sixty miles to Corpus Christi to enroll in that posse. (Dobie 1929, pp. 73 – 80, 125; Huson 1953, I p. 471, II p. 214; U.S. Congress 1876, p. xviii)

In Corpus Christi a vigilante committee of about one hundred Anglos set out ostensibly to drive off the "Mexicans" on large land grants south of Corpus Christi. For several months prior to the raids, famous rancher Richard King had stirred passions against several large neighboring Tejano ranches around the Peñascal Ranch, located about sixty miles south of Corpus Christi. These ranches were home to about five hundred Tejano men, women, and children described by Texas Ranger N.A. Jennings, as "peaceful Mexican farmers and stockmen who had lived all their lives in Texas." King instructed the vigilante posse to elect leaders—about twenty men—who should go first to Brownsville to be deputized. With their instructions, [8] and acting under color of law, the vigilantes then masked and painted themselves, and systematically killed all of the Tejano patriarchs and "every adult male that was present." As the raiders burned one ranch after another, the women and children fled into the chaparral and hid throughout the night. Many of the men's bodies were never found, and were presumed to have been "dumped in the bay." When Texas Ranger Captain L. H. McNelly arrived to investigate the raids, he wrote back to Austin, "The acts committed by Americans are horrible to relate; many ranches have been plundered and burned, and the people murdered or driven away; one of these parties confessed to me in Corpus Christi as having killed eleven men on their last raid."

Many of the Tejano lands involved in the Peñascal Raid were incorporated into the King and Kenedy ranch empires, as the women and children and other Tejano rancheros fled across the border to Mexico. According to one account: "They departed taking their money and personal possessions with them, and often they were found dead along the way with their money missing." (Taylor 1934, 57; Cheeseman 1998, 88; Mexico 1874, pp. 18, 19, 68, 106; Hidalgo County, A, 149; Dunn 1932, pp. 9, 63; Villareal 1972, pp. 16-19) In the Refugio raid and in the Corpus Christi raid, the Anglo vigilantes included law officers, and were acting under color of law. The marauders were deputized before conducting the Peñascal raid, and some even claimed to be Texas Rangers. In neither case, however, were there any arrests of the perpetrators. (Cheeseman 1998, 88) In his book, *The*

Texas Rangers, Walter Prescott Webb stated that the "reign of terror" reached its peak at the turn of the century, when between 500 and 5,000 Tejanos died, "many of them innocent, at the hands of the local posses , peace officers, and Texas Rangers." (Webb 1991, 176n.)

After the Revolution and even after the U.S.-Mexico War, the state government continued to undermine Tejano land title claims. The legislature passed Texas Land Relinquishment Law of 1852, for example, requiring that all unarchived lands granted before 1835 be surveyed and filed with the Texas General Land Office by 1853 or be declared null and void. Later, the Texas Constitutions of 1869 and 1876 included the same requirements, placing the burden of proof on the Tejano title holders. The state legislature imposed restrictions on Tejano rights to testify. When Tejano appelants came to Austin to plead their land cases, they were told that a committee rule required that in order for Tejanos or other non-whites to testify, "their character for truth and veracity had to be established by the testimony of two white men." (Rubio 1986, 114; Texas, *State Gazette*, Vol. II, No. 6.)

[9] One of the most questionable government actions in the administering of Tejano lands was known as the Bourland-Miller Commission of 1850. As Anglo-American capitalists and land speculators stimulated a growing demand for Tejano lands, the state legislature sent two commissioners across the Tejano ranching frontier to verify and record the titles to as many Tejano lands as possible. The state's interest was clearly to facilitate land transfers from the old Tejano land-holding fmailies into Anglo hands. After the commissioners collected the titles, and loaded them for sea transport from Brownsville

to Austin through the Gulf of Mexico, the Steamship *Anson* caught fire and sank off the coast of Matagorda, destroying all the Tejano land titles. (Greaser and de la Teja 1992, pp. 455, 457n.) The most questionable role of the state government was not so much in the coincidental fire, but in actively promoting the sale of the lands of a targeted class of citizens through legislation and a special commission.

The end of the 19th century would find the Tejanos inundated not only by continuing Anglo-American immigration from the United States, but by a wave of emigrant Mexicans fleeing the violence of the Mexican Revolution. Incoming Anglo-Americans continued to acquire Tejano lands in South Texas, which they called "The Rio Grande Valley." As immigrants themselves, the Anglo Americans ironically made little distinction between the native Tejano citizens of Texas and the flood of immigrant Mexican nationals. By taking control of the county government, Midwestern Anglo-American commercial farmers re-structured the county taxes, budgets, road and bridge construction, and education to suit the farmer at the expense of ranchers and the Mexican-American population. Landless Tejanos and Mexican immigrants were all categorized by Anglo-Americans as "Mexicans" and seen as cheap labor with no distinction as to social status, education, or citizenship. Just as they re-structured the county government to suit themselves, Anglo Americans re-structured Texas history and culture to rationalize their disfranchisement of the Mexican American as a laboring class with limited educational or political freedom. In the period of 1900 to 1920, the Anglo-American commercial farmers began to claim economic and political power from Anglo ranchers and Mexican Americans alike. This period was called Progressivism.

20th Century

Throughout the 20th century, the racialization of politics and the economy had continued to the point that Texas had what amounted to a caste stratification with Anglo-Americans in dominant positions and Mexican Americans generally in subordinate positions. One 1965 study [10] of Texas racial relations stated that "Anglos have always been on top . . and the Mexican Americans isolated on the bottom." (Civil Rts. Educ. Study, 11) A distorted historical transcript had been developed by 1900 that depicted the Anglo-American as the liberator of Texas from a heathen Mexican population. The historical transcript was articulated by policy leaders and the public in order to rationalize the political and economic subordination of Mexican Americans. As an example, in a 1911 state vote on prohibition, state leader Thomas Ball in Brownsville said he opposed ". . . the Mexican vote, which Texas in 1836 declared unfit to govern this country." (Anders 1982,, 101) Even a poor Anglo cotton picker used history to elevate himself above Mexican Americans, saying "The study of the Alamo helps to make more hatred toward the Mexicans. . . if a man . . slaughters your kinsman. . . I am in favor of not letting Mexicans come over and take a white man's labor." (Montejano 1987, 224)

The Progressive Era

During the 1900 and the 1920s Progressive Era, Anglo-Americans began to refine their political control over the Mexican Americans. In Texas, "Progressive" meant anti-Mexican. By the turn of the century, Mexican Americans had found refuge under the protection of political bosses. The political bosses protected them from Texas Ranger violence and Anglo-American raids, and then controlled their voting for state and federal politicians, who gave tacit consent. The Progressives were middle-class Anglos. As one authority said, "Most came from the ranks of the Anglo, Protestant majority and looked with contempt upon the social standing, life-styles, religion, and moral values of the Hispanic population. . ." In order to strip the political bosses of their power, then, middle-class Anglo-American professionals blamed the Mexican American victims of the system, and made a concerted effort to disfranchise the Mexican Americans. One of the most powerful political bosses was Archie Parr. In 1908, Parr took a seat on Duval Co. Commissioner's Court. He used the County Treasury as "slush fund" and gave his constituents short-term work on road and bridge projects. Then, he simply deducted their poll tax fees from their wages, and directed their voting. Parr and other bosses like Jim Wells used a device called "Corraling voters" to amass enough votes to elect state and federal officials. The political machines under Parr, Jim Wells, and Robert Kleberg worked in close cooperation with state and federal officials who benefitted from their control of the South Texas votes such as Col. Edward M. House, Lyndon B. Johnson, and John Nance Garner. As presidential advisor to Woodrow Wilson, Col. House gave Jim Wells "a near monopoly over the distribution of state patronage" in [11] the Valley, according to one historian. (Anders 1982, pp. 13, 103, 176) These slating and corralling devices were used by political bosses in many other cities of Texas as well. As an example, San Antonio had the Callaghan political machine which reportedly paid the poll tax for Mexican Americans, and instructed them on voting. More blatantly, the Good Government League of post-World War II San Antonio regularly slated the city council candidates. Although it slated a middle-class Mexican American as a token, it limited the Mexican American representation to that one token position, which was far below their percentage of the electorate. (Garcia 1981, 157; Rosales, 2000, 5 & 13.)

Gerrymandering became a method used by Texas policy makers at the highest levels to segregate Mexican American voter groups. This method was later used to segregate Mexican-American laborers and public school students. In order to secure their Mexican American voting blocks, political bosses used gerrymandering of electoral districts and created whole counties. Indeed, 13 of South Texas counties were created by these bosses for that purpose. Some counties were created by Progressive politicians to counter the political bosses. As an example, Ed C. Lasater took Brooks County from "Mexican" Starr County in order to secure Brooks for his "thrifty and idustrious farmers from Iowa, Kansas, Texas, Nebraska, Indiana, . ." Likewise, D.W. Glasscock broke Jim Hogg County from Zapata County in order "to get out from under the domination of the Mexican vote." Meanwhile, Parr and other bosses made other efforts to carve Duval, Nueces, Jim Wells, Kleberg counties to concentrate their Mexican American voting blocs. Within a few years, the South Texas counties doubled from 7 to 13. As an example, at the turn of the century, U.S. Congressman John N. Garner was a member of the House Committee on Congressional Districts and "the subcommittee that drafted the initial version of the reappointment bill. . . the House measure confirmed exactly to Garner's and Wells' specifications . . created a district that included Uvalde and the Trans-Nueces but excluded San Antonio." (Anders, Boss, 110; Montejano 1987, 131) By the end of the century, gerrymandering of Mexican Americans had proven to be an effective and accepted practice by Anglo American policy makers at all levels of Texas government.

Throughout the Progressive Era, Anglo idealogues and politicians explicitly articulated their rationale of disfranchising what University of Texas professor called the "dangerous" Mexican vote. And during the 1914 gubernatorial race, the *San Antonio Daily Express* quoted prohibitionist candidate Thomas Ball as supporting reforms to disfranchise Mexican Americans. He said that "liquor and Mexicans" would both "rest together forever in death." And in the [12] 1918 general election for Texas Senator, candidate D.W. Glasscock stated that his campaign was "to get the Anglo Saxon on top." (Anders, Boss, 241; Montejano 1987, pp.131, 145-7)

One of the main devices created specifically to disfranchise Mexican Americans in Texas was the poll tax. The 1903 Terrell Election Law required payment of the poll tax between October and February on the assumption that Mexican Americans were too poor or forgetful to comply. The state reformer, Terrell, himself said the law was intended to close "the flood gates for illegal voting as one person could buy up the Mexican and Negro votes." His proponents said Mexican Americans could not afford the poll tax, would lose receipts, or not pay so far in advance. Using community organizations called the "Good Government League," the Progressive reformers articulated their intent. In 1913, for example, State Rep. Joseph O. Boehmer of Eagle Pass established the Ballot Purification League, and submitted a bill admitting his intent was "to disqualify the Mexicans of the Western and Lower Rio Grande Counties." Historian Evan Anders has argued that "The practical effect of most of these proposals would be to curtail the voting of impoverished, illiterate blacks and Mexican Americans." (Anders 1982,, 102 (Montejano, Anglos , 143)

The Progressives also used restrictive laws, such as the 1918 state law to eliminate interpreters at the polls. They used the "White Man's Primary" to exclude Mexican American voting in the Democratic Primary elections, which in a one-party state, pre-empted the general election. In establishing the White Man's Primary Association (WMPA) in 1904, the State Democratic Executive Committee required an oath, declaring "I am a white person and a Democrat." The Dimmit Co. WMPA was so effective that *Carrizo Springs Javelin* in June 12, 1914 said it "absolutely eliminates the Mexican vote as a factor in nominating county candidates, though we graciously grant the Mexican the privilege of voting for them afterwards." The newspaper added that it was for labor and "race control" to protect the "purity of Anglo women." (Montejano, Anglos , 143-4)

In many cases, violence was used by Anglo-American mobs and state and local officials against Mexican American voters. The Texas Rangers had traditionally intimidated Mexican Americans, and were used specifically to discourage their voting after 1900. As an example, Progressive Gov. Wm. Hobby in 1918 created the "Loyalty Ranger Force" of 1,000 special rangers, and 3 rangers in each county to supplement Texas Rangers. The Rangers gave "armed support" to Democrat machines in "partisan" conflicts. In the senatorial race that year, Texas Ranger William Hanson (former U.S. Marshall, and organizer of Loyalty Rangers) and several [13] rangers discouraged Mexican American voters in Corpus Christi, telling them that they would "go to prison if they were illiterate and still tried to vote." Hanson then sent several rangers to Duval County for "management of the primary election." One official reported that "only about sixtyodd Mexicans" voted in Nueces County elections as a result. A South Texas lawyer, Marshall Hicks, testified in *Glasscock v. Parr* (1919) in the minutes of the *Texas Senate Journal* that his opponent, D.W. Glasscock had the Texas Rangers selectively "investigate" Mexican American voters, and spread "a spirit of terrorism among those Mexican people." Or as Evan Anders said in his study, "the mere presence of armed Rangers at the polling stations had an intimidating effect on the Hispanic population" in Cameron, Duval, Nueces, Hidalgo, and Starr Counties. (Montejano 1987, 145-7; Anders, Boss, pp. 252, 257, 263)

In 1916, during the turmoil of the Mexican Revolution immigration, Anglo political leaders in the Valley held meetings, and stirred Anglo fears of Mexican American uprisings. But, according to Anders, "the Anglos' suffering and hardships paled beside the horrors that they inflicted upon the Hispanic population." Anglos used vigilante action, and "a bloodbath that claimed from two hundred to three hundred Hispanic lives ensued." In widespread lynchings, Anglo gangs burning Mexican American houses, ranches, and hanged 15 in San Benito. Local officials participated in lynchings. "The most blatant abusers of police power were the Texas Rangers." according to a legislative committee report in 1919. The Texas Rangers "confiscated the arms of Hispanic residents" in Cameron County, violating their Bill of

Rights, and leaving them defenseless. In one small town, the Rangers dragged 15 Mexican Americans from their homes, and executed them in front of their families. They reportedly killed 102 Mexican Americans in "cold-blooded murder."

A few years later, a momentous incident occurred called the "Hidalgo County Rebellion." In this incident, crowds of Anglo reformers demonstrated and rioted against Mexican American voters at elections to supplement the Texas Ranger brutality. In 1928, the Weslaco barrio election box was assailed by the Republican "Good Government League" which led the "Rebellion" cited in a U.S. Congressional investigation. According to the federal report, a crowd of 3,000 to 4,000 Anglos at the polling place shouted "Don't let those Mexicans in to vote. Throw them out" while men with shotguns protected the crowd. An estimated 200 to 300 regular Mexican American voters "did not show up at all." One former Texas Ranger, Hidalgo County Sheriff A.Y. Baker, became the Democrat boss of the county, and was reputed to have committed election fraud and large-scale graft. When State Rep. J.T. Canales protested [14] the violence and the use of Loyalty Rangers in the 1919 legislature, he was given a death threat by Ranger Frank Hamer as he walked up to the capitol building in Austin. In the legislature, Rep. Canales pressed his demands, accusing the Rangers of covering up their atrocities. (Anders, Boss, pp. 224-6, 239, 269; Montejano 1987, 147)

Years later, scholars and organization leaders would blame these widespread events for a disaffected Mexican American electorate. Many years after the Progressive Era, Mexican Americans continued to live under the systematic discrimination established in Texas by the Progressive politicians.

The segregated schools, the poll tax and voting intimidation, and the job discrimination continued as the status quo in Texas from the 1920s through the 1960s. The only major changes during the Depression Era were the federal programs of President Franklin D. Roosevelt's New Deal. Ironically, even though the New Deal provided for jobs, farm price restabilization, and old-age pensions, the New Deal programs tended to exclude the Mexican Americans. For example, the Civilian Conservation Corps often neglected Mexican American young men, the Agricultural Adjustment Act displaced the Mexican American sharecroppers by making it more profitable for land owners to leave their land fallow rather than employing sharecroppers, and the Social Security Act gave a guaranteed retirement to all Americans except agricultual labor and domestic workers, most of whom, in Texas, were Mexican Americans. Scholar Juan Gomez-Quinones has stated that the absence of Mexican Americans at all levels of appointed positions before 1970 is major indicator of their exclusion from the democratic process in Texas. And even though Mexican American voting had increased, Willie Velasquez of San Antonio, the founder of the Southwest Voter Registration Education Project (SVREP) stated that "Clearly, past discriminatory practices have hindered voting." Velasquez began in 1974 to register Mexican American voters. He found that he had to file several law suits in order to seek enforcement of the Voting Rights Act, and to restructure local voting districts which had been Gerrymandered. (Gomez-Quinones 1994, pp. 155, 166, 172).

Labor Controls

Early in the 20th century, Texas state and local officials began to relate labor control over the

Mexican American population to social and political control. One South Texas superintendent explicitly stated that the state officials condoned minimal education of "the lower element" [Mexican Americans] specifically to control them in the labor force. "We don't need skilled or white-collared Mexicans. . . There isn't a concerted effort against them but the white- [15] collar man is not a common laborer." Another school official said he complied with local growers to keep the Mexican American population out of school, saying ". . it is up to the white population to keep the Mexican on his knees. . . This does not mix very well with education." (Montejano 1987, 192-3)

As Anglo-American businessmen and government officials sought to maximize their profits in using the Mexican Americans as a labor force, they developed a systematic web of formal and informal labor control devices. Recruitment of foreign nationals and domestic workers helped to build a labor surplus to drive wages downward and to displace the risk factor of production onto the labor force itself. As an example 6 major labor recruiting agencies working on the Texas-Mexico border in 1907-8 recruited 16,479 Mexicans for railroad construction alone. Other agencies recruited Mexican and Mexican American workers for the cotton industry and mining in West Texas. The railroads and agribusinesses made no distinction between citizen and foreign national. Both classes of Mexican American were subjected to the same state and local labor controls. (Foley 1997, 44; Daniel, FEPC, 128)

Other labor controls included vagrancy laws, indebtedness, and county passes. By 1927, Willacy County was implementing Vagrancy Laws enforced by the county sheriff, the Justice of the Peace, and the County Attorney. They systematically arrested Mexican American laborers traveling in search of higher wages for not having the approved "county passes" signed by an Anglo employer or county official. The Mexican American workers were convicted, and paroled as "convict labor" to Anglo-American growers. When asked about the legality of these controls, a U.S. Dept. of Justice agent rationalized it, saying it was necessary at harvest time. To support the growers, the state government co-ordinated the labor control devices with them and the South Texas chambers of commerce. In 1927, the state legislators pressed the Texas State Employment Division to assist the growers. The legislature passed the Emigrant Labor Agency Laws to keep the Mexican American labor force from being recruited by out-of-state recruiters. The state controls included requirements that out-of-state recruiters pay prohibitive bonds, fees, and taxes. And in 1934, the Texas Farm Placement Service began to maintain check points on highways in order to direct Mexican American labor to farmers. In so doing, the state government helped to create local labor surpluses to drive wages down, and ostensibly to prevent migrants from "aimless wandering" in search of higher wages. (Montejano 1987, pp. 205, 210- 12)

[16] South Texas agribusinessmen began to use Taylorism and professional management in their control of labor. In South Texas, Taylorism meant control of the Mexican American labor force. By 1930, Corpus Christi led the nation in cotton production and profits mainly through the complete control of the large Mexican American labor force. These commercial farmers established a system of controls that included racial stratification of labor, company towns and armed guards. In 1929, for example the

Chapman Ranch had 18,000 acres in Nueces County. It gave Anglo-American farmers 160-acre plots to be worked by Mexican American workers, who comprised 97% of the labor force, but received no land plots. Chapman divided his workers by race, providing one Anglo school and one "Mexican School" for his Mexican American workers, separate churches, a hardware store, a grocery store, and a dry goods store where workers were required to pay with his company scrip as a condition of the oral employment agreement. Mexican American laborers were issued coupons which they had to use in ranch store, ostensibly for "salary advance," but in reality to keep them in debt as a further control device.

Even larger was the Taft Ranch near Corpus Christi. Around 1900, near Corpus, the 200,000-acre Taft Ranch comprised 39% of the San Patricio County population. Like the Chapman Ranch, owner Charles Phelps Taft kept his Mexican American laborers separate from Anglos, who were also given 160-acre farms. His workers were also kept in company towns, provided housing, grocery stores, dry good stores, separate schools, and separate churches. The Taft Ranch hired only Mexican Americans with a wife and children in order to maintain more stable workers. The Mexican American workers lived on the Taft Ranch under a shadow of armed intimidation. The Ranch sponsored "rifle clubs" consisting of its Anglo-American farmers and overseers. It also admittedly had a machine gun, and issued the Anglos .30-.30s and .38 caliber pistols. The Anglo overseers held target practice on the ranch ostensibly to preclude any possibility of an "an uprising of some sort" among Mexican American workers. Charles Phelps Taft, the owner, was Pres. William Howard Taft's brother. He kept his Mexican American workers in debt. He periodically "rounded up" his Mexican American and black workers and voted them for President Wm. Howard Taft, and other selected candidates. (Foley 1997, pp. 81, 119, 121-7, 132-3) The Chapman Ranch and Taft Ranch developed models of labor control that were replicated in varying forms across the state. In 1916, for example, the Commission on Industrial Relations reported that Mexican American agricultural workers were chained and guarded by armed men with shotguns. One grower told the commission that Mexican Americans were better labor because "you can treat them in any manner and not be [17] bothered with lawsuits. . ." Other industries also implemented a dual wage system for its Anglo and Mexican American workers as late as 1942 when the War Production Board reported that "the differentials between Mexican and American white workers is as high as $1 per shift." (Foley 1997, 49; Daniel, FEPC, 77)

In labor controls as in political control, the Texas Rangers played a prominent role by intimidating the Mexican American workers to preclude organization or protest. In 1913, for example, Texas Rangers broke a strike in El Paso where Mexican Americans made up 60% of the work force. The 650 smelter workers went on a strike, which was broken by Texas Rangers using violence and hired company henchmen. Likewise, in 1966, when national civil rights leader Cesar Chavez came to the Rio Grande Valley to support a Mexican American farmworker strike, the Texas Rangers used intimidation, arrests, and violence to harass the strikers. (Gomez-Quinonez 1994, 79, 255; Daniel, FEPC, 128) Throughout this period, government investigations continually reported discriminatory practices against Mexican American workers. Even in World War II, the Fair

Employment Practices Commission found a dual wage system in the Texas oil industry. Some Texas companies, like Humble, Sinclair, and Shell refused to hire Mexican Americans. And unions like the CIO and other unions collaborated with the companies to establish the dual wage systems, segregated work areas, separate occupational categories, and restrictions of Mexican Americans in skilled work. The Dallas office Director, Dr. Carlos Castaneda, found that Texas mining and oil companies used token Mexican American workers "to avoid an open charge of discrimination." His conclusion, however, was that "Discrimination against the Latin-American worker has not been eliminated." (Zamora 1992, 327; Daniel, FEPC, 150)

Even after the war, as Mexican Americans took 10,000 of the 35,000 jobs at Kelly A.F.B. in San Antonio, the U.S. Commission of Civil Rights reported that they "continued to be concentrated in the lower pay scales. . ." through a network of discriminatory devices. Typically, an Anglo manager would "Pass-Over" a Mexican American worker for an Anglo on hiring and promotions. The personnel evaluation system was found to use a "Dummy Profile" for promoting and hiring pre-selected Anglos. Many of the Mexican American workers were performing skilled jobs at lower rate of pay. (U.S. Com. Civ Rts, Employment, 3; Montejano 1987, 269) In agriculture, the farm ownership patterns had seen a replacement of the family farm by corporate agribusiness. Likewise the Mexican American agricultural force changed to a migrant force. The Mexican American farm labor force became an interstate migrant labor force [18] which increased "from 95,000 in 1963 to 129,000 in 1966." One study of the migrant force of 350,000 in the Lubbock area in

1939 was 85% Mexican American. And according to a recent study, conditions for Mexcican American migrant workers have not improved significantly. The Texas Office of Rural Health reported recently that their work is still "the highest of all industries in work-related deaths, with a rate of 52 deaths per 1,000,000 workers." (Montejano 1987, 273; Tijerina 1979, 38; Richardson 1999, 33)

Mexican Towns/ Barrios

Another device promoted by business and local governments to keep Mexican American workers separate was the formation of an exclusively Mexican American town or neighborhood. As Anglo-American farmers migrated into the Rio Grande Valley from midwestern states in the 1890s, they used race as a device to segregate not only their workers but whole towns. They were attracted by land promoters with promises of low labor wages and cheap agricultural lands, but they rejected the local Mexican American culture and population. According to a study of the Valley counties, "Racially segregated schools and residential patterns emerged" at the turn of the century. Many of these segregated or exclusively Mexican American towns were planned and developed by powerful growers specifically to isolate their labor force. In 1910, for example, the Taft Ranch built Taft and Sinton on ranch land specifically to separate its Mexican American workers from its Anglos. Likewise, other South Texas towns were developed by growers. Asherton was built as a "Mexican Town" by a banker named Richardson. Kingsville was segregated by the Kleberg Town & Improvement Company. Weslaco was built as a segregatd town in 1921 by municipal ordinance using the Missouri Pacific Railroad tracks. McAllen was segregated by the formal policies of the Real Estate

Board and the Delta Development Company. (Anders 1982, 142; Montejano 1987, 167)

In the larger cities of the state, Mexican immigrnts and native Mexican American citizens alike were simply not allowed to settle within the city limits. Segregated into barrios, they were commonly denied access to business, to neighborhoods, to education, and to city services. As the new Texas cities grew, they took the shape of a segregated community. When Mexican Americans returned to Austin after the vigilante raids, for example, they were allowed to remain primarily as a disfranchised labor force living in the county dump. Those in Dallas, Lubbock, and Houston settled across the railroad tracks near the railroad depots or stockyards. In this racially and politically segregated barrio, the Mexican American citizenry of Texas developed an [19] unequal status which lingers to the present day as a result of the decades of denial. In general, the Texas barrios were described as deplorable, isolated from city services, and lacking political representation.

The Dallas barrio, for example, developed along Mill Creek across the Trinity River from downtown Dallas after the Civil War. Mexican immigrants were housed near the railroad depot and Mexican American citizens moved into the barrio called "Cement City" because of the cement works. It was described as having dilapidated houses with "No sewage—no sanitation... worse conditions." A newspaper report said in 1944 that "Every such congested, overcrowded, unhealthful center is like a canker or eating sore on our fair city." It added that the substandard housing was "little improved" through the decades of the 20th century, and were "hardly fit for housing livestock on a farm." Indeed "Little Mexico," as the Dallas barrio was later called, ranked first in tuberculosis deaths, pellagra deaths, and overall death rate for the city. As stated above, these conditions would leave a lingering effect on the Mexican American community. A report, U.S. Census Tract X of Dallas in 1970 showed that the barrio had the lowest education and income levels, and the highest infant mortality rate in Dallas as late as 1970. (Achor 1978, pp. 34, 35, & 63)

Through the decades, Dallas continued to develop a "sharp division between the Anglo and non-White population," the highest of thirty-five southwestern U.S. cities according to a report in 1960. After urban renewal and school desegregation in the 1970s, statistics revealed that "Dallas has still maintained separate patterns of settlement." As a result of the economic and racial segregation, one study reported in 1972 that "Minority access to political power is severely limited—in fact, it was almost nonexistent for many years." The study indicated that from 1931 to the early 1970s, an informal council of Anglo political leaders called the Dallas Citizens Council used its political arm, the Citizens Charter Association (CCA) to influence local elections. In so doing, the CCA denied Mexican American access to equitable representation in local elections, and virtually prohibited broader representation in state and federal legislation. The CCA typically slated pro-business Anglo candidates for all elections and never had a single Hispanic in any of the eighteen Texas legislative districts, three state senatorial districts, or six U.S. congressional districts in Dallas County.

The Mexican American community of Dallas began to organize for democratic activities, and was "radicalized" by a singularly revealing incident in 1972. Barrio residents had long complained of police brutality, but little evidence could be found to verify it until a Dallas [20] policeman shot a Mexican American child in an interrogation. The police officer, Darrel Cain, used his .357 magnum revolver to force a confession from 12-year-old Santos Rodriguez (later found to be innocent) in a deadly game of Russian roulette. The gruesome incident agitated Mexican Americans across the state, although it had no impact on the segregation or political representation for the Dallas barrio. (*Ibid.*, pp. 50, 59. 60, 148) Indeed, Mexican American children were still attending segregated schools in Dallas in the 1950s. Not only were they restricted to four segregated elementary schools, their only high school until 1960 was Crozier Tech, a vocational school. A turbulent desegregation of schools in the 1960s seemed to exacerbate matters by leading to a massive “White Flight” out of the inner city schools. The Dallas Planning Department reported that100,000 whites had fled Dallas to the suburbs between 1968 and 1973, leaving Dallas Independent School District about 50% African American and 20% Mexican American. With the “White Flight” went the tax base as businesses followed the Anglos to Arlington, Plano, and Irving. Later developments have tended to transform the inner city area through gentrification, but none of the newer trends substantially increased Mexican American representation. (Phillips 2006, pp. 127 & 167)

Like Dallas, the first Mexican immigrants and Mexican American citizens in Houston moved in with the railroads in a segregated neighborhood called “El Crisol.” By 1910 another barrio emerged near the railroad depot of the Southern Pacific called El Segundo Barrio. The Houston barrio, like other Texas barrios, was described as late as World War II as having “dismally poor housing conditions” with most residents living in "two, three room houses, very cheaply constructed of unpainted lumber." The barrio reportedly had little running water or heat, and many of its residents living in boxcars with no bedding. The Houston school district established Rusk Elementary School as the single segregated elementary school for Mexican Americans. Rusk was known as the "Mexican School." By the late 1920s and 1930s, new barrios grew up in Houston's Second Ward with the largest barrio, Magnolia, near the Houston ship channel. All of these barrios had segregated schools, that although lacking in physical and curriculum advantages, stressed Americanization and corporeal punishment for speaking Spanish. (Rosales 1981, pp. 224 – 248)

By 1875 when the Mexican American population of Austin began to recover from the vigilante raids, they were allowed to settle only at the edge of town. The Aursin barrio was in the city dump where the city garbage was dumped over the bluff into the Colorado River, presently located at the Congress Avenue bridge downtown. As the Mexican American [21] population increased, only a few lived outside of the city dump grounds, some along the upper reaches of Waller Creek at present-day 25th Street. An analysis of segregation in Austin between 1875 and 1910 indicated that although other ethnic groups—even the Irish—had integrated into the city, "Not so the Mexicans who continued to live . . in other physically and socially marginal pockets." (Manaster 1986, 99) Nor were they allowed burial in the city cemetery, but outside the cemetery instead, in the pauper's burial ground labeled as the "Strangers' Ground." (Austin Oakwood Cemetery, Book I) Conditions in the city dump were described in a complaint by former city Alderman A.J. Zilker in 1899. Zilker reported that city dump had collected 10,000 loads of trash in the last 15 months alone, including dead animals and vegegable matter that created an "unbearable" stench for "a large number of people live near the dump. . ." (*Austin Daily Tribune* 1899, p. 4) A university sociologist, William B. Hamilton, conducted a social survey of Austin in 1913, in which he described the Mexican-American neighborhood in the city dump as living "in the 'Dark Ages' of civic sanitation." The Mexican-American residents lived in "small huts, one and two families in a one-room shanty, and little children are forced to play out in the dusty street on the filthy, dirty creek or river bank where their homes are located." (Hamilton 1913, 9)

By the late 1920s, Austin policy makers had begun to realize that they had inadverdently forced the Mexican Americans to settle an area that became prime real estate on Congress Avenue at the river. Their response was to conduct a model of urban planning that not only created the first city-planned Texas barrio, but to invent the modern American model of a housing project. They hired a consulting agency which proposed to move the Mexican Americans and African Americans out of the city dump and out of the Clarksville neighborhood, both along the north bank of the river. Specifically, it proposed moving them out of the now "desireable" area for construction of a proposed Waller Creek Driveway and a broad new Congress Avenue. The report recognized that the property was "at present occupied by very unsightly and unsanitary shacks inhabited by negroes. With these buildings removed for the trafficway, most of the remaining property will be of substantial and more desireable type." Stating that the property "will increase its value many times. . ." the report used coded language to indicate that the Mexican-American "blighted district" was the reason for current low value, but "if the reason is removed, the value will increase." The consultants advised the city planners to avoid "unconstitutional" attempts like the vigilante raids previously used. It suggested that they simply create "a negro district, as an incentive to draw the negro population to this area" in [22] East Austin to avoid duplication of segregated parks, schools, and facilities. It also included a suggested removal of the Mexican American neighborhood along with the Negro population. (Austin 1928, pp. 46 - 57)

The City of Austin adopted the consultant report as a "Master Plan" in 1929 "as official city policy the goal of concentrating Blacks in East Austin." It segregated municipal services, and in coordination with the city planners, "the school system promoted the City policy by building all segregated schools." To provide for tacit enforcement of the removal, property restrictions in the private sector "prohibited Blacks, and in some cases Mexican-Americans from buying or renting . . outside East Austin." (Austin Human Relations Commission 1979) Meanwhile, in order to entice the minorities to move into the East Austin barrio, Honorable U.S. Congressman Lyndon B. Johnson introduced a bill authorizing the U.S. Housing Authority to fund housing projects "enhance the value not only of the surrounding property but of all property in Austin." (U.S. Congress 1933) With the federal funds appropriated by Congressman Johnson, Austin boasted the "Nation's First Completed [Housing] Project" with three sites selected for "separate projects for white families, Mexican families, and negro families." By 1940 and 1950, Austin had become the most segregated major city in Texas based on Index of Dissimilarity. (Austin

1979, pp. 1-15; Austin Housing Authority 1948, p. 12) As the 20th century progressed, Austin segregation became even more pronounced. Even after WWII, when the returning veterans, Mexican American veterans included, the city continued forced segregation. Texas Land Commissioner Bascom Giles developed two housing sub-divisions in north Austin which he promoted as the Duplex Nation and the Wilshire Historic District near the Austin Mueller Airport. Giles developed the sub-divisions specifically for the returning WWII veterans, but he included "restrictive covenant which prohibited non-whites from owning or residing in the neighborhood." Thus, even returning Mexican American veterans were restricted to the same barrio and excluded from the modern housing provided for Anglo American residents of Austin. (Texas 2006, pp. 15 & 16)

Although segregated from the earliest days of the barrio, Austin's Mexican Americans apparently always voted, though in significantly smaller percentages than Anglo Americans or even European immigrants. The 1867 voter registration records of Travis County indicate the 128 Mexican Americans registered among the total 4,838 other voters, mostly Anglo American, but many listed as immigrants from Germany, Prussia, England, Bavaria, Africa, Ireland, some of these listed as "Naturalized." Mexican Americans voted in small numbers, but perhaps the [23] most deleterious effect was caused by the implementation of the poll tax. A case study of voting in 1933 Austin election illustrates the negative impact of the poll tax on Mexican American voting. Mexican Americans show significant decline in registration and even more decline in voting. Charts and tables in this study show less than 3% Mexican Americans voted after implementation of the poll tax.

Analysis also shows that at the same time, according to the report that "whites augment their strength . . solely at the expense of the Mexican element." (Martin 1933, p. 929) After the poll tax was repealed, Austin eligible voter numbers went up from 42,300 to 71,300. The 1967 election was first election since the repeal, and according to the newspaper reports, "The turnout was the biggest ever for a city election—32,892. . ," although it still reflected a low percentage of eligible voters of only 46%. (*Austin American-Statesman* 1967, p. A-15) Mexican Americans had begun to actively campaign for only-Anglo candidates with a Mexican American advertising in the newspaper promoting their Anglo candidate, but after repeal of the poll tax they began to run their own candidates like S.J. "Buddy" Ruiz, the first local Mexican American candidate for an Austin elected post. (*Austin American-Statesman* 1969)

In order to achieve the residential segregation, many other Texas cities used restrictive covenants and deed restrictions, specifically directed at the Mexican American population. In 1977, one study reported that "real estate covenants along racial and ethnic lines continue to have substantial effect on housing patterns" in Corpus Christi and San Antonio. In 1947, later Congressman Henry B. Gonzalez organized the Pan American Progressive Association (PAPA) to document restrictive housing in San Antonio. He reported restrictive covenants in home mortgages which effectively prohibited Mexican American moving into the more affluent neighborhoods of the city. Many other cities created a segregated Mexican American section or "barrio" using subtle tactics like smaller lot sizes, lower home costs, and square footage covenants. These patterns quickly established a pattern that racist practices would later enforce. In 1920, for example, the Lockhart school superintendent said "If a Mexican bought a lot among the whites they would burn him out." Many towns openly posted signs that read "No lots sold to Mexicans" and "No Mexicans admitted." The practice of segregation led to congestion and social problems such as infant mortality and disease. As an example, San Antonio, had the highest rate of tuberculosis in the U.S. in the 1930s. The denigration of the Mexican American as a second-class citizen in Texas eventually led to social practices and attitudes that were articulated and implemented socially. As an example, the distinguished lawyer and State Rep. [24] J.T. Canales was publicly refered to as the "greaser from Brownsville" in 1910 legislative session. Across the state, Mexican Americans were denied service in restaurants, swimming pools, barber shops, and in public. Even after World War II in 1946 two Mexican American veterans were refused service in Helotes, near San Antonio. The Anglo merchant stated that their veteran status had no effect on the discriminatory practice. Contemporary newspapers indicated that such treatment against Mexican American was common "throughout the entire state." (US Comsn. Civ. Rts., Unfinished, 185; San Miguel 1987, pp. 15, 68 115; Foley 1997, 42; Rosales 2000, 16)

Official Education Policy

Education is one of the most vulnerable areas of democratic life to racial discrimination not only because it is subject to local prejudices, but also because it tends to perpetuate the racial polarization. The political, economic, and social segregation in Texas during the 20th century had strong ramifications in education as well. Indeed, education was to a great extent the primary racial advantage in those other spheres of life. The destructive restrictions against Mexican Americans in Texas began shortly after the government was taken over by Anglo-American power. In 1841, the Republic of Texas Legislature passed a Joint Resolution that suspended printing laws in Spanish. Ironically, only three years later, it chartered a foreign-language German university. In 1856, a law was passed allowing Spanish in the courts of Texas only if the J.P. and the primary party could not speak English.

In an 1858 amendment to an 1856 school law, the state legislature made English the "Principle language" of instruction. It strengthened this in 1870 by requiring English for instruction in all public schools. In this racially divided social environment, Texas public education developed as an exclusive and segregated system at the state and local level. The principle of racial segregation was formally established in the Texas, Constitution of 1876, which stated in Article 7 § 7 that "Separate schools shall be provided . ." Many schools interpreted this to apply to the Mexican American as well as the Negro. Throughout the state, schools excluded Mexican Americans until the 1890s. (Taylor 1934, p. 192) When they did provide education for Mexican American students, many cities across Texas began to segregate their Mexican American students into separate schools called "Mexican Schools." Houston, San Antonio, and El Paso had "Mexican Schools" by the turn of the century. Mexican American attendance at these segregated schools became mandatory. By 1921, the school board in Alice [25] ordered that "all Latin Americans attend Nayer . . Anglo Saxons attend Hobbs-Strickland School." By the turn of century, Mexican American students were forced by school board policies to bypass neighboring

Anglo schools to attend Mexican American segregated schools. And many of these "Mexican Schools," offered schooling only to the 6th grade. (Garcia 1981, 110; Rangel 1972, pp. 315, 367)

By the 1920s, state officials began to issue statements of policy that singled out the Mexican American culture and students for special restrictions. One of these officials was Annie Webb Blanton, the state superintendent of public instruction. In the 1920s, she promoted a policy to make Texas schools teach "Americanization," which was a euphemism for Angloconformity. In opposition to the Mexican American culture, she proclaimed "if you wish to preserve, in our state, the language and the custom of another land, you have no right to this." In response to her policy, E.E. Davis and C.T. Gray conducted "A Study of Rural Schools in Karnes County," which they published in the University of Texas Bulletin #2246 in December, 1922. In the report they stated "In general, it should be stated that separate schools are preferable for both the Mexican and the Americans." Their reason was that Americans "do not like to go to school with the dirty 'greaser' type of Mexican child." (Davis 1916, pp. 9, 10, 41-43 pp. 9, 10, 41-43) This was followed by a report by George A. Works, Texas Education Survey Reports, under the auspices of the Texas Educational Survey Commission in 1925. In this statewide survey, Works stated that "it is time to segregate, if it is done on educational grounds. . ." (Works 1925, p. 213.) Thus segregation received endorsement not only from the Superintendent of Public Instruction and the state, but from University of Texas scholars as well.

School boards then began to follow a widespread practice of neglecting Mexican American student enrollment almost completely, condoned by

Superintendent Blanton. By 1920, 70% of Mexican American school-age children in Texas were not enrolled as opposed to only 22% of the Anglo non-enrolled students, although mandatory school attendance had been required by law since the 1880s in Texas. In a classic study of education in Texas, University of Texas Professor H.T. Manuel in 1928 found that 40% of the Mexican American students were not enrolled at state level as compared to 9% of the Anglo students. Manuel found only 4% of the Mexican American students were attending junior high and high school as opposed to 60% of the Anglo students. During this time period, many South Texas school officials and principals in Nueces County and Dimmit County reported that they simply did not enforce Mexican American student enrollment or attendance. (San Miguel 1987, pp. 6-7; 24, 32, 49; Garcia 1981, [26] 110; Rangel 1972, 315) Much of the educational neglect was due to excluding the Mexican American students, but much was due to segregation in the school district boundaries.

Segregated Districts

The "Mexican School" became a widespread phenomenon in Texas education. The various school districts segregated their Mexican American students, but they provided significantly poorer facilities for them. The "Mexican School" segregation spread rapidly across the state. In 1930, for example over 40 school districts had Mexican schools. A 1942 study by Wilson Little found 50% of the Mexican American students segregated through the 6th grade in 122 districts in "widely distributed and representative counties" of the state. Few Mexican American students went beyond the 6th grade. A typical example of the racial stratification in housing, labor, and education was seen in Cotulla, where future President Lyndon B. Johnson taught at the "Mexican School." In 1928, he taught in Welhausen Elementary School for Latin Americans. Across town, Amanda Burks Elementary was "limited to Anglo-Americans." In a typical stratification, 80% of the population was Mexican American, and barrio segregated. LBJ wrote about the racial situation, noting that his girlfriend in the neighboring town was in the Ku Klux Klan. By the 1940s, whole sections of the state had segregated "Mexican School" belts of towns, many of these developed specifically by the growers to isolate the Mexican Americans. In the Lower Valley, Edinburg, Harlingen, and San Benito school systems were segregated, while on Hwy. 83, Mercedes, McAllen, Mission, Pharr, San Juan, Alamo, and Weslaco districts were completely segregated. On the Gulf Coast in South Texas, Raymondville, Kingsville, Robstown, Kenedy, and Taft schools districts were segregated, while in the Winter Garden, Crystal City, Carrizo Springs, Asherton, and Frio Town were segregated towns with segregated schools. (Montejano 1987, 168; Pycior 1997, 14; San Miguel 1987, 56; Civil Rts. Study, 13)

In the larger cities, the school board policy was to segregate whole school districts, or to segregate the Mexican American students into predominantly Mexican American schools. In 1900 Rusk Elementary was established as Houston's first Mexican school. Later, the Houston school board built Lorenzo de Zavala, Hawthorne, Dow, Elysian Street, Jones, and Lubbock exclusively for Mexican Americans. These students were rarely encouraged to go beyond the 6th grade. By 1940, however, Mexican Americans began to enter high schools, when about 3% of the high school students were Mexican American. (San Miguel 2001, pp. 12, 32) A report for the school year 1942-43 reported that there were 260,759 “Latin” or Mexican American students [27] in Texas or 20% of the white. Much of the segregation was, of course, due to the initial segregation of the housing and “Mexican Towns,” but much of it was due to outright gerrymandering of the district boundaries within a city. A survey of superintendents revealed that “While many claimed that there was no segregation in their schools, some admitted that the drawing-up of district boundary lines was deliberately made to enclose areas predominantly Latin.” (Kuhr 1971, 73) In the study by Wilson Little, he stated that many superintendents surveyed were asked why they segregated their Latin students. He reported that, “In laying out the attendance areas within a given school district, therefore, it is not at all uncommon to find that one school is attended only by Spanish-speaking children and that another school in the same district is attended only by Anglo-American students.” As a result, he found that “Separate housing for Spanish-speaking children is a fixed practice in many school systems in Texas.” (Little 1994, 59)

After the 1920s, Mexican American students were put into “developmental” classes and vocational classes, ostensibly because they needed special attention. Unfortunately, students were mixed with a variety of other students who were blind, spoke Spanish-only, were delinquents, or were bright students who simply did not like school. The San Antonio schools were reported in 1934 to have similar segregation. In that year, Alonso Perales and Eleuterio Escobar founded the Liga Pro-Defensa Escolar or School Improvement League in San Antonio. In their study of Mexican American schools, they reported statistics comparing West Side Mexican schools to the Anglo schools. The Mexican American schools had 12,334 students compared to 12,224 Anglo students. But the Mexican American students were in only 11 schools compared to 28 Anglo schools. The Mexican American schools had 23 acres of space compared to 82 acres for the Anglo school grounds. The Mexican American schools had 48 students per room compared to 23 Anglo students per room. The school funding revealed similar contrast, as the school board spent $24.50 for each Mexican American student compared to $35.96 average spending per Anglo pupil. Similar discriminatory funding was revealed in Nueces and Dimmit Counties. In 1934, noted historian Paul S. Taylor interviewed a Nueces Co. superintendent, who openly admitted that 100% of the $18,000 property tax revenue "goes on the white school." (San Miguel 2001, pp. 12, 32; San Miguel 1987, 54; Garcia 1989, 66)

Gerrymandering of attendance zones within a district became widespread by the late 1940s. Charles Ray Akin wrote his Master's thesis at the University of Texas at Austin in 1955 on "A Study of School Boundaries in East Austin, Texas" under the distinguished education scholar George I. Sanchez. Aiken compared the "Mexican School" Zavala and the Anglo school [28] Metz in attendance. He stated that "there exists the possible basis for a charge of segregation, especially since Zavala is 100 per cent composed of Latins, although some Anglos live nearer here than to Metz where they attend; [and] 4) since Metz and Zavala are located within three blocks of each other. . ." (Aikin 1951, 28)

Later, in 1954, famed lawyer Gus Garcia led a group of Mexican American parents in a petition to Dr. J.W. Edgar, State Commissioner of Education on whether a "zone line" for the new Gillet Jr. High in Kingsville, Texas was legal. The line made the school

100% Mexican American in attendance. Although the Kingsville I.S.D. Supt. George W. Wier said "that the zoning boundaries were set up on the basis of student load and other factors" and that there was "no intention to segregate," Garcia argued otherwise. In a newspaper article, he stated that the line was "more crooked than a sick snake." [*"está mas chueca que una vívora enferma"*] In another article to the *Corpus Christi Caller*, Garcia accused the school of making the school "predominantly 'Mexican' either by virtue of gerrymandering or geographical location." (Garcia Papers, Mexican American Library, University of Texas at Austin)

One of the most salient characteristics in discrimination of Mexican Americans in Texas is the formal role played by government and school officials. There is ample evidence that the state "embraced" segregation as a formal concept in education of its Mexican American citizens. A Texas Education Agency survey in 1921 reported overcrowded Mexican American schools and half-day sessions for Mexican American students. The state agency made no comment or suggestion that the practice was inadequate. And throughout the first half of the 20th century, the state Attorney General systematically approved construction bonds submitted as required by the various independent school districts for his approval. The bond packages frequently called for construction of segregated "Mexican" Schools, but received customary approval with no mention or state sanctions for the segregated facilities. In 1920, Gov. Wm. P. Hobby called a special session to pass education laws, including a 1922 law to make English the "medium of instruction" in public schools. Following the lead of the governor and attorney general, the Texas State Teachers Association (TSTA) at their 1922 convention, passed a resolution opposing any but the English language in school. The state's teachers proclaimed that "Respect for our Flag should carry with respect for our Language and loyalty to it." And in 1925, the legislature passed a law specifying that schools "shall use the English language exclusively" in public education. With the formal policy equating English with loyalty, Texas schools began exclusively to teach Mexican American students hygiene, English, drawing, and music with the [29] assumption that they needed to be clean and divest themselves of their Spanish accent and "all things Mexican." (Rangel 1972, pp. 318-19; San Miguel, 1987 pp. 25, 35, 45)

Mexican American Challenge

As Mexican American parents and civic leaders began to pereive the official nature of discrimination in the mid-20th century, they initiated formal protests and legal challenges to the agencies and government. Limited in resources, the Mexican American challengers were also limited in their success to end discrimination, but they established a legal foundation for many advancements. The "first challenge" to segregated schools in Texas was in 1928 in Charlotte, Atascosa County. The parents of Amanda Vela protested to the school superintendent that she did not live in the predominantly Mexican American district, and she did not speak any Spanish; therefore, they wanted her to attend the Anglo school. The school board trustees resisted it, but the superintendent conceded that the Mexican Americans should not be segregated. The State School Board upheld the superintendent's decision to let her into the Anglo school, notwithstanding the trustee's resistance. The case revealed early on the consistent pattern of recalcitrance that local school officials would show toward integrated schools. This was evident in the school districts of Beeville, Sinton, Elgin, Bastrop, and Cotulla when attorney Gus Garcia told Atty. Gen. Price Daniel that Texas schools were using "a subterfuge to practice segregation" after the 1947 *Mendez v. Westminster* case. Gen. Daniel denied the subterfuge.

Then in 1948, Garcia filed a case against the Bastrop I.S.D., and the judge found that the district was illegally segregating the Mexican American students. In its decision, the court added a proviso, however, that segregation was acceptable in 1st grade "solely for instruction purposes." The Delgado "proviso" led to evasive tactics by many other school districts to segregate Mexican American students who had dubious need of segregation for instructional purposes. In 1957, the League of United Latin American Citizens (LULAC) sued Driscoll I.S.D., which was using the Delgado proviso to evade the court's ruling. In Driscoll, one little girl who was segregated for "instructional purposes" on the basis of language was found to be proficient only in English. Moreover, the school system had failed to provide any "instructional" programs for the segregated students. By the mid-1950s, other schools across the state used freedom of choice plans, selected student transfer and transportation plans, and classification systems based on language or scholastic ability to maintain segregation. These programs did not [30] enhance the education of Mexican Americans in any way, and served only to perpetuate and justify the segregation.

After the frustrating legal challenges met only with evasion and subterfuge, Mexican American civic leaders began a different approach to improving their schools. One classic example was the development of an early school program called the "Little School of

400." This pre-school program was funded personally by a Houston restauranteur, and president of LULAC, Felix Tijerina in 1955. The Texas legislature later adopted Little School of 400 as Texas Pre School Program, but by 1967, only 12% of eligible schools were offering it to their students. In 1967 through 1970, Mexican American students took the initiative from their parents and civic leaders to conduct their own walk-outs and demonstrations to protest insensitive curriculum and discriminatory practices in high schools and colleges. Mexican American students conducted school boycotts in Crystal City, Kingsville, and Edcouch-Elsa. In Kingsville, the police arrested 110 Mexican American students, and the boycotts yielded minor concessions from the school boards, but the actions brought public attention to the segregation and discrimination. Also, the boycotts spurred the federal government's Department of Health, Education, and Welfare (HEW) to take legal action against offending school districts. By 1972, HEW gained compliance in many South Texas towns like Bishop, Lyford, Los Fresnos, Beeville, and Weslaco, and it put Del Rio under court order for compliance. (San Miguel 1987, pp. 76, 120, 123, 134; Rangel 1972, 369)

Legacy

The legacy of 150 years of multi-faceted government-condoned discrimination against Mexican Americans in Texas is a state educational system that maintains a high drop out rate and is still characterized by widespread segregation. One of the vestiges of the years of "Mexican Schools" is the continued formation, construction, and maintenance of schools and school districts that are imbalanced compared to the number of Mexican American students in the community or district. Many Texas cities now have whole segregated districts that have replaced the old "Mexican Schools." In Nueces County, for example, a 1968 federal agency study found racially separated contiguous districts. The predominantly Mexican American school district in Robstown, which was established by Robert Kleberg as a segregated town for his Mexican American agricultural labor force, is adjoining the Callalen I.S.D., which is predominantly Anglo. In Val Verde County, the predominantly Mexican American San Felipe [31] I.S.D. adjoins the all-white Del Rio I.S.D., and in Bexar County, the predominantly Mexican American districts of Edgewood and Harlandale are adjoining Anglo districts in San Antonio. By the 1960s, 50% or more of Mexican American students in Texas were segregated. Worse, not only students but even Mexican American teachers were also segregated or neglected. In 1968, the Anglo/Mexican American teacher ratio was reported to be 17:1. Mexican American teachers comprised only 4.9% of the teachers in Texas. And in the Rio Grande Valley, where Mexican Americans comprised 64% of the student enrollment, only 7% of the teachers were Mexican American. Likewise, Mexican American principals comprised only 3.4% of Texas principals. These low statistics were found to be similar for Mexican American school board members and school administrative staff, with Mexican Americans overrepresented in the custodial staff numbers. The latest studies reveal that even in the 1990s, the percentage of Mexican American high school administrators was only 65% for schools that were over 90% Mexican American in enrollment. (Civil Rts. Study, pp. 21, 23, 30, 42; Richardson 1999, 132)

The social and academic vestiges of systematic discrimination and segregation of Mexican Americans also continue to yield statistics that place Texas in an unenviable position among other states. A 1977 report issued by the U.S. Commission on Civil Rights reported that 19% of the Mexican Americans over age 25 in Texas were illiterate. Mexican Americans had twice the Anglo unemployment rate, and 15% of them still lived in overcrowded housing with inadequate plumbing as compared to the Anglo 1.7%. A clear holdover to the Texas "Mexican town" was the 70% of Mexican Americans in Texas who still lived in barrios. In San Antonio, for example, a 1980 study concluded that the limited residential access of middle-class Mexican Americans to the three affluent northern census tracts tended also to limit their educational access. (US Comsn. Civ. Rts., Unfinished, 184; Rosales 2001, 12) In 1981, Judge William Wayne Justice found the state bilingual plan inadequate, and that measures had not been taken to fully "remove the disabling vestiges of past *de jure* discrimination." He ordered corrections to train teachers, identify students in Limited English Proficiency (LEP), and to expand the program. And in 1980, the Southwest Voter Registration and Education Project (SVREP) found that Mexican Americans were underrepresented on school boards in 92% of the 361 Texas school districts where Mexican Americans make up over 20% of the school population. In many other comparisons, Texas educational statistics show evidence of past discrimination. A nationally publicized report in 1984 by the National Commission on Secondary Schooling reported that in Texas, the majority of Mexican American students are still in "inferior and [32] highly segregated schools." They are "extremely overage" and "disproportionally enrolled in remedial English classes." Texas Mexican American students still have an unacceptably "high dropout" rate, and receive poor preparation for college. Reduced Mexican American voter participation has also reflected the past discriminatory devices in Texas. Until the 1980s, 179 of the 214 large cities in Texas had at-large electoral systems, or 83%. In general, the at-large nonpartisan electoral system combined with the poll tax and other obstacles to hinder voter participation of Mexican Americans throughout most the twentieth century. (San Miguel 1987, pp. xv, 201; Montejano 1987, 292; Rosales, 2000, 13; U.S. Commission on Civil Rights, Texas, 47)

As a result of the historical discrimination against Mexican Americans in Texas, they still bear the effects of this discrimination which hinders their ability to participate effectively in the political process. It is clear that the lower rates of voter registration, voting, [33] and running for elective office are directly related to this discrimination.

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EXHIBIT TWO

Expert Report of Dr. F. Arturo Rosales
Gonzalez v. Arizona,
No. 06-CV-01268-ROS (D. Ariz. Dec. 5, 2007)

[1] Report of Dr. F. Arturo Rosales

This report outlines the history of Mexican origin people in the State of Arizona, one which has been characterized by racial and ethnic repression. My academic background provides me with the expertise to conduct the research for this project and to write the following report. I should add that while much of my experience which qualifies me to write this report has national and even international breadth, I have always included the experience of Mexican people in Arizona in my studies.

My present academic position is professor of history at Arizona State University (ASU). I received a Ph.D. from Indiana University in 1978, an M.A. from Stanford University in 1972 and in 1969, I earned a B.A. at Arizona State University. Before returning to ASU in 1980, I was an assistant professor at the University of Houston. My publications and research experience on the experience of Mexicans and Mexican Americans in the United States has been extensive ever since writing a dissertation in 1977 on Mexican immigration to the Chicago area and the emergence of Mexican *colonias* in that city. Since then I have published seven books. While at the University of Houston, I co-edited with Barry J. Kaplan *Houston: A Twentieth Century Urban Frontier* (Port Washington: Associated Faculty Press, 1983), a book which contains a large section on the experience of the city's Mexican population. During 1981-82, as executive director of the NEH funded Association of Southwestern Humanities Councils, I co-edited with David Foster and contributed to *Hispanics and the Humanities and the Southwest* (Tempe: Center for Latin American Studies, Arizona State University, 1984) a directory of humanities resources dealing with Hispanics in the Southwest. In April of 1996, my book *Chicano! The History of the Mexican American Civil Rights Movement* (Houston: Arte Publico Press, 1996) a companion text to a Public Broadcasting System television series of the same name, was named in 1997 an Outstanding Book on Human Rights in North America by the Gustavus Myers Foundation. In addition, after seven years of researching Mexico City and Washington, D.C. archives and writing, I published *"Pobre_Raza!": Violence, , Justice and Mobilization Among Mexico Lindo Immigrants, 1890-1936* (Austin, University of Texas Press, 1999) a book that analyzes the justice system and Mexican immigrants at the beginning of this century. Since then Arte Publico Press has published two more of my works; *Testimonio: A Documentary History of the Mexican American Struggle for Civil Rights* in 2000, and [2] in 2006, *A Dictionary of Latino Civil Rights History*. I am now working on a new book, tentatively titled "Entering Mexico: Repatriates, Tourists, Unwanted Immigrants and Colonization Pipe Dreams, 1920-1940." My publication record also includes 30 journal articles and essays, 20 book reviews, 5 book chapters and over 20 entries in history encyclopedias and dictionaries.

My extensive public and academic service also equips me to provide this report. I have been director of many public programs funded by the Arizona Humanities Council and served as a participant or organizer in numerous others. I have presented in public fora throughout Arizona for ten years as a speaker for the Humanities on the Road project, a program funded by the Arizona Humanities Council. I have also worked as a consultant for numerous National Endowment for the Humanities funded projects through their Public Programs Division, which deal with historical exhibitions in museums, libraries, and public schools. Presently I am on the advisory committees for the "Reality Works" radio project, called "Race and Reconciliation," and on the "American Lynching: A Documentary Feature" project. My curriculum vita is attached as Exhibit 1 to this report.

[3] THE REPORT

This report will view the discrimination history of United States residents of Mexican descent in Arizona. This includes native born citizens, naturalized citizens, legal resident immigrants and undocumented immigrants. The study delineates five areas of discrimination and violations of civil rights.

- **LAND AND PROPERTY RIGHTS**
- **POLITICAL DISENFRANCHISEMENT**
- **THE JUSTICE SYSTEM AND POLICE RELATIONS**
- **CIVILIAN MISTREATMENT OF MEXICANS**
- **GENERAL SEGREGATION**
- **SCHOOL SEGREGATION**
- **DISCRIMINATION IN THE WORKPLACE**
    AGRICULTURE
    MINING

HISTORICAL BACKGROUND

Today approximately 1,600,000 Hispanics live in the state of Arizona out of a total population of six million-over 90 percent of this Hispanic grouping is of Mexican descent. The population grew to this proportion because of vegetative demographic growth and in-migration during the late 20th century. The dramatic increase in the Hispanic population simply reflects the overall growth trend of the state, which in the beginning of the 20th century consisted of population of only 150,000 persons; of that, approximately 12 percent were ethnically Mexican.[87]

Arizona was part of the vast area ceded to the United States by Mexico after that nation lost the Mexican American War. The Treaty of Guadalupe Hidalgo, signed at the end of the war, granted [4] Mexicans who remained in United States territory the constitutional rights of citizens and ostensibly protected their property, culture and religion, and gave them the right to vote. The territorial acquisition delineated in the Treaty of Guadalupe HidaJgo did not include the area that is now southern Arizona and southwestern New Mexico, a region extending from present-day Yuma along the Gila River (25 miles south of Phoenix) all the way to the Mesilla Valley, where Las Cruces, New Mexico is situated. Under pressure from the Americans, General Antonio L6pez de Santa Anna sold this region to the United States during his return to power in 1853. The Gadsden Treaty perimeters gave Mexicans in the purchased territory the same rights provided by Treaty of Guadalupe Hidalgo.[88] The majority (1,000) of Mexicans lived in the section of the agreement which pertains geographically to Arizona in region in the valleys carved out by the Santa Cruz and the San Pedro Rivers.

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[87] US Census Bureau, "State & County QuickFacts," Available at http://quickfacts.census.gov/qfd/states/04000.html; "Population of Arizona," *New York Times*, October 19, 1900, p. 5.

LAND AND PROPERTY RIGHTS

While the Treaty of Guadalupe Hidalgo granted constitutional rights to Mexicans who remained in the new political jurisdiction of the United States, most of the guarantees were not upheld. As a result, the economic and political fortunes of Southwest Mexicans declined considerably during their experience with United States rule. Provisions in the Treaty of Guadalupe Hidalgo regarding land holdings safeguarded Hispanic properties, but Southwest land values rose as the Anglo population increased and as the area became more economically developed. Inevitably, intense land competition followed and Mexican property was coveted by developers and Anglo farmers. Thus, divesting Mexicans of their property assumed wholesale proportions throughout the 19th century.[89]

Even though all Mexican properties in the Gadsden Purchase were purportedly protected by the same promises made regarding the protection of Mexican properties in the Treaty of Guadalupe Hidalgo, the Gadsden Treaty made it more difficult to confirm titles by stipulating that they would be [5] valid only if confirming evidence was found in Mexican archives.[90] M. Escalante, the Mexican consul in Tucson in 1878 wrote to the Mexican foreign minister accusing Arizona land speculators and squatters of defrauding Mexican landowners of their property in clear violation of land protection clauses of the Treaty of Guadalupe Hidalgo and the Gadsden Purchase Treaty. According to Escalante, in 1854 the u.s. Congress gave the General Surveyor ofthe Territory of New Mexico and Arizona the power to resolve land disputes involving Mexican titles, but in the twenty four years of the existence of that policy Mexicans in Arizona lost thousands of acres because titles which had been granted during the eras of Spanish or Mexican rule were not honored.[91]

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[88] James E. Officer, *Hispanic Arizona*, 1536-1858, (Tucson: University of Arizona Press, 1989), p. 133.

[89] See Suzanne Forrest, *The Preservation o/the Village: New Mexico's Hispanics and the New Deal* (Albuquerque: University of New Mexico Press, 1989) and David J. Weber, *Foreigners in Their Native Land; Historical Roots o/the Mexican Americans* (Albuquerque: University of New Mexico Press, 1973) for an excellent description of the this process.

The federal government also became in involved in the usurpation of Mexicans' land. In 1869, preparations were made to expand the Gila Indian Reservation and the federal government surveyed the properties of homesteaders so they could be compensated if their claims to the land were valid. United States Army surveyors believed that 2,500 acres belonging to twenty farmers and speculators were affected; seventeen of the claimants were Mexicans. The federal report described many of the Mexicans as interlopers whose bids were not legitimate because they were opportunistically claiming land for its compensation value. The Anglos and Europeans, however, were portrayed by the surveyors as more deserving.[92] As a result most of the Mexican claimants were disqualified from compensation.

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[90] Ray H. Mattison, "Early Spanish and Mexican Settlements in Arizona," *New Mexico Historical Review* 21, no. 4 (October 1946): 290.

[91] M. Escalante, Mexican Consul in Tucson, Arizona, to Mexican Sectetary ofthe Foreign Ministry, August 6, 1878, Archivo Hist6rico de la Secteraria de Relaciones Exteriores (AHSRE) 11-2-106, in Angela Moyano Pahissa (ed.) *Proteccion Consular a Mexicanos en los Estados Unidos* (Mexico: Secretaria de Relaciones Exteriores, 1989), pp. 28-30.

The declining status of Arizona Mexicans was also signaled by rapid land loss among Valley of the Sun (Phoenix area) Mexican farmers. This was especially true during the depression caused by the Panic of 1873, a banking crisis which resulted in riots throughout the country and in which [6] Mexicans were forced to leave the Phoenix area after a rash of lynching of Mexicans took place.[93] Between 1870 and 1900 the number of Mexican farmers in Maricopa County declined from seventy-nine to about thirty, even though the Mexican population increased twelve-fold during the three decades.

The most dramatic example of Mexican land loss was the take-over of large tracts of irrigated properties in west Tempe by W. Wormser in the 1890s. Wormser, a merchant, obtained a 7,000 acre farm south of the Salt River by foreclosing on a number of farmers after they could not pay for seed, tools, and other supplies that were advanced at an earlier date. Many of these usurped farmers were the Mexicans who built the San Francisco Canal, a major infrastructure improvement along the Salt River.[94] According to Douglas Kupel, the City of Phoenix water historian, Wormser purposely foreclosed so that he could take the title to Mexican lands.[95]

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[92] United States. House of Representatives, 41 st Congress, 3d Session, *Survey of Pima and Maricopa Reservation*, pp 1-17.

[93] Nancy Cohen, *Reconstruction of American Liberalism*, 1865-1914 (Chapel Hill: University of North Carolina Press, 2002), pp. 122-124; Bradford Luckingham, *Minorities in Phoenix: A Profile of Mexican American, Chinese American, and African American Communities, 1860-1992* (Tucson: University of Arizona Press, 1994), p. 18.

POLITICAL DISENFRANCHISEMENT

In Arizona, which was part of the New Mexican territory until 1863, Mexicans experienced a dilution of political and economic power as more Anglos moved into an industrializing Arizona.[96] This was especially true in the southern part of the territory, around Tucson, the area purchased with the Gadsden Treaty in 1853. Tucson became the territorial capital after Arizona separated from New Mexico in 1863, but Anglos soon moved it to Prescott because of the political power held by Mexicans in southern Arizona.[97] According to the study by the sociologist Martha Mencheca, [7] Arizona legislators adopted for their new territorial constitution codes taken from California's state charter which restricted citizenship and electoral eligibility requirements allowing only white males and white Mexican males, a vast minority, to vote. This measure disqualified

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[94] Charles Goldman v. Pedro Sotelo, *Arizona Reports*, Vol. 8 (1901- 1904),114;

[95] 9Interview by Author with Douglas Kupel, History Consultant, 1992.

[96] The effort for separation from the Mexico territory was itself motivated by the desire not to be dominated by New Mexico which had a very large Mexican population. See B. Sacks, "The Creation of Arizona Territory," *Arizona and the West* 5, no. I (Spring 1963): 48-49.

[97] Weber, David J. *Foreigners in Their Native Land; Historical Roots of the Mexican Americans*, (Albuquerque: University of New Mexico Press, 1973), p. 144.

American Indians, mestizos,[98] and Mexican Indians from the electoral process. In 1877, legislators passed additional laws in which non-whites were disqualified from voting on the basis of race, from serving as justices of the peace and from practicing law; only white males were allowed to enter those professions.[99]

Beginning in the 1880s, the building of railroad transportation to the American Southwest and northern Mexico drastically reduced the need for Southwest pre-industrial crafts and beast-powered merchant transportation, activities where Mexicans predominated. In addition, irrigation projects financed through the N ewlands Reclamation Act of 1903 expanded the acreage which could be put under cultivation. These innovations dramatically changed the economies of Arizona, greatly stimulating the immigration of Mexican laborers. At the same time, modernization brought in a new influx of Anglos, who did not need to cooperate with Mexicans.[100] As a consequence of this demographic change, the antipathy Anglo Americans felt toward Mexicans was exacerbated, increasing the incidence of discrimination and the resistance to provide them political influence and opportunity.

Prescott in northern Arizona became the territory's new capital, purposely away from Mexicans, and as Phoenix became more important, that city became the capital.[101] The historian Manuel Servin points out that:

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[98] *mestizo* (mixed Indian and Spaniard)

[99] Martha Menchaca, "Chicano Indianism: A Historical Account of Racial Repression in the United States," *American Ethnologist*, Vol. 20, No.3. (Aug., 1993), pp. 583-603.

[100] Luckingham, *The Urban Southwest: A Profile History of Albuquerque-El PasoPhoenix- Tucson* (El Paso: Texas Western Press, 1982), p. 19.

> ... between 1865 and 1909 the Mexican-American population of the territory was represented by Francisco Le6n (1865 and 1871), Esteban Ochoa (1868, 1871, and 1877), Jesus Elias (1868 and 1875), Juan Elias (1871 and 1873), Ramón Romano (1871), Jose Maria Redondo (1873,1875, and 177), M. G. Samaniego (1877,1881,1891, and 1895), N. Gonzalez (1899 and 1903), and Alfred Ruiz (1905). Thus it is patent that as far as pre-state Arizona was [8] concerned Mexican-American representation and participation in the governmental administration of the territory greatly diminished after 1877."[102]

According to Eric V. Meeks, a historian at Northern Arizona University, by the latter 1870s Mexican political influence began to wane. In the first Legislative Assembly of Arizona after it became an Independent territory from New Mexico, two out of the nine council members were Mexican Americans. By 1885, only one Mexican had been elected to the State Legislature.[103]

As Arizona modernized, territorial leaders felt that statehood was necessary for continued growth and prosperity. The question of statehood dragged on in both the Arizona and New Mexico territories throughout much of the late 19th century. The U.S. Congress for a number of reasons remained cool to the idea but in the early 20th century it considered accepting a bid in which both territories would enter the Union as one state. Arizona politicians resisted such an overture primarily because of the extensive Hispanic influence in New Mexico. One congressman who opposed joint statehood with New Mexico stated: "Can Arizona as a single state control it better by itself, or shall we join the Mexican greasers [of New Mexico] to Arizona and let them control it?"[104] According to the Arizona historian H.A. Hubbard, a form of anti-Hispanic sentiment formed in the territory during this period as rumors spread that:

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[101] Weber, *Foreigners in Their Native Land,* p. 144.

[102] Manuel Servin, "The Role of Mexican-Americans in the Development of Early Arizona," in *AnA wakened Minority: The Mexican-Americans,* 2nd ed., Manuel Servin. Editor (Beverly Hills: Glencoe Press, 1974), p. 30.

[103] Eric V. Meeks "Border Citizens: Race, Labor, and Identity in South-Central Arizona, 1910-1965," (Ph.D. Dissertation: The University of Texas, 2001), pp. 52-53.

> [9] .... jointure would mean that in Arizona no schools could be conducted in English. Groups of Anglo-Saxon school children in Arizona with appropriate placards paraded the streets in mute and pathetic appeal against the impending outrage. Then there were the courts. In New Mexico the courts were held in Spanish. To Arizonans jointure was interpreted to mean that, when their territory became a state joined with New Mexico, no case would be tried except before a Spanish-speaking judge.[105]

James H. McClintock, the journalist and high ranking Arizona government official, proudly proclaimed in a *Los Angeles Times* opinion piece in 1906 that one of the assets possessed by Arizona making it deserving of separate recognition was the relatively small Hispanic population As he put it

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[104] Weber, *Foreigners in Their Native Land*, p. 145.

[105] H. A. Hubbard, "Arizona's Struggle against Joint Statehood," *The Pacific Historical Review*, Vol. 11, No.4. (Dec., 1942), p. 421.

".... only 12 percent of Arizona's population is Mexican or Spanish in surname."[106]

Dr. Eric Meeks notes that after Arizona attained statehood in 1912, Anglos waged an anti-immigrant campaign which "was characterized by increasingly racist rhetoric and a series of proposals that would restrict Mexican immigrants' political rights and the right to work in Arizona."[107] In 1912, the new state constitution restricted non-citizens from working on public projects. Then in 1914, the legislature enacted the "eighty per-cent law" in which eighty percent of the employees in businesses that had five or more employees had to be "native-born citizens of the United States." After a U.S. District Court declared the law unconstitutional, the Arizona legislature passed the Claypool-Kinney bill, an act which prohibited the employment of non-English speakers in the state's mining industry. According to Professor Meeks, this was a deliberate attempt to circumvent the court decision which declared the "eighty per-cent law" unlawful.[108]

In addition, after Arizona became a state, access to the ballot box for Mexican Americans became even more limited as antipathy to all people of Mexican origin grew and immigration increased during the first two decades of the 20th century. A coalition of craft unions, small farmers and merchants led by the governor of the state, George Hunt, launched an anti-immigrant [10] campaign characterized by a proposal that restricted Mexican Americans' political rights and the right to work in Arizona. Arizona voters passed a literacy law in 1909 that disqualified non-English speakers from voting in state elections.[109] The act specifically singled out Mexicans:

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[106] "Arizona," *Los Angeles Times*, August 19, 1906, VII6.

[107] Meeks "Border Citizens: Race," p. 52.

[108] Ibid., p. 88.

> .... every citizen of the United States and every citizen of Mexico who shall have elected to become a citizen of the United States ... who, not being prevented by physical disability from so doing, is able to read the Constitution of the United States in the English language in such a manner as to show he is neither prompted nor reciting from memory, and to write his name, shall be deemed to be an elector ofthe state of Arizona.[110]

Mexican Americans in Arizona recognized very early in the 20th century that obstacles to full participation in the political process remained and subsequently started community organizations, such as the Latin American Clubs of Arizona, Inc., as a response.[111]

Their campaigns ran into many obstacles, however. The limitations of voter registration as a strategy for political empowerment, for example, can be seen in a South Tucson campaign in the mid-1930s. There, the majority of the residents were Mexican or Mexican American, yet local property-holders and entrepreneurs were mainly non-Mexicans. The latter group led a campaign to incorporate South Tucson as an independent municipality to avoid annexation by the City of Tucson, which would have meant higher property taxes and licensing fees. Once incorporated, the Pima County Board of Supervisors appointed five white property-holders to serve as the new town's city council, but Mexican residents, with help from the Latin American Club, organized a voter registration campaign with the goal of electing a majority Mexican Americans city council in South Tucson's first election, held in April of 1937. Despite these efforts, only one Mexican American was elected to the council. As Eric Meeks points out, "... the literacy test requirement, combined with a local requirement of property ownership, excluded many Mexican Americans from voting in the [11] election."[112]

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[109] Ibid., p. 87.

[110] Quoted in Luckingham, *Minorities in Phoenix*, pp. 48-49.

[111] F. Arturo Rosales, *A Dictionary of Latino Civil Rights History* (Houston: Arte Publico Press, 2006), p. 179.

Voting restrictions against Mexican Americans in Arizona continued throughout the 20th century. Literacy requirements and a sixth grade education were still preconditions to voter registration in Arizona as late as 1966 and remained on the books until 1972.[113] Also in 1966, elaborate residency requirements for voter registration—such as having to live one year in the state, six months in the same city, and thirty days in the same precinct and county—confused many potential voters, including Mexican Americans.[114] In addition, potential voters were required to register at the county recorder's office, which was only open during business hours, limiting access for many working people.[115]

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[112] Meeks "Border Citizens," pp. 267-268

[113] "Secretary of State," Aizona Election Code, 1966," *Constitution of the State of Arizona,* (Compiled and Issued By Secretary of Sate, 1977), p. 29.

[114] United States Commission on Civil Rights, *Rights Act, Unfulfilled Goal* Washington, DC. September, 1981. Available at *http://www*.law.umaryland.edulmarshall/usccr*idocumentslcr*12 v944a. pdf

[115] Susan Lennox, "Blame It on the Whether: Whether or Not Arizona Residents Registered and Voted in the 1960s, Arizona

Also, many Arizona voters were prevented from casting ballots to vote because they were purged from the rolls. This occurred when the voter failed to cast a ballot in a primary and a general election or if the voter did not vote in two consecutive elections. Voters were not subsequently informed of the purge or of the need to re-register. Research has shown these practices can have a disproportionate effect on Hispanics and Native Americans voters.[116]

In 1970, Arizona Congressman Morris K. Udall, writing in the publication *Congressman's Report,* addressed discriminatory practices in the Arizona election system and acknowledged "the unfortunate emphasis on 'reading the constitution in English,' which has often been used to intimidate our Spanish-speaking and Indian minorities."[117]

[12] Intimidation of Mexican American voters can also be seen in Operation "Eagle Eye," a project in 1964 designed to challenge the legality of a voter's registration at the polling site. One method used by the operation was to mail letters to all registered voters in South Phoenix, a majority Hispanic and African American area, using the addresses from voter registration records. Returned letters were then taken to the corresponding polling place on the date of the election; as voters stood in line waiting to vote they were challenged on the grounds that they did not live at the address listed in the voter rolls,

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and the Voting Rights Act of 1965," paper given at the Arizona History Convention, Safford, Arizona, April 23, 2004.

[116] Ibid.

[117] Morris K. Udall, "Our Really Silent Majority," *Congressman:S Report* July 23, 1970 Vol. IX, No.2. Available at http://www.library.arizona.edulexhibits/udall/congrept/91st1700n3.html

voiding their registration.[118] The challengers would also approach Mexican Americans to determine if they could competently read the U.S. Constitution. One poll watcher remembers that these tactics caused lines at polling places to back up, prompting many waiting in line to leave.[119]

In a study on Arizona politics, the political historian David Berman indicates that "Anglos sometimes challenged minorities at the polls and asked them to read and explain "literacy" cards. Intimidators hoped to discourage minorities from standing in line to vote."[120] Many of these abuses were curtailed when the United States Congress extended the special remedies of the Voting Rights Act of 1965 to Arizona in 1975.[121]

Arizona's slow progress to accommodate Spanish speaking voters continued to create [13] problems for potential Mexican American voters in Arizona. The

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[118] Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression-or Both? A Report to the Center for Voting Rights & Protection," (September 2004), pp. 17, 21. Available at http://www.votelaw.comlblog/blogdocs/ GOP_Ballot_Security _Programs. pdf

[119] Brian Bork, "Perspective," *Calvin College Chimes.* Available at http://www-stu.calvin.edulchimesI2001.04.27Iperspectives/ story02.shtml; Dennis Rodd, "Just Our Bill," *Pittsburgh Post-Gazette* December 2, 2000.

[120] David R. Berman, *Arizona Politics & Government: The Quest for Autonomy, Democracy, and Development* (Lincoln: University of Nebraska Press, 1998), pp. 48-49.

[121] Mexican American Legal Defense and Education Fund, *A Voting Rights Act Handbook For Chicanos,* (San Francisco: Mexican American Legal Defense and Educational Fund, 1977) pp. 5, 8-9.

U.S. Commission on Civil Rights noted that in November 1974, south Phoenix polling sites revealed few, if any, bilingual workers at polls and only one bilingual election for eight heavily Mexican American precincts.[122] In the same election year a poll worker refused a Tucson voter a ballot because he could not find her name on the rolls. Determined to cast her ballot, the rejected voter went to the court house to get proof of her registration. The Commission explained that the poll worker's inability to understand Spanish or even the ability to find Spanish surnames was not an uncommon in the Mexican American precincts.[123] For example, many Mexican American women use the surname of both parents and then their married surname.[124] Hispanic voters whose names could not be found on rolls were often not informed of how to remedy the situation to successfully cast their ballots.[125]

Arizona voting practices affecting Mexican Americans were not limited to registration and the polling place. For example, in the 1960's the State Legislature's reapportionment of districts worked to dilute the Mexican American vote. As discussed in the federal court case *Klahr* vs *Goddard and Bolin*, rural districts had far more representatives and senators than the two major metropolitan areas of Tucson and Phoenix, which had 71 percent of the state's population. However, as new districts were created to correct this imbalance, the voting strength of Mexican American districts was curtailed, especially in the Phoenix area. Most Mexican Americans resided in south Phoenix, but through gerrymandering the strength of the community's votes was [14] weakened or diluted.[126] An additional example of dilution is the 1970 Phoenix Union High School District Board election where Joe Eddie Lopez was a candidate from south Phoenix. He did not win a seat and felt the district's white majority made it impossible for a Mexican American to win in the at-large election.[127]

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[122] *The Voting Rights Act Ten Years After, A Report to the United States Commission of Civil Rights* (January 1975), pp.116-117, 110-111, 85, 93-94. Available at .http://www.law.umaryland.edu/marshall/usccr/documents/cr12v943a.pdf.

[123] Ibid. P 103.

[124] Elaine Baca-Rodriquez, "The Impact of the National Voter Registration Act of 1993 in Arizona," (Ph.D. Dissertation, Northern Arizona University, 2002), p. 126

[125] *The Voting Right Act: Unfilled Goals: A Report of the United States Commission on Civil Rights* (September 1981). Available at http://www.law.umaryland.edu/marshalllusccr/documents/cr12v944a.pdf

THE JUSTICE SYSTEM AND POLICE RELATIONS

Almost as soon as Mexicans encountered Anglos in Arizona during the 19th century their experience with the American justice system was marked by discrimination. Few Mexicans, for instance, served on juries but they were disproportionately sentenced to jail and given longer sentences than their Anglo counterparts. There is record of Mexicans hung by Anglo lynch mobs without the benefit of a trial or representation.[128] A particularly vicious episode occurred in 1859 when Santa Cruz Valley rancher John Ware was murdered and the constabulary arrested one of his Mexican "peons." Local cowboy Sam Rogers and his gang, known for their cruel treatment Mexicans, kidnapped the imprisoned Mexican and hung him from a tree.[129]

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[126] J. L. Polinard, "Arizona," in Leroy Hardy, Alan Heslop, Stuart Anderson, editors, *Reapportionment Politics,' the History of Redistricting in the 50 States* (Beverly Hills, Calif. : Sage Publications, 1981), pp. 36-44.

[127] Ibid.

[128] See Menchaca, "Chicano Indianism" for a discussion of how Mestizo Mexicans in Arizona were classified as non-white and

One newspaper writer in 1872 declared, "The Indian is now a nuisance and the Sonoran[130] a decided annoyance, but both of these are sure to disappear before civilization as sure as the noonday sun." In the Phoenix area, the slightest hint of Mexican wrongdoing was met with [15] severe reprisals.[131] At a mass meeting in Phoenix on April 19, 1872, citizens organized for protection against "Sonorans" and elected County SheriffT.C. Warden as Captain of the Safety Committee. Members of the group decided that all suspicious Mexicans deemed not to have legitimate business in the Valley were to be run out of town.[132] While on the surface it seemed

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not allowed to participate in such public activities as voting or jury duty, pp. 588-589; Rosales, *¡Pobre Raza!*, p. 140; Antonio Rios Bustamante,. "Guilty as Hell, Copper Mines, Mexican Miners and Community, 1920-1950: The Spatial and Social Consequences of Mining Town Industry in Arizona." (Chicano Collection, Hayden Library, Arizona State University, n.d.), 44-45.

[129] Rosales *Chicano! A History of the Mexican American Civil Rights Movement* (Houston: Arte Publico Press, 1996), 11-12.

[130] A Sonoran is the name given to Mexicans born in the Mexican state of Sonora which were the majority of immigrants in Arizona during the second half of the 19th century,

[131] Cohen, *Reconstruction of American Liberalism,* 1865-1914 pp. 122-124; Luckingham, *Minorities in Phoenix,* p. 18.

[132] *Arizona Weekly Miner,* November 16, 1872; Arizona newspapers are replete with stories of this warfare which was interpreted as simple banditry by Mexicans from Sonora; See

that a distinction was made between "good" and "bad" Mexicans, according to Pedro Perez an immigrant interviewed in the the 1930s, the vigilantes were indiscriminate in deciding which ones were unwelcome strangers:

> From 1875 to 1880 a lot of people were hanged for small steals [sic] of any kind and a lot of them were framed in horse stealing, cattle .... When this was happening most of the early Mexican families besides ours, that were residing here left town and for awhile [sic] it looked like the future of the town was done for, but after quite a while the people began to come back.[133]

If a Mexican American committed a crime against Anglo Americans in Arizona, the response was predicable. When, during a drunken melee in Phoenix, amid the *Dia de San Juan* festival on June 24, 1900, Mexicans killed two Anglos, Governor Murphy condemned the Mexican celebration and the *Arizona Republican* announced that Sheriff D.L. Murray offered an eight hundred-dollar reward for the "Mexican greaser" killers. Publishers of the local Spanish language newspaper called for a meeting of all Mexicans in the area to protest the reaction of the government officials. Later that year, the state legislature banned future celebrations of the Mexican holiday.[134]

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also Rosales, "Lost Land" Origins of Mexicans in the Salt River Valley Of Arizona, 1865-1910," p.20.

[133] "Related Story of Pedro Perez, 1933," Federal Writers Project File, Arizona Department of Library, Archives and Public Records.

[134] L. A. Navarro, Phoenix consul to Secretaria de Relacionies Exterriores (SRE), June 30, 1900, AHSRE, 12-7-238.

[16] Tensions between Mexicans and law enforcement ran high when encounters with police resulted in death. In 1920 the Mexican Consul sent in a report of Mexicans killed in altercations with the police. According to this study between 1910 and 1920 at least twelve Mexicans were killed in arrest attempts and according to the Consul, most ofthese police homicides could have been averted.[135] John Welch, a half Mexican, and longtime police chief in the archetypical mining town of Miami, had an especially fearsome reputation. In December 1931, Mexican Consul Luis Castro lamented that a Cochise County grand jury acquitted the officer after he shot to death Martin Lopez y de la Torre.

The disproportionate application of capital punishment to Mexicans was a great concern at the beginning of the 19th century. In the 1910s, every person executed at the new state prison at Florence was Hispanic, even though several Anglo Americans had received death sentences. During a two-year capital punishment respite, seventy-nine killings took place in contrast to forty-seven in 1915-16. Arizona voters, motivated by this dramatic rise in murders, reinstated capital punishment in November 1918. Of nineteen killers convicted during the grace period, only four were Mexicans. Nonetheless, with the reinstatement of the death penalty the first person executed was a Mexican.[136]

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[135] Report of Mexicans Killed Between 1911-1919, Compiled by the EI Paso Consulate, Juan Jose Duarte, May 19, 1919, Archivo Historico de la Secretaria de Relaciones Exteriores (AHSRE)11119/24, hereafter known as "Report" (with victim's name and date incident took place).

[136] Thomas E. Sheridan, *Los Tucsonenses: The Mexican Community in Tucson, 1854-1941*. Tucson: University of Arizona Press, 1986), p. 174.

[17] Mexicans often complained about interrogation tactics employed by the police with Mexican detainees. Questionable interrogation tactics of Mexicans occurred in the mining town of Greaterville, Arizona, during April 1915. Pima County Deputies Fenter and Moore visited the Leon family home to interrogate three brothers—Jose Maria, Francisco, and Hilario—whom they suspected had killed a Mrs. Loreta Yanez and stolen her cattle. The brothers vehemently denied the accusations so the deputies tried to coerce a confession—by hanging them until the brothers passed out. Hilario died immediately. Jose Maria was left out in the desert for twenty-one hours and when found was taken to his Greaterville home until a doctor could be summoned. Francisco, not as incapacitated, managed to find his way home. Sheriff Thomas Forbes in Tucson assured incensed Mexican community leaders he would conduct a full investigation. The area newspaper reported that Jose Maria died a week later :from meningitis caused by oxygen starvation.[137]

Widespread publicity of the brutality resulted in a trial in which the deputies were found guilty of second degree murder and sentenced to prison. The swift action which at first pleased the Arizona Mexican community, ended in bitter disappointment. On February 13, 1917, the Arizona governor and the Board of Pardons and Paroles pardoned and released the former deputies.[138]

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[137] This story is detailed in a series of articles *in El Tucsonense* April 9, 28, 30,1915, May 1,1915. See also *Los Angeles Times* April 23, 1915.

[138] Rosales, *¡Pobre Raza!, Violence,: Justice and Mobilization Among Mexico Lindo Immigrants, 1890-1936* (Austin, University of Texas Press, 1999), pp. 85-86.

CIVILIAN MISTREATMENT OF MEXICANS

Civilian mistreatment of Mexicans was a constant source of despair for Mexicans and their leaders. Sometimes it took place through mob violence as happened in May of 1912 when Anglo miners invaded a *Cinco de Mayo* festival in Twin Buttes, about 40 miles :from Tucson, and attacked the Mexican workers. They then tore down and destroyed the Mexican flags on display for the holiday. In a similar episode during September of the same year a group of Phoenix, Arizona Anglos invaded a Mexican independence celebration, which [18] sparked a riot in which both ethnic groups suffered injuries. The following year, during the July 4th celebration, Anglo revelers tore down the Mexican flags at the consulates' offices in Tucson and Douglas, Arizona.[139]

In a Mexican government study of American civilian attacks on Mexicans during the 1910s, Arizona carne in a close second to Texas. Out of 150 incidents documented by the Consul, 36 took place in Arizona. For example, W. H. Heltrip murdered Jesus Arias during January 1913 in Yuma, claimed self-defense, and authorities did not charge him. A bartender of "Austrian descent" on November 12, 1912, beat a drunken Tomas Soto when he created a disturbance at a bar in the mining town of Miami. The next morning Soto's body was found a few yards from the saloon, but the bartender fled and could not be found, according to local authorities.[140]

Common also was for Anglos not to be subjected to charges of negligence in spite of supporting evidence. According to the Mexican consul in Phoenix, Thomas

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[139] Ibid., pp. 110-111.

[140] "Report," Tomas Soto, November 12, 1912.

Walker, of the Arizona Cotton Growers Association ran over Juan Jose Duarte on May 19, 1919 with his automobile killing the Mexican pedestrian. He was not cited by Phoenix police. The Mexican community was incensed as witnesses stated Walker was speeding down the avenue Duarte was crossing and did not bother to slow down. The community believed it was Walker's influence that kept the police from investigating.[141]

Also, a military build-up along the border during the Mexican revolution led to many altercations between Mexicans and army personnel. In Arizona, American soldiers killed Jose Perez and M. Ortiz on November 21, 1913 during a Miami riot between Mexicans and Army personnel. The local Sheriff was informed but he arrested no one, according to a Mexican protest letter. Also in Miami, a U.S. army truck ran over David Herrera, killing him on October 15th, 1917. The soldiers were stationed in the area to quell strikes in which hundreds of miners had been arrested. The Mexican community, skeptical of any [19] explanations offered by authorities, felt the driver deliberately hurled the vehicle at Herrera.[142]

Such violations of the civil rights of Mexicans have continued into recent years. In the late 1970's, two brothers and their father, all members of the wealthy Hannigan family were accused of robbing and torturing three Mexican farm workers who had entered the United States illegally. The Hannigans who owned extensive ranching land and a bevy of Dairy Queens were tried for intercepting three undocumented Mexicans crossing their property in southern Arizona near the Mexican border. The Hannigans stripped and tortured the Mexicans with hot pokers, burning cigarettes, knives, and a shotgun filled with bird seed. Hours later, the immigrants were set free to return to Mexico naked and bleeding. An all-Anglo jury acquitted the two Hannigan brothers of charges of kidnapping, assault, and robbery; father George died before trial. Following strident protest, federal authorities ultimately charged the Hannigans with obstructing interstate commerce. Patrick Hannigan, but not his brother Thomas, was convicted and sentenced to three year's imprisonment.[143] Law Professor Steve Bender has documented similar cases along the border. Most have taken place in Arizona.[144]

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[141] "Report," Juan Jose Duarte on May 19, 1919

[142] "Report," Jose Perez and M. Ortiz, November 21, 1913 and David Herrera, Jr., October 15, 1917.

GENERAL SEGREGATION

Racial segregation was prevalent in the railroad and mining towns of Arizona as railroads spurred modernization after the 1880s. At this time segregation in schools, public facilities, and housing increased for a number of reasons. The threat posed by Apaches ended in the late 19th century and the need for a cooperative self-defense no longer bound Mexicans and Anglo Americans. Secondly, the economic livelihood of the region's Mexican elite based in freighting and open-range ranching eroded with the influx of American capital and [20] technology. Concurrently, new industries imported their own skilled workers and management personnel while Mexican Americans and Mexican immigrants were relegated to semi-skilled and unskilled positions in the new Anglo American owned mines and railroads. By 1910 Mexicans became imbedded in racially-ordered class system.[145]

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[143] Steve Bender, *Greasers and Gringos: Latinos, Law, and the American Imagination*, (New York: New York University Press, 2003), p 131.

[144] Ibid., p. 130.

The existence of segregation is widely discussed in studies of mining in Arizona. As the mining companies established labor camps and company towns they designed them along strict segregated parameters.[146] For example, in 1916 the New Cornelia Copper Company resuscitated old copper mines in the mining town of Ajo and immediately laid out the plans to segregate its Native American, "Mexican," and "American" (Anglo) residents by establishing the Mexican settlement in the northwestern portion of town. For recreational purposes the company built two dance halls and sponsored dances for the non-Mexicans on several week-nights while only Sunday was reserved for the Mexican event. In a 1977 interview with Alberto Sotelo, a former Ajo resident, he remembered segregation permeating life for Mexicans. As a child he and the other "Mexican children attended separate schools, could only swim in the town pool on limited days after the 'American' families had used it and before the pool was cleaned, and were restricted to a certain section of the local movie theatre."[147]

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[145] Meeks "Border Citizens," p. 43; Joseph Park, "The History of Mexican Labor in Arizona during the Territorial Period," (M.A. thesis, University of Arizona, 1961), pp. 219-220.

[146] These studies are too numerous to put in this footnote but see for example, Linda Gordon, *The Great Arizona Orphan Abduction,* (Cambridge: Harvard University Press, 1999); James R. Kluger, *The Clifton-Morenci Strike: Labor Difficulty in Arizona, 1915-16* (Tucson: University of Arizona Press, 1970); Meeks "Border Citizens"; Philip J. Mellinger, *Race and Labor in Western Copper: The Fightfor Equality,* 1896-1918 (Tucson: University of Arizona Press, 1995); Joseph Park, "The History of Mexican Labor in Arizona during the Territorial Period.," (M.A. thesis, University of Arizona, 1961).

A result of extensive modernization of the agriculture owing to railroads and federally financed irrigation projects was the massive immigration of Mexicans to the Salt River [21] Valley, where Phoenix is located. As a result of this influx Phoenix acquired the largest contiguous *barrios* in all of Arizona.[148] In 1930 almost 8,000 Mexicans were concentrated and segregated in a small area in the south side bounded by 11th Street to the east, 16th avenue to the west, the edge of the Salt River to the south, and Washington street to the north. There, barrios emerged with such names as Milpitas (small fields) or Cuatro Milpas (four fields).[149]

According to a study by the Phoenix Housing Authority and the WP A, as late as 1941, most Mexicans in south Phoenix were living in dire poverty. The average income of Mexican families (1,200 in survey) was $589 a year. The study disclosed that 70 percent of the homes were considered uninhabitable and lacked inside plumbing, electricity, and adequate doors or windows.[150]

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[147] Meeks "Border Citizens," p. 85. For a description of the similar conditions that existed in the Clifton-Morenci district, see Kluger, 20-23.

[148] *Barrio* simply means a neighborhood in Spanish-speaking countries, but in the United States urban areas, it is applied to Mexican American or other Hispanic neighborhoods which are distinguishable from other parts of the city. See Daniel D. Arreola, "Urban Ethnic Landscape Identity," *Geographical Review*, Vol. 85, No.4, (Oct., 1995), pp. 518-534.

[149] 63Pete Rey Dimas, "Progress And A Mexican American Community'S Struggle For Existence: Phoenix's Golden Gate Barrio" (Ph.D. Dissertation, Arizona State University, 1991), passim.

Perhaps the most infamous case of segregation occurred in Tempe. This involved the segregation of Mexicans at Tempe Beach, in reality a swimming complex which was built by the influential Hayden family and other local investors in the 1920s. The developers picked a site in Tempe along the wide Salt River which began to dry up by the end of the decade because of upstream damming and built what became known as Tempe Beach, the "brilliant star in Tempe's crown." While city fathers and other boosters touted this achievement with pride they decided that its benefits would only be available to Mexicans on a separate and part-time basis; they could use the facility once a week. As a historian of Tempe, Scott [22] Solliday, said, "[t]he swimming pool was basically closed for Hispanics. There was one night a week, and it was the night before they drained the swimming pool and filled it with fresh water. And so obviously, aside from the fact that they were not allowed to use the swimming pool most of the time, just the implications that we have to drain the pool after you're done swimming was really such a vicious insult to the people here in Tempe."[151] In the 1940s, Mexican Americans in Tempe and Phoenix, along with the League of United Latin American Citizens

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[150] Dimas, "Progress And A Mexican American Community's Struggle For Existence," pp. 37 and 52; Bradford Luckingham, *Phoenix: The History of a Southwestern Metropolis* (Tucson: University of Arizona Press, 1989), p. 122; *Phoenix Gazette*, May 3, 1941.

[151] Quote from "Tempe's Hispanic Heritage." Available at EightiKAET broadcasts from the campus of Arizona State University http://www.azpbs.org/arizonastories/seasontwo/hispanicheritage.htm .

(LULAC) Council 110, and the American Legion Thunderbird Post 41, a Mexican American veteran's group, along with Tempe Mexican veterans led a campaign to pressure the Tempe Chamber of Commerce, which leased the site from the city, to desegregate the swimming complex. In 1946, Tempe Beach was desegregated.[152]

Another example of segregation in Arizona took place in Phoenix and concerned housing for veterans. Soldiers after World War II returned to Phoenix and to a housing shortage that forced the city to construct emergency housing. Officials selected three separate sites in order to build 150 family units near the downtown area; one for Anglo Americans, another one for Mexican Americans, and the third for African American veterans. The site chosen for Mexican Americans was located on what had been an old city dump but Anglo American families would be in a cleaner, more attractive part of the city. American Legion Thunderbird Post 41 protested this separation and demanded before the city council that housing for Mexican American veterans and their families be located in an integrated unit on the same ten acres of land where the Anglos' unit was planned. The Anglo veterans formed the Garfield Property Owners Protective Association in order to prevent integration. Such an arrangement, they protested, would lower property values and result in [23] an increase in the crime rate and incidents of rape would rise. A protracted debate ensued, and the Mexican Americans veterans ultimately took the matter to the Arizona Supreme Court. On December 11, 1946 the

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[152] Christine Marin, "LULAC and Veterans Organize for Civil Rights in Tempe and Phoenix, 1940-1947." Available at http://www.cervantesvirtual.comlservlet/SirveObras/68016185989478386754491/p000000l.htm

Court ruled that the City of Phoenix must integrate the housing units.[153]

Segregation in Arizona was also facilitated through federal programs. In the 1930s young Mexican Americans were exposed to the larger Anglo society through such New Deal agencies as the Civilian Conservation Corps (CCC) and the National Youth Administration (NY A), both designed to enroll young people and keep them off the streets during this era of massive unemployment. Nonetheless, discrimination in these new deal programs was prevalent in Arizona.[154] CCC overseers only recruited a small portion of Mexican Americans to join the Corps and even though the program did not have an official segregation policy when it came to Mexicans, officials housed them in separate barracks because of complaints from white Arizonans.[155]

SCHOOL SEGREGATION

Segregation in Arizona public schools became more prevalent as immigration from Mexico increased in the early 20th century. For example, the Navajo County school superintendent purposefully segregated Mexican students from their Anglo peers from the turn of the century until the 1930s.[156]

Segregation was particularly pervasive in Arizona mining towns, not only in the public schools but in almost every aspect of community life as well. For the first decade of the 20th century, children in the mining community of Clifron-Morenci attended “four elementary schools segregated both internally and between schools: North Clifton, mixed but with separate classes for Mexicans and Anglos; South Clifton all Anglo; and two Chase Creek [24] schools, one Anglo and one Mexican,” according to the historian Linda Gordon. She adds that when low attendance dictated the two Chase Creek schools merge to economize, the district continued to spend extra money to segregate the Mexican and Anglo students.[157] Similarly in another mining community, Ray-Sonora, Mexican and Anglo children attended separate schools- the Sonora School for the Mexicans and the Ray School for the Anglos—even though their parents worked for the same mining company.[158]

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[153] Ibid; See also American Legion Post 41 Website, http:// www.azpbs.orglarizonastories/seasontwo/americanlegionpost.htm

[154] Rosales, *Chicano!*, p. 99.

[155] Meeks "Border Citizens," pp. 210-211.

[156] Oordon, *The Great Arizona Orphan Abduction*, p. 194.

In a 1916 report that surveyed 427 rural school districts in Arizona, U.S. Bureau of Education researchers indicated “[i]n practically all Cities in Arizona and in [rural] graded schools large enough to make adjustments, the non-English children are segregated for the first two, three, or four grades.” The Bureau study recommended that this practice continue because it would be in the best interest of both races and advocated a curriculum for the Mexican schools that featured English, practical problems in arithmetic and pre-vocational training.[159]

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[157] Ibid., p. 194.

[158] Laura K. Munoz, “Desert Dreams: Mexican American Education in Arizona” (Ph.D. Dissertation, Arizona State University, 2006), p. 103

[159] Educational Conditions in Arizona, “State Study” ATHJ, no 1 (February 1917: 11B, quoted in Munoz, “Desert Dreams,” p. 105.

In the mining town of Douglas, Arizona, vocational training was emphasized in the Mexican schools, as Anglo housewives wanted Mexican girls to become better maids.[160] In the spring of 1916, Helen Roberts, professor at Tempe Normal School (now Arizona State University) and Grace Gainsley of Pirtleville School in Douglas introduced "special vocational work" for Mexican children. When Roberts became principal of Tempe's Eighth Street school for Mexicans, which was run by the Tempe Normal School, she instituted these vocational courses. While many Mexican parents did not want their children to attend these segregated facilities, officials strictly enforced truancy laws and the parents were arrested, [25] fined or threatened with jail.[161] In Bisbee during 1920, in order to segregate the Mexican from the Anglo students, a new school was built with 10 classrooms; the designers slated five for industrial education.[162]

The first successful desegregation court case involving Mexican Americans in Arizona, *Romo* v. *Laird*, occurred in Tempe, Arizona, in 1925. The suit was brought by Adolfo Romo on behalf of his four children, who were attending Eighth Street Elementary School, a training laboratory for Tempe Normal School. Anglo children had attended the Eighth Street facility since Tempe was settled in the late 19th century because it was the only school in the town. However, in the early 20th century agricultural sectors in central Arizona modernized and the population of both non-Mexicans and Mexicans increased. Trustees of the Tempe School

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[160] Ibid., pp. 112-113.

[161] Ibid.

[162] Ibid., p. 122

District # 3 then built the Tenth Street School in 1915 but did not allow Mexican children to attend, citing their lack of English proficiency. Romo, whose wife was half Anglo, felt that his English-speaking children did not belong in a segregated facility and attempted to enroll them in the new school, but was refused by school officials. He then sued the school district in Maricopa County Superior Court, and Judge Joseph S. Jenckes ordered that the Romo children be allowed to enroll and attend.[163]

Jenckes ruled against segregation because the district violated the 1913 Arizona Civil Code that required school districts to provide all school children in the state an equal education. Referencing the Eighth Street School's practice of having students serve as instructors, the judge found that "the defendants [had] failed in their duty to the plaintiff in not providing teachers of as high a standard of ability and qualifications to teach the children of the plaintiff in the said Eighth Street SchooL...." The Romo children and other Mexican Americans were allowed to enroll in the new school as a result, but Tempe school officials continued to segregate other Mexican American children whose parents did not complain.[164]

[26] In 1938 the Latin American Club became involved in an intensive campaigt;l to end segregation

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[163] Rosales, *A Dictionary of Latino Civil Rights History*, pp. 390-391.

[164] In the Superior Court of the State of Arizona in and for the County of Maricopa, Adolfo Romo, Plaintiff vs. William E. Laird, J .H. Daniel and LF. Waterhouse as members of and constituting the Board of Trustees of Tempe School District No.3 and G.W. Persons, Superintendent of Tempe School District No.3, Defendents. No. 21617, Judgement and Findings of Fact and Order, October 5, 1925

in the twin mining towns of Globe-Miami. The Conquistadores, an Arizona State Teacher's College Mexican American organization, joined them in this effort. The leadership ofthe two organizations continued their desegregation efforts in the 1952 *Sheely* v. *Gonzalez* case. In the *Sheely* v. *Gonzalez* decision, the court abolished segregation in Tolleson. Though the case served as a major legal victory and set a precedent for school desegregation throughout Arizona, most school districts failed to comply with similar court rulings. School officials resisted compliance with these judicial mandates, and the state neglected to enforce them, and Mexican American students continued to attend racially isolated schools.[165]

In 1978 Latino and black parents won a federal class-action lawsuit against Tucson Unified School District (TUSD). Their challenge was premised on the racial isolation that resulted from the migration of Anglos away from central Tucson to suburban areas ofthe city in the 1960s. The plaintiffs argued that the primarily minority inner city schools did not provide the same educational opportunities and were deteriorated compared to the newer, predominately Anglo schools. Thus, the plaintiffs argued TUSD had a duty to racially integrate its schools. In 1978 the plaintiffs prevailed and Judge William C. Frey issued a desegregation order in June of that year. As a remedy, the district chose to create magnet schools in the central city sites and to bus minority students to predominantly white schools.[166] The District remains under court supervision today.[167]

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[165] Munoz, "Desert Dreams," p. 266.

[27] MODERN EDUCATION ISSUES

Language and pedagogical issues have also been a source of concern in the Mexican American community. Until 1972, Guadalupe, Arizona, special educators administered IQ tests written solely in English to Yaqui Indian and Mexican American children who spoke little or no English, even though a case challenging similar practices toward Mexican-American children terminated that practice in California. The Guadalupe Organization, Inc learned through extensive publicity about the California effort and initiated a suit against the local school district which ended the practice after a court review was sought by the plaintiffs who filed a suit against the Tempe Elementary School District.[168]

The civil rights of English Language Learners (ELL) were strengthened in 1974 when Congress passed the Equal Educational Opportunity Act (EEOA), which stated that:

> no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by ... the failure of an educational agency to take

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[166] [text of footnote missing in original]

[167] Chris Limberis, "Desegration Dispute: Has TUSD's Desegregation Efforts Driven Students to Charter Schools?" April 21, 2005, *Tucson Weekly*. Available at http://www.tucson weekly.comlgbase/Currents/Content?oid=oid%3A67993

[168] Richard A. Berk; William P. Bridges; Anthony Shih, "Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests," *Michigan Law Review*, Vol. 71, No.6. (May, 1973), pp. 1212-1250.

> appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[169]

This measure requires educational institutions to provide the necessary resources to overcome linguistic and/or cultural barriers that prevent students from equal participation in instructional programs. Arizona established laws for ELL programs almost immediately but it was not until 1986 that the Arizona State Legislature required school districts to provide special instruction for ELLs. It also established ELL teacher qualifications and reporting requirements for school districts. The increasing number of ELLs coupled with increased student accountability made it [28] difficult for school districts, specifically the Nogales School District, to comply with the requirements. Initially, school districts received approximately $50 dollars per ELL beginning in the 1989-1990 school year to comply with the teaching English requirement.

In 1992, Southern Arizona Legal Aid filed the *Flores* case, a class action lawsuit in federal court on behalf of parents of ELLs. Seeking to force the state to improve programs for ELLs, the plaintiffs contended in part that "the state is in violation of federal law by failing to provide Arizona school districts with the revenues necessary to instruct LEP students." The plaintiffs also claimed that the Arizona Department of Education failed to ensure that schools were providing adequate programs for ELLs.[170] Charges of inadequate funding stemmed from the failure of the Arizona Department of Education to meet the level of funding necessary to maintain ELL programs, a cost per pupil which the Department had arrived at through its owns studies. Even though the complaint was filed in 1992 it was not until 1999 that it received a hearing. In January of 2000 the federal judge who presided over the case ruled that Arizona was in violation of the federal Equal Opportunity Act because its funding for ELL programs was "arbitrary and capricious." As late as 2006, the state had not yet complied with the mandate according to a number of federal court overviews.[171]

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[169] Quoted in Angela Marie Randolph, "Advocating English for English Learners: Flores v. Arizona, a Case Study" (Ph.D. Dissertation, Arizona State University, 2005), pp. 4-5.

[170] Ibid., p. 9.

DISCRIMINATION IN THE WORKPLACE

Before the Second World War, mainstream unions did not accept many Mexican American workers because they had previously been successful in industries outside of Arizona where few Mexicans worked. They generally neglected Mexicans employees, and unions in the agricultural camps, which were often comprised of Mexican American and Mexican immigrant workers, were virtually non-existent or too weak to be effective. By World War II Mexican Americans in Arizona began to participate more fully in unionization, although some industries, such as agriculture, have not unionized at the same pace.

AGRICULTURE

As early as 1908 Mexicans were recruited to corne to Arizona to work in agriculture. The [29] main reason was the railroad became an economic boom to the agricultural output of the Valley and by 1907 Phoenix served as a rail hub with lines extending in every direction. The Newlands Reclamation act of 1902 and the completion of the Roosevelt Dam in 1912 spurred agricultural production, creating an intense demand for Mexican labor.[172]

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[171] Ibid., pp. 63-70.

While employers fought strenuously for Mexican immigration, they and sympathetic politicians felt that Mexicans should only be tolerated for their physical labor and not afforded the rights of citizens. For example, u.s. Representative Carl Hayden testified on behalf of his cotton constituency and while supporting waiving the provisions of the 1917 Literacy Act (immigrant literacy requirement) for Mexicans, he admitted that Mexicans could be a threat to the American way:

> The proper thing to do in the United States is to populate our country with our own kind of people. Whenever there are permanently imported into this country, from any source a class of people who will not, after one or two generations, look the same, act the same, have the same ideals as good citizens as the native born American, that sort of people should be excluded from the United States.[173]

Mexicans tended to stay and work in Valley agriculture year- round by the end of the 1920s, since irrigated crops allowed for year-round work. Farmers in providing housing for Mexican seasonal workers gave preference to families that: ".. contained a reserve supply of seasonal workers in addition to the regular breadwinner. Children just beyond the school years furnished an ideal reserve supply from the farm operator's point of view, and they tipped the scale of economic advantage in favor of their home households."[174]

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[172] Dimas, "Progress And A Mexican American Community's Struggle For Existence," pp. 39-45.

[173] United States Congress, *Temporary Admissions of Illiterate Mexican Laborers. Hearings Before the Committee on Immigration and Naturalization. House of Representatives,* Sixty Sixth Congress, Second Session on H.J. Resolution 271. January 26,27,30 and February 2, p. 195.

When W. H. Knox, president of the Arizona Cotton Growers Association and Congressman Carl Hayden testified to renew the immigration literacy waivers given to Mexicans at a 1920 congressional committee hearing they struck a delicate balance so as to convince committee [30] members that while Arizona employers wanted Mexicans, they were still interested in maintaining the dominant position of Anglos. He assured the committee that whites lived in Valley towns, while most Mexicans were confined to peripheral agricultural and mining camps and said, "The result of this industry [cotton] is building up a city .... Thousands and thousands of acres that have been desert, by pumping plants [have been] put under irrigation and are making homes for thousands of white people."[175]

Mexican agricultural workers were often unsuccessful in their unionizing efforts. At times they defended their interests through informal means, such as traveling in groups or families and insisting on being hired as a unit.[176] This provided some form of security, but as historian Pete Dimas has pointed out in his dissertation on Mexicans in Phoenix, the position of Mexicans in agriculture made abuses in the workplace harder to defend and often workers found themselves at the mercy of their employers.[177] For example, in Phoenix, Arizona on May 9, 1912, farm worker Jose Castro was beaten senseless by his boss, who knocked out most of his teeth. Justice of the Peace Parker, who heard the case ruled that no criminal charges could be filed.[178] Similarly on October 7, 1919, cotton farmer, C.B. Kunce was accused of beating employee Crispin Ruvalcaba with a tree branch after he had been handcuffed by local constable. The scars from the beating were still visible days after. Maricopa County Attorney R.A. Jarrot and Judge C.D. Wheeler characterized the assault as a "Brutal Job" according to the *Arizona Republican*. Kunce pleaded guilty and was tried by a justice of the peace and fined. The constable, Charles Beckham pleaded not guilty and was freed.[179]

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[174] E. D. Tetreau, E. D. Tetreau, *Arizona s Farm Laborers*. Agricultural Experiment Station Bulletin 163.Tucson: University of Arizona, 1939. p.312.

[175] United States Congress, *Temporary Admissions of Illiterate Mexican Laborers. Hearings Before the Committee on Immigration and Naturalization*. p. 195.

[176] Rosales, *¡Pobre Raza!*, p. 109.

MINING

[31] According to several historians, mistreatment of Mexican Americans in Arizona was widespread. One of the biggest abuses was wage segmentation. Eric Meeks' dissertation provides insight as to why Arizona Mexican Americans were not paid the same as their Anglo counterparts.

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[177] Dimas, "Progress And A Mexican American Community's Struggle For Existence," pp. 31-64.

[178] "Report," Jose Castro, May 9, 1912.

[179] Ygnacio Bonillas, Mexican Ambassador to Robert Lansing United States Secretary of State, October 28, 1919; Ibid., Lansing to Bonilla, January 18, 1920, National Archives, Record Group 59, File 311.1221 R94.

By the tum of the century, there was a clear, multi-tiered, racialized class structure in Arizona's mines. This racial hierarchy was readily apparent in the wage levels in the Clifton Morenci-Metcalf mining district of southeastern Arizona. In the Clifton mines in 1909, ninety-four percent of native-born workers who were identified as "white" earned three and a half dollars per hour or more. Immigrant groups identified by the Immigration Service as "white"—primarily from North America and Northern Europe—earned comparable amounts. In stark contrast, ninety three per cent of Mexican workers earned between one and a half and two and a half dollars, with less than one per cent earning more than three and half dollars.[180]

The Mexican consulate service often served as a broker for Mexicans and their employers. Consuls were supposed to maintain distance when labor conflicts involved compatriots, but they nonetheless monitored procedures to prevent legal violations. When Cochise County officials jailed four thousand Mexican participants in the 1917 Arizona copper mine strikes, the Mexican consul in Douglas, Ives Levelier, helped get hundreds of strikers released. Consuls also objected to dangerous and unhealthy working conditions. Miner's consumption, also known as "black lung," affected Mexican miners so disproportionately that the Mexican consul in Globe, Arizona, Gustavo G. Hernandez, wrote in May of 1918, to the Arizona State Federation of Labor and Governor George W. P. Hunt, asking that management be made to comply with state regulations requiring ventilation of mining shafts for an end to the conditions which caused this disease.

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[180] Meeks "Border Citizens," p 83.

"It strikes me that the number of Mexicans who are sick [more] than any other nationality ... ," the consul wrote. Mexicans were more susceptible to black lung because they operated "pluggers" where most of the deadly dust was inhaled.[181]

The most intensive institutional union efforts involving Mexicans took place in Arizona mines, with workplace danger and dual wages as the main concerns of Mexican miners. Owing to [32] these conditions, in 1903, a number of strikes in the mining regions of Clifton-Morenci were repressed by local police, the Arizona militia, and Arizona Rangers at the behest of the mine owners and local politicians.[182] The same methods were employed against striking Mexican miners in Globe-Miami and Bisbee as well.[183]

During extensive labor organizing activity in 1914 by the Western Federation of Miners, employers and local officials conducted harassment campaigns to intimidate workers. In August a posse of Americans fought a pitched battle with Mexican union organizers after they were accused of stealing a horse near Ray. In a battle that the *Los Angeles Times* called "Race War in Arizona," four Americans and two Mexicans were killed after the Mexican "bandits" took refuge in a canyon cabin and the Americans assaulted the building. "After the first brush between horse thieves and posse, Ray citizens drove all the Mexicans out of town," said the *New York Times*. The dead Americans were two law officers and two employees at the Ray Consolidated Company. The *Arizona Republican* identified the Mexicans as wood cutters and unionists who hauled wood for mining operations. Mining company officials considered Pedro Smith, one of the dead Mexicans, and Ramon Villalobos, the only survivor of the shootout, to be union agitators. The Mexican community suspected that the "horse stealing" charge was trumped-up in order to jail these alleged "troublemakers." Villalobos, who was hanged two years later for his part in this killing, became a *cause celebre* as compatriots tried to save him from the gallows.

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[181] Rosales, *Testimonio: A Documentary History of the Mexican American Struggle for Civil Rights* (Houston: Arte Publico Press, 2000), pp. 230-231.

[182] Weber, *Foreigners in Their Native Land*, 219; Mellinger, *Race and Labor in Western Copper, 42-48.*

[183] Rosales, *¡Pobre Raza!, 174-175.*

CONCLUSION

Discrimination against Mexican Americans in Arizona has existed since the Treaty of Guadalupe Hidalgo absorbed the area north of the Gila River in 1848 and the Gadsden Treaty in 1853 acquired the rest of what is now Arizona from Mexico. After conducting this study I conclude that Mexican Americans in Arizona have experienced a history of discrimination in voting and registration. In addition persons of Mexican origin have had to endure discrimination in other areas such as property rights, employment and education. I believe that this discrimination has hindered and continues to hinder the ability of Mexican Americans to fully participate in the political process in Arizona.

[33] December 5, 2007

/s/ F. Arturo Rosales

F. Arturo Rosales

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AMICUS CURIAE BRIEF

No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT MUST NOT WAVER FROM THE COUNTRY'S COMMITMENT TO ERADICATE RACISM 5

II. JUDICIAL DEFERENCE SHOULD BE AFFORDED TO LEGISLATIVE FACT-FINDING 7

III. CERD AND ICCPR IMPOSE A CONSTITUTIONAL REQUIREMENT ON THE U.S. TO UNDERTAKE EFFORTS TO ELIMINATE RACISM 9

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

City of Rome v. United States, 446 U.S. 156 (1980) 6

Cook v. United States, 288 U.S. 102 (1933) 14

Crawford v. Marion County Election Board, 553 U.S. 181 (2008) 16

Dombrowski v. Pister, 380 U.S. 479 (1965) 1

Georgia v. United States, 411 U.S. 526 (1973) 6

Hansberry v. Lee, 311 U.S. 32 (1940) 1

Harper v. Virginia Bd. Of Elections, 383 U.S. 663 (1966) 12

Holland v. United States, 348 U.S. 121 (1954) 8

Lopez v. Monterey County, 525 U.S. 266 (1998) 6

Marbury v. Madison, 5 U.S. 137 (1803) 7

Shelby County, Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) 3, 15

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 14

United States v. City of Calera, Alabama, No. CV-08-BE-1982-S (N.D. Ala. Oct. 29, 2008) 4

Wesberry v. Sanders, 376 U.S. 1 (1964) 12

CONSTITUTIONAL PROVISIONS

U.S. CONST. ART. VI 9

STATUTES

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577 (2006) 16

OTHER AUTHORITIES

138 Cong. Rec. 8068 (1992) 12

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International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 11

International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. 12

Kent Faulk, *Jefferson County Commission President David Carrington Agrees County Hasn't Lived Up To Employment Practices Consent Decree*, AL.com, Dec. 5, 2012 16

Kyle Whitmire, *Bowman says Jefferson County Still Has Discriminatory Hiring, Voices Confidence In County Manager To Fix Problem*, AL.com, Dec. 10, 2012 16

United Nations Charter Art. 1(3), 59 Stat. 1031, T.S. No. 993, *entered into force* Oct. 24, 1945...... 10

Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 Hastings L. J. 1723 (1995) 7

William Paley, *The Principles of Moral and Political Philosophy* 551 (1785)............................... 8

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary national bar association, with a mandate to advocate for the protection of constitutional, human, and civil rights. As one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, its members helped draft the Universal Declaration of Human Rights. Members have brought such cases as *Hansberry v. Lee*, 311 U.S. 32 (1940), which struck down segregationist Jim Crow laws in Chicago and *Dombrowski v. Pister*, 380 U.S. 479 (1965), halting discriminatory and retaliatory state court criminal proceedings against civil rights activists in the South.

The Lawyers Guild is also a member organization of the International Association of Democratic Lawyers, which enjoys consultative status with the United Nations Economic and Social Council. Through its International Committee, it is actively engaged in promoting and developing international peace and human rights through law.

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than the *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus National Lawyers Guild writes to underscore the obligation of this Court not to arrogate to itself the job of the legislature, especially in the face of overwhelming evidence supporting the legitimacy of Congress's decision to extend the constitutionally crucial role of Section 5 of the Voting Rights Act and the Constitutional authority of an elected Congress to evaluate evidence presented to it. Substituting its own opinion for that of elected officials who heard testimony would immeasurably harm the very system of checks and balances that are the cornerstone of our democracy and would, in fact, bring discredit on the Court and engender widespread distrust of its motives. The Court lacks the authority to substitute its judgment for the measured findings of elected officials that racism still runs rampant in this land and that covered jurisdictions remain appropriate subjects of the greater attention the Voting Rights Act imposes when that attention places minimal burdens on them.

Those burdens are particularly slight as compared to the evil they are intended to address. At stake in the issue at hand is the so-called preclearance provision of a statute—nearly half a century old—that has held jurisdictions accountable when they try to enact racist electoral practices. Such practices effectively deprive victims of overt past discrimination equality in the exercise of the most fundamental right of citizenship.

In this case, both the district court and the court of appeals upheld the constitutionality of Section 5. In rejecting Shelby County's challenge, Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit, writing for the majority, ruled that Congress appropriately extended the protections of the preclearance requirement in 2006 for 25 more years, finding that judicial deference to Congress was warranted after an exhaustive review of the record, "given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance." *Shelby County, Ala. v. Holder*, 679 F.3d 848, 873 (D.C. Cir. 2012).

This case affords the Court the opportunity to step back to acknowledge and adhere to the principles of a fair government envisioned in 1787 by the founders: three separate, distinct and coequal branches of government with overlapping but separate spheres of authority, created to prevent abuse of power and ensure the protection of individual freedoms. While the specific legal and moral imperative of eliminating racism within our society is an imposing one, members of the Court are also duty-bound to exercise judicial deference to the lawmakers whose exhaustive fact-finding formed the basis for their decision.

Moreover, *amicus* wishes to elaborate on the treaty obligations the United States has undertaken and which Congress has implemented by extending

Section 5. These obligations exist both under the norms of international law and by the mandate of Article VI of the Constitution, which makes those treaty obligations "the supreme Law of the Land." Compliance with treaty obligations constitutes an additional compelling governmental interest in enactment of this statute.

ARGUMENT

A reversal in this case would represent the Court's intervention in a way that would undermine our society's commitment to ensuring that vestiges of racism are not afforded the opportunity to blossom and grow. The record in this case indicates the enduring presence of racial discrimination in Shelby County, the very kind of prejudice that Section 5 of the Voting Rights Act has been relied upon to curtail for nearly half a century.

The district court noted the likelihood that, of the hundreds of violations of Section 5 that have taken place in recent years, many had the intent or effect of curtailing the electoral power of African-Americans and other excluded peoples. This is exemplified by the case brought by the Justice Department against the City of Calera in Shelby County, resolved by consent decree, *United States v. City of Calera, Alabama*, No. CV-08-BE-1982-S (N.D. Ala. Oct. 29, 2008), which alleged multiple Section 5 violations but did not explicitly allege racial disparity. One of the underlying facts, however, was that, following an unauthorized change in Calera's election law, the city's lone African-American councilor lost an election. When the change was voided to redress the Section 5 violation, he was reelected. It is telling that Shelby County is seeking this remedy rather than the simpler and less costly remedy of meeting its obligations for ten years and being excused from further coverage.

I. THIS COURT MUST NOT WAVER FROM THE COUNTRY'S COMMITMENT TO ERADICATE RACISM

Certain facts regarding this matter cannot be in dispute. The United States has a shameful history of discrimination against, and oppression of, African-Americans, Native peoples, and other persons of color dating back centuries prior to the adoption of the Constitution. The first enslaved Africans came to the Americas as early as 1502 and, with the establishment of a British colony in Virginia in 1607, the trade came to what is now part of the United States.[2] The contempt in which indigenous people were held by our founders is embodied in the Declaration of Independence, which lists as one of the grievances against King George III that he "endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages." Declaration of Independence (U.S. 1776).

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[2] *Amicus* trusts this history is sufficiently well documented that the Court will take judicial notice of it.

Following the Civil War and the passage of the Thirteenth Amendment, the situation for African-Americans in the deep south – the center of areas subject to section 5 – hardly improved. *See e.g.*, Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008) (concentrating on the post-bellum oppression of African-Americans in Alabama, where Shelby County is located, and which persisted unabated up to World War II).

This sordid history need not be recounted at length, but it should not be forgotten and this Court must consider its present effects. Indeed, this Court has found each prior extension of the Act to be warranted. *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156, 100 (1980), and *Lopez v. Monterey County*, 525 U.S. 266 (1998). The district court and the court of appeals have both detailed the extensive investigation undertaken by Congress before it passed the latest extension in addition to the mountain of evidence supporting its decision. Because others, including the two lower courts here, have thoughtfully explored why it is the province of Congress to make such a determination, *amicus* restricts itself only to brief commentary without recounting all the testimony and evidence that led Congress to its decision.

II. JUDICIAL DEFERENCE SHOULD BE AFFORDED TO LEGISLATIVE FACT-FINDING

Since this Court decided *Marbury v. Madison*, 5 U.S. 137 (1803), the federal courts have been unwilling fact finders, preferring to remain true to their constitutional jurisdiction and decide matters of law. Federal courts have deferred to Congress and state legislatures in findings of fact. And, indeed, legislatures have resources and time to dedicate to the process of collecting and evaluating information necessary to take action. Members of Congress and other legislatures may engage in a range of activities to assemble their facts, including consulting "staff, friends and constituents," and educating themselves "by reviewing past legislation or even by reading a novel or watching television." Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 Hastings L. J. 1723, 1743 (1995).

Here, testimony was presented to Congress and its Members weighed in on such issues as the credibility and persuasiveness of the witnesses it heard. Its members were popularly elected and, therefore, reflect the popular will. While this Court has the duty to determine when the popular will infringes on fundamental individual rights, it should be a rare case where it voids a law within the specific constitutional domain of Congress. Voiding a law raises the specter of the judiciary being viewed as an overtly partisan political body. The Court should make every effort to ensure that it is viewed as an independent branch of government divorced from politics and as a neutral arbiter of constitutional interpretation.

Further, let us suppose, without acknowledging, that the dissent below reasonably interpreted the evidence before Congress. That does not mean that the majority opinion and the district court's opinion were unreasonable and, if both sides are reasonable, that necessarily means that the courts should defer to Congress. Even if the evidence before Congress admits to differing interpretations and even if Congress did not have direct proof of ongoing problems in covered jurisdictions, but only inferred the need for continuing coverage, it acted within its constitutional prerogative.

The evidence before Congress, even if only circumstantial (*amicus* would argue it is more than that) was extensive. A defendant in a criminal case can be convicted with only circumstantial evidence. *Holland v. United States*, 348 U.S. 121 (1954) ("circumstantial evidence is intrinsically no different from testimonial evidence"). Some scholars have written that circumstantial evidence is more credible than direct evidence. *See e.g.*, William Paley, *The Principles of Moral and Political Philosophy* 551 (1785) ("well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie"). Surely Congress can implement legislation fulfilling its Constitutional duty under the Thirteenth and Fourteenth Amendments based upon similar evidence.

Moreover, winning the right not just to testify but to have one's experiences taken seriously by the law was a critical advance in the civil rights struggle in this country. *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 157 (1866) (report of the Judiciary Committee that Congress had the Constitutional power to allow African Americans as witnesses in state courts and recommending that the House do so). With efforts to protect racial equality finally gaining majoritarian support in the political branches, it would be cruel irony indeed if this Court were to substitute its factual beliefs for the considered judgment of Congress, informed as it was by the testimony of experts and constituents.

III. CERD AND ICCPR IMPOSE A CONSTITUTIONAL REQUIREMENT ON THE U.S. TO UNDERTAKE EFFORTS TO ELIMINATE RACISM

Given the unquestioned history of discrimination, particularly in the-states subject to the preclearance provisions of Section 5, and the embarrassment it has caused the United States around the world, principles of international and treaty law must be given due consideration in this Court's analysis. Because its treaty obligations are the "supreme Law of the Land," this is not merely a matter of international law, but of constitutional requirements as well. U.S. Const. Art. VI. In addition, It should be noted that "a decent respect for the opinions of mankind" and the submission of what we do and why to a "candid world" are integral to our history and inscribed in one of the two foundational documents that gave birth to this nation. Declaration of Independence (U.S. 1776).

The United Nations Charter is a treaty entered into and ratified by the United States. Indeed, the United States played a leading role in establishing the United Nations. The Charter provides that one of the raisons d'être of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." United Nations Charter Art. 1(3), 59 Stat. 1031, T.S. No. 993, *entered into force* Oct. 24, 1945. Congress's efforts to insure the fundamental right of African-Americans and other citizens of color to engage meaningfully in the electoral process is therefore both a response to a treaty obligation and a constitutional mandate.

Accordingly, the government has a compelling, indeed constitutionally compelling, interest in enforcing the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, which states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination,

> provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. . . .
>
> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, Art 1(4), Art. 2(2). CERD's purpose is to insure "adequate advancement of certain racial or ethnic groups or individuals requiring such protection," so as to afford them "equal enjoyment or exercise of human rights and fundamental freedoms." CERD Art. 1 § 4. While it is true that special measures should only be utilized for as long as they are needed, which is the issue here, the right to vote is "precious" and "fundamental," so such measures are particularly important and any error should be on the side of insuring equal access to the polls. See *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 670 (1966). As this Court has sagely observed: "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). If there is any area in which the courts should tread carefully, it is in regard to the threat of disenfranchisement of citizens exercising this fundamental right.

The U.S. government likewise expressed its view that actions aimed at rectifying past discrimination are consistent with its treaty obligations when it ratified the International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. That convention prohibits discrimination or distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Because the text of the covenant did not specifically sanction corrective measures, the United States adopted an understanding to the effect that it would make distinctions if *rationally related* to a legitimate government objective. 138 Cong. Rec. 8068 (1992). That is to say, the government's understanding of its treaty obligation under the ICCPR is that only a rational basis is required for such corrective action.[3] And that treaty obligation is the "supreme Law of the Land." U.S. Const. Art. 6.

Although the United States adopted a number of reservations, understandings and declarations when it ratified the CERD, it never disavowed the need to take corrective action to remedy past discrimination. Congress reserved the right not to follow Article 4, which forbids racist speech, and Article 7, which requires that "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination. . ." 140 Cong. Rec. 14326 (1994). It did not, however, preclude measures necessary to address the legacy of discrimination that has plagued the union since before its birth. It is clear that the United States has undertaken treaty obligations that endorse measures taken for the purpose of achieving genuine equality. Again, such measures are especially crucial when it comes to voting, because the failure to remedy the problem there makes it impossible to remedy the problem anywhere.

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[3] *Amicus* understands that this Court may have imposed a somewhat more rigorous standard, requiring that the law must be "congruent and proportional" to the evil sought to be corrected, perhaps without regard to the ICCPR and our government's understanding of the extent of what could be done to correct this particular evil.

Admittedly, our jurisprudence holds that non-self-executing treaties, like the CERD, require enabling legislation to have the force of law under U.S. CONST., Art, VI. *See e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (holding that no enabling legislation was required to give the Warsaw Convention, a self-executing treaty, the force of law); *see also*, *Cook v. United States*, 288 U.S. 102, 119 (1933). However, these cases hold ~~only~~ that non-self-executing treaties are distinct only because they need enabling legislation to be enforceable in domestic courts. Nowhere is it said that non-self-executing treaties are without meaning – a position which, if adopted, would wreak havoc with international relations as it would render any ratification of a non-self-executing treaty meaningless. At a bare minimum, these human rights treaties serve as persuasive articulation of the compelling government interest in genuine equality which clearly cannot be achieved in any area if not protected in the electoral sphere; and in turn, compliance with our declarations of commitment to these high principles is a compelling state interest. Abandonment of such principles should be inconceivable. In fact, Section 5 be would have been seen as enabling legislation enacted pursuant to the CERD had it been originally been passed by Congress prior to the United States ratifying the treaty. The latest extension of Section 5, passed after the United States ratified the CERD, in addition to the myriad other reasons articulated by the district and circuit court opinions, should be so understood.

Assuming that the extension of the Voting Rights Act should be congruent and proportional to the problem it seeks to correct, that congruence and proportionality still must balance the overriding importance of the right to vote against the relatively minimal burdens placed upon states and their subdivisions to obtain preclearance. *See* 679 F.3d at 868 (observing that the process of obtaining preclearance is "routine and efficient"); 811 F. Supp. at 501 (noting the "minimal administrative cost" related to compliance).[4]

More than overwhelming those minimal burdens, Congress (and others) have properly determined that the effects of a racist past remain with us, particularly in covered jurisdictions. Jefferson County, Alabama, which is contiguous to Shelby County,[5] has recently admitted that it has failed to abide by a 30-year-old consent decree intended to remedy race and gender discrimination in hiring of county and that discriminatory practices have continued.[6]

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[4] In fact, the burdens imposed by Sec. 5 are so minimal that the oxymoronic "retroactive preclearance" of changes is routine.

[5] In relatively recent years, many whites fled from Jefferson to Shelby County because of the increased African-American population and the concomitant increase in black electoral power.

[6] The contempt hearing took place in December 2012 and no ruling has yet been made. Reports, however, reflect the county's admissions. *See e.g.*, Kyle Whitmire, *Bowman says Jefferson County Still Has Discriminatory Hiring, Voices*

Far less has been enough to sustain legislative action in other settings. For example, there is no evidence anywhere in the country that people voting illegally in person have affected the outcome of any election, yet this Court has previously found that laws requiring voters to provide photo identification before being allowed to cast ballots are constitutional. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). By contrast, 15,000 pages of evidence, carefully weighed by Congress led it to the conclusion that discrimination persists in the electoral arena and adversely affects people of color, particularly in the jurisdictions covered by Sec. 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577 (2006). This Court cannot consistently find that the Indiana legislature acted

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Confidence In County Manager To Fix Problem, AL.com, Dec. 10, 2012 ("Several career categories at the county still showed statistically significant bias against women and minorities, witnesses from both sides said"); Kent Faulk, *Jefferson County Commission President David Carrington Agrees County Hasn't Lived Up To Employment Practices Consent Decree*, AL.com, Dec. 5, 2012 (reporting that white County Commission president David Carrington acknowledged the failure of the county to comply with the requirements of the consent decree and needed to correct certain hiring practices); Barnett Wright, *Jefferson County Commission Warned In Memo To Follow Consent Decree*, Birmingham News, Feb. 24, 2012 (reporting on a memo written by a member of the county attorney's office warning Commissioner Jimmie Stephens that his decisions to lay off lower paid African-American employees rather than higher-paid white employees would be "very difficult to explain").

constitutionally in Crawford and that Congress exceeded its authority here.

In light of a history of hundreds of years of oppression and disenfranchisement, the continuing incidents of such disenfranchisement, the slight burden on covered jurisdictions to meet their obligations under Section 5 of the Voting Rights Act, the fundamental nature of the right involved, the constitutional burdens assumed by the United States by its treaty obligations and the international understanding of the importance of rectifying past racial discrimination, the reasons Congress has found for extending the Act are more than sufficient to justify its decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Honorable Court to affirm the decision below.

Dated: February 1, 2013

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AMICUS
CURIAE
BRIEF

No. 12-96

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SHELBY COUNTY, ALABAMA,

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On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

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BRIEF OF *AMICI CURIAE* THE NAVAJO NATION, LEONARD GORMAN, ANTHONY WOUNDED HEAD, SR., AND OLIVER J. SEMANS, SR., IN SUPPORT OF RESPONDENTS AND RESPONDENT-INTERVENORS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE VOTING RIGHTS ACT AS ENACTED AND REAUTHORIZED PROTECTS INDIANS FROM PURPOSEFUL DISCRIMINATION THAT HAS DENIED THEIR RIGHT TO VOTE IN STATE AND FEDERAL ELECTIONS 4

- A. Voter Discrimination Prior to the Passage of the Voting Rights Act 4
- B. The Voting Rights Act of 1965 Provided Certain Protections to Indians 7
- C. Continued Discrimination Subjected Counties in Arizona and South Dakota to Section 5 8
  - 1. Apache, Navajo and Coconino Counties in Arizona Discriminated against Indian Voters 8
  - 2. Todd and Shannon Counties in South Dakota Discriminated against Indian Voters 12

TABLE OF CONTENTS – Continued

Page

II. THE 2006 REAUTHORIZATION WAS A LEGITIMATE RESPONSE TO CONTINUED INTENTIONAL DISCRIMINATION AGAINST INDIAN VOTERS IN COVERED JURISDICTIONS 13

- A. Indians Continue to Be Disenfranchised by Voting Schemes 16
- B. Polling Place Discrimination 21
- C. Ineffective Language Assistance Disenfranchises Indian Voters 23
- D. Language Minority Provisions Have Had a Beneficial Impact on the Number of Indian Voters 27

III. SECTION 5 PRECLEARANCE IS A KEY COMPONENT TO PROTECTING THE FUNDAMENTAL RIGHTS OF INDIANS 29

- A. Native American Voter Registration and Turnout Have Increased 30
- B. The Evidence Reveals that There Is a Continued Need for Section 5 31
- C. Federal Observers Help to Increase Compliance with the Voting Rights Act in Covered Jurisdictions 35
- D. Section 5 Preclearance Continues to Protect Indian Voters 37
- E. Section 5's Preclearance Requirements Are Not Onerous 38

TABLE OF CONTENTS – Continued

Page

IV. REAUTHORIZATION IS SUPPORTED BY THE RECORD AND A VALID EXERCISE OF CONGRESSIONAL POWER 41

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

American Horse v. Kundert, No. 84-5159 (D.S.D. Nov. 5, 1984) 18

Apache County High School No. 90 v. United States, No. 77-1815 (D.D.C. June 12, 1980) 11

Apache County v. United States, 256 F. Supp. 903 (D.D.C. 1966) 8

Black Bull v. Dupree School District, No. 86-3012 (D.S.D. May 14, 1986) 22

Blackmoon v. Charles Mix County, 505 F. Supp. 2d 585 (D.S.D. 2007) 20

City of Boerne v. Flores, 521 U.S. 507 (1997) 15

Elk v. Wilkins, 112 U.S. 94 (1884) 5

Goddard v. Babbitt, 536 F. Supp. 538 (D. Ariz. 1982) 19

Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976) 10, 11

Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) 6

Kirkie v. Buffalo County, No. 03-3011 (D.S.D. Feb. 12, 2004) 19, 20

Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975) 12

Navajo Nation v. Brewer, No. 06-1575 (D. Ariz. May 27, 2008) 2, 34

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 16, 38

TABLE OF AUTHORITIES – Continued

Page

Oregon v. Mitchell, 400 U.S. 112 (1970)........................9

Porter v. Hall, 271 P. 411 (Ariz. 1928)...........................6

Quick Bear Quiver v. Nelson, 387 F. Supp. 1027 (D.S.D. 2005)..34

Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000)..18

Shirley v. Superior Court for Apache County, 513 P.2d 939 (Ariz. 1973)...10

Thornburg v. Gingles, 478 U.S. 30 (1986) 29

United States v. Arizona, No. 88-1989 (D. Ariz. May 22, 1989)..17, 25

United States v. Arizona, No. 94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994).................17

United States v. Day County, No. 85-3050 (D.S.D. Oct. 24, 1986) 18

United States v. McKinley County, New Mexico, 941 F. Supp. 1062 (D.N.M. 1996) 27

United States v. South Dakota, 636 F.2d 241 (8th Cir. 1980) 13

UNITED STATES CONSTITUTION

U.S. CONST. amend. XIV...5, 41

U.S. CONST. amend. XV 41

Page

FEDERAL STATUTES

42 U.S.C. §§ 1973 *et seq.* .... *passim*

43 Stat. 253, Pub. L. No. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)) 5, 10

FEDERAL RULES, REGULATIONS, AND NOTICES

30 Fed. Reg. 9,897 (Aug. 7, 1965) 8

30 Fed. Reg. 14,505 (Nov. 19, 1965) 8

41 Fed. Reg. 784 (Jan. 5, 1976) 12

76 Fed. Reg. 63,602 (Oct. 13, 2011) 25

FEDERAL LEGISLATIVE MATERIALS

Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

H.R. REP. NO. 109-478 (2006) .... *passim*

Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) 35

S. REP. NO. 109-259 (2006) 41

To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 33, 35

TABLE OF AUTHORITIES – Continued

Page

Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) .... *passim*

Voting Rights Act: Evidence of Continued Need, Vol. III: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006) 19

Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 17, 25, 27, 28, 29

Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 14, 18, 31

Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005) 23, 24, 31, 36

TABLE OF AUTHORITIES – Continued

Page

Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005)............................*passim*

STATE STATUTES

ARIZ. REV. STAT. ANN. § 16-101....................................7

ARIZ. REV. STAT. ANN. § 16-579..................................33

S.D. CODIFIED LAWS § 12-18-6.1.................................33

OTHER AUTHORITIES

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3] (2012 Ed.)..5

DANIEL MCCOOL, SUSAN OLSON, AND JENNIFER ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (Cambridge University Press 2007)................7

Letter from T. Christian Herren, Jr., Chief *US DOJ Voting Section*, to Michele L. Forney, *Arizona Assistant Attorney General* (July 30, 2012)...40

U.S. Census Bureau, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf..1

TABLE OF AUTHORITIES – Continued

Page

U.S. COMM'N ON CIVIL RIGHTS, THE UNFINISHED BUSINESS: TWENTY YEARS LATER, A REPORT SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS BY ITS FIFTY-ONE STATE ADVISORY COMMITTEE (1977)..13

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Navajo Nation is the largest federally recognized Indian tribe in the United States, comprising over 300,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[2] The State and political subdivisions of the Arizona portion of the Navajo Nation are required to submit voting changes for preclearance under Section 5 of the Voting Rights Act. The Navajo Nation has been involved in a number of voting rights lawsuits to ensure that its members can participate in the electoral process. The Navajo Nation and its members sent letters to Congress in support of the reauthorization of the expiring provisions of the Voting Rights Act.

Amicus Leonard Gorman is an enrolled member of the Navajo Nation, a qualified elector in Arizona and a resident of Window Rock, Arizona, in Apache County. Mr. Gorman is the Director of the Navajo Nation Human Rights Commission. The Commission is charged with protecting and promoting the human rights of Navajo citizens. As part of this mission, the Commission is focused on ensuring that Navajo citizens are able to vote and to elect candidates of their choice. He has participated most recently in the Congressional and legislative redistricting for the states of Arizona, New Mexico and Utah. He testified before the Arizona Independent Redistricting Commission. Mr. Gorman was a plaintiff in *Navajo Nation v. Brewer*, challenging Arizona's voter identification law.[3]

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or part, and no persons or entity, other than *amici curiae* and their counsel, made a financial contribution for the preparation or submission of this brief.

[2] According to the 2010 U.S. Census, approximately 173,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. Census Bureau, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

Amicus Oliver J. Semans, Sr., is a member of the Rosebud Sioux Nation and lives on the Rosebud Sioux Reservation located in Todd County, South Dakota. Mr. Semans is the Executive Director of Four Directions, a non-partisan voting rights and voter protection organization. Mr. Semans has organized Get Out the Vote campaigns in South Dakota for tribal voters and has testified at a hearing in Rapid City, South Dakota in support of the reauthorization of the Voting Rights Act. Mr. Semans has testified extensively before South Dakota State Senate Committees on proposed laws that would adversely affect the voting rights of Indians and has continuously worked on increasing voter turnout.

Amicus Anthony Wounded Head, Sr. is a member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation and a former tribal council representative.

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[3] No. 06-1575 (D. Ariz.) (settled and dismissed on May 27, 2008).

The Pine Ridge Reservation is one of the poorest areas in the country.[4] Mr. Wounded Head lives in Shannon County, is a native language speaker and is supportive of language translations for American Indian language speakers. Mr. Wounded Head has witnessed the disenfranchisement that can be reversed through the protections of Section 5.

◆

SUMMARY OF ARGUMENT

Indian people have endured a century of discrimination and overcome new obstacles each generation in order to exercise the right to vote in state and federal elections. Nowhere have these struggles been more prevalent than in the Section 5 covered jurisdictions of Apache, Navajo and Coconino Counties in Arizona the home of the Navajo Nation and Todd and Shannon Counties in South Dakota the home of the Rosebud and Oglala Sioux. The *amici curiae* file this brief to elucidate the importance that the Voting Rights Act and, in particular, Section 5 preclearance, has had in overcoming the purposeful efforts to disenfranchise Indian voters.

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[4] The Pine Ridge Reservation is located in Shannon and Jackson counties. Shannon County has the highest Indian population of any county in the United States at 94.2%, and is the "second-poorest county nationwide." The poorest county is Buffalo County, South Dakota and has an 81.6% Indian population. *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

While passage of the Voting Rights Act in 1965 ended certain means of discrimination, Indians continued to be denied the right to vote through a variety of new strategies. As part of the 2006 reauthorization process, Congress obtained evidence that Indians continued to be disenfranchised by voting schemes, polling place discrimination and ineffective language assistance. The 2006 reauthorization was a legitimate Congressional response to the disenfranchisement. Protected by the Section 5 preclearance, voter registration and turnout have increased, but new challenges have arisen that require continued vigilance. Section 5 preclearance remains a key component to protecting the fundamental right to vote. The minimal burden required of covered jurisdictions to comply with Section 5 is justified to protect Indian voters.

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ARGUMENT

I. THE VOTING RIGHTS ACT AS ENACTED AND REAUTHORIZED PROTECTS INDIANS FROM PURPOSEFUL DISCRIMINATION THAT HAS DENIED THEIR RIGHT TO VOTE IN STATE AND FEDERAL ELECTIONS.

A. Voter Discrimination Prior to the Passage of the Voting Rights Act.

American Indians "have experienced a long history of disenfranchisement as a matter of law and of practice." It was not until Congress passed the Indian Citizenship Act of 1924 that all Indians were granted United States citizenship.[5] Prior to 1924, Indians were denied citizenship and the right to vote and could only become citizens through naturalization "by or under some treaty or statute."[6] The 1924 Act ended the period in United States history in which obtaining United States citizenship required an Indian to sever tribal ties, renounce tribal citizenship and assimilate into the dominant culture.[7]

With the passage of the Indian Citizenship Act and by operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.[8] Notwithstanding the passage of the Indian Citizenship Act, some states continued to deny Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.[9]

Even after 1924, Arizona Indians were prohibited from participating in elections. The Arizona Supreme

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[5] An Act of June 2, 1924, 43 Stat. 253, Pub. L. No. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

[6] *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

[7] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3], n. 42-44 (2012 Ed.).

[8] U.S. CONST. amend. XIV, § 1.

[9] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

Court upheld the prohibition finding that Indians living on reservations could not vote because they were wards of the federal government and, as such were "persons under guardianship" and thereby prohibited from voting in Arizona.[10] Reservation Indians in Arizona did not achieve the right to vote in state elections until 1948 when the Arizona Supreme Court overturned the *Porter v. Hall* decision.[11]

Like Arizona, South Dakota has had a long history of discrimination against Indians. Todd and Shannon Counties have been the focus of much of the discrimination because the Rosebud Reservation is located in the former, and the Pine Ridge Reservation is in the latter.

The Sioux people of South Dakota have experienced a long struggle to attain full voting rights. The first territorial legislative assembly limited voting to whites. This provision was revoked after passage of the Civil Rights Amendments, but still limited voting to citizens, which excluded most Indians. The territorial civil code expressly prevented Indians from voting. The state's civil code, developed in 1903, specified that Indians could not vote or hold office while "maintaining tribal relations."[12] The state applied a culture test to voting, requiring Indians to abandon their identity, their culture, their language, and their homeland in order to vote. This provision was not repealed until 1951.[13] The repeal of this provision did not automatically result in full voting rights for Indians living in Todd and Shannon Counties.

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[10] *Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928).

[11] *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (holding that Indians living on Indian reservations should in all respects be allowed the right to vote).

B. The Voting Rights Act of 1965 Provided Certain Protections to Indians.

At the time of passage of the Voting Rights Act in August 1965, the State of Arizona required all voters to pass an English literacy test as a prerequisite to voting.[14] Only those Indians who could read the United States Constitution in English and write their names were eligible to vote in state elections. The enactment of the Voting Rights Act in 1965 included a temporary prohibition of literacy tests in covered jurisdictions.

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[12] DANIEL MCCOOL, SUSAN OLSON, AND JENNIFER ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 137-138 (Cambridge University Press 2007).

[13] *Id.* at 138.

[14] The English literacy test was not repealed until 1972. *See* ARIZ. REV. STAT. ANN. §§ 16-101.A4, 16-101.A5 (1956); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1372 (2006) (appendix to the statement of Wade Henderson).

Apache County, Arizona was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.[15] On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.[16] As a result of this coverage, literacy tests were suspended in each of these three counties. However, in 1966, these three counties became the first jurisdictions to successfully bail out from coverage under Section 5 after the U.S. District Court for the District of Columbia held that Arizona's literacy test had not been discriminatorily applied against Indians in the preceding five years.[17]

C. Continued Discrimination Subjected Counties in Arizona and South Dakota to Section 5.

1. Apache, Navajo and Coconino Counties in Arizona Discriminated against Indian Voters.

When the Voting Rights Act was amended in 1970, it included a nationwide ban on literacy tests, which again preempted the operation of Arizona's literacy tests.[18] Arizona became one of the states to unsuccessfully challenge the ban on literacy tests. In upholding the ban and striking down literacy tests, the Supreme Court noted that Arizona had "a serious problem of deficient voter registration among Indians."[19] The Court recognized that non-English speakers may make use of resources in their native languages in order to responsibly and knowledgeably cast a ballot.[20]

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[15] Determination of the Attorney General Pursuant to Section (4)(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9,897 (Aug. 7, 1965).

[16] Determination of the Director Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 14,505 (Nov. 19, 1965).

[17] *Apache County v. United States,* 256 F. Supp. 903, 910-911 (D.D.C. 1966).

The Voting Rights Act amendments of 1970 included, as one of the measures of voting discrimination, registration and turnout in the 1968 presidential election. As a result, Apache, Coconino and Navajo Counties again became covered by Section 5 along with five other Arizona counties.[21]

Even after 1970, there were a number of challenges to Indians' right to vote and right to hold office. Many of these cases challenged activities in Apache County, one of only a few counties within the United States in which the predominant languages spoken are Indian. Of these languages, the most commonly used is Navajo, a historically unwritten language.[22] The Arizona Supreme Court quashed a permanent injunction by the lower court against the seating of Tom Shirley, a Navajo Indian living on the Navajo Reservation, who had been elected to the Apache County Board of Supervisors.[23] The Arizona Court reaffirmed the right of Indians to vote, vacated the injunction and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor from District 3.[24]

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[18] The Voting Rights Act, 42 U.S.C. § 1973aa (1970) (current version at 42 U.S.C. § 1973b (2008)).

[19] *Oregon v. Mitchell*, 400 U.S. 112, 117, 132, 153 (1970).

[20] *Id.* at 146.

[21] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1370 (2006) (appendix to the statement of Wade Henderson).

Apache County also discriminated against Indian voters by gerrymandering the districts for the three seats on the County's Board of Supervisors. In the early 1970's, Apache County District 3 had a population of 26,700 of whom 23,600 were Indian, while District 1 had a population of 1,700 of whom only 70 were Indian and District 2 had a population of 3,900 of whom only 300 were Indian. Several Indian voters challenged Apache County for violating the one-person, one-vote rule.[25] Apache County claimed that Indians are not citizens of the United States and the Indian Citizenship Act granting them citizenship was unconstitutional.[26] The three-judge federal court rejected the County's arguments, noted that the County must be redistricted in accordance with one-person, one-vote standards and granted plaintiffs' motion for summary judgment.[27]

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[22] Considering the Navajo Reservation as a whole, including parts of the States of Arizona, New Mexico and Utah, over one-third of the voting age citizens on the Navajo Reservation are limited-English proficient and over one-quarter are illiterate. *Id.* at 1403-1404 (appendix to the statement of Wade Henderson).

[23] *Shirley v. Superior Court for Apache County*, 513 P.2d 939, 945 (Ariz. 1973).

[24] *Id.*

[25] *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

In 1976, Apache County attempted to avoid integration of Indian students into the public schools by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county. Although the special election affected Indian students who would be denied equal schooling, Indian turnout for the election was abnormally low. Investigation demonstrated that the low turnout was a result of the closing of nearly half of the polling places on the reservation, the total lack of language assistance, the absence of Navajo language informational meetings regarding the bond election and the use of English-only in the implementation of absentee voting procedures. This litigation ended in a Consent Decree in which Apache County agreed to a number of changes to the blatant discrimination in voting practices.[28]

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[26] *Id.* at 14.

[27] *Id.* at 16.

[28] *Apache County High School No. 90 v. United States*, No. 77-1815 (D.D.C. June 12, 1980).

2. Todd and Shannon Counties in South Dakota Discriminated against Indian Voters.

After the passage of the Voting Rights Act, Indians living in Todd and Shannon Counties. South Dakota, home of the Pine Ridge and Rosebud Reservations, were prohibited from voting for county officials. This injustice was finally ended by the Eighth Circuit in 1975.[29]

In 1976, the counties of Todd and Shannon were placed under the provisions of Section 5 of the Voting Rights Act.[30] The Attorney General of South Dakota, William Janklow, directed the South Dakota Secretary of State to virtually ignore the Voting Rights Act provisions that were "plaguing" the state[31] and Indians from Todd and Shannon Counties were prohibited from holding office; that injustice was not struck down until 1980.[32]

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[29] *Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975).

[30] Partial List of Determinations Pursuant to Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 784 (Jan. 5, 1976); *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1990 (2006) (appendix to the statement of Wade Henderson).

[31] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1990 (2006) (appendix to the statement of Wade Henderson).

The continuing racial animosities in South Dakota have resulted in a series of reports by the U.S. Commission on Civil Rights. In 1977, the Commission noted that the "voting problems of minorities" in South Dakota were part of the state's "unfinished business in the area of civil rights."[33] In 1981 the Commission again turned its attention to South Dakota to investigate the voting problems of Indians. Much of this report focused on Todd and Shannon Counties.

II. THE 2006 REAUTHORIZATION WAS A LEGITIMATE RESPONSE TO CONTINUED INTENTIONAL DISCRIMINATION AGAINST INDIAN VOTERS IN COVERED JURISDICTIONS.

The expiring provisions of the Voting Rights Act include (i) Section 4(b)(4), (ii) Section 5 preclearance, (iii) Section 203 – bilingual elections for limited English proficient voters, (iv) Section 6 – federal election examiners, and (v) Section 8 – federal election observers. The Voting Rights Act, including the

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[32] *United States v. South Dakota*, 636 F.2d 241, 243 (8th Cir. 1980).

[33] U.S. COMM'N ON CIVIL RIGHTS, THE UNFINISHED BUSINESS: TWENTY YEARS LATER, A REPORT SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS BY ITS FIFTY-ONE STATE ADVISORY COMMITTEE (1977).

Section 5 preclearance requirement and the minority language provisions, provides necessary protections to Indian voters from ongoing discrimination. Congress implemented Section 203 of the Voting Rights Act in 1975 based on findings that American Indians, Alaska Natives and other language minorities were prohibited from fully participating in the democratic process.[34] However, even with the implementation of Section 5, and other protections, the provisions do not provide absolute protection for Indian voters. Congressional testimony and materials submitted in support of reauthorization of the expiring provisions of the Voting Rights Act demonstrate numerous instances where Indians have been subject to discrimination since 1982.

In support of reauthorization, the House of Representatives Committee to the Judiciary received testimony that revealed a need to extend Section 5 to protect racial and language minority citizens from discrimination.[35] Laughlin McDonald of the ACLU testified that "there is in fact, abundant modern-day evidence showing that section 5 is still needed in this country and that the right to vote is still in jeopardy,"[36] because there is widespread, systematic voting discrimination against Indians.[37] The House Committee Report found that Section 5 enforcement authority was critical, because it allowed the Department of Justice and private citizens to monitor covered jurisdictions with a history of discrimination to ensure full compliance of the law.[38] The Committee ultimately found that "substantial discrimination continue[d] to exist in 2006."[39]

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[34] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 4 (2005) (testimony of Jacqueline Johnson, National Congress of American Indians).

[35] H.R. REP. NO. 109-478, at 56 (2006).

The Congressional Record supports the Committee's finding and the Congressional reauthorization. Because there is ongoing intentional discrimination against Native Americans in covered jurisdictions, there is "a congruence between the means used and the ends to be achieved" by extending Section 5's protections.[40] The record demonstrates that the current need to prevent voter discrimination against Indians in Todd, Shannon, Coconino, Apache and Navajo

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[36] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 4 (2005) (testimony of Laughlin McDonald).

[37] *Id.* at 101 (appendix to the statement of Laughlin McDonald).

[38] H.R. REP. NO. 109-478, at 42 (2006).

[39] *Id.* at 25.

[40] *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

Counties justifies the reauthorization of Section 5 of the Voting Rights Act.[41]

A. Indians Continue to Be Disenfranchised by Voting Schemes.

Recent instances of voting discrimination in Indian Country documented in the Congressional Record indicate that Section 5 is still necessary to protect Indian voters. The House Committee Report included testimony of voting schemes that prevented Indians from gaining majority seats by dismantling minority districts.[42] The Committee Report also found that similar tactics kept Indians from registering and casting effective ballots.[43]

There is an extensive history of discrimination against Indian voters from the Navajo, Apache, and Hopi tribes included in the Congressional Record.[44] Since 1982, there have been two successful cases against Coconino, Navajo, and Apache Counties where the specific provisions of the Voting Rights Act were enforced on behalf of Indian voters.[45] In 1989, the United States brought forth a claim against Arizona for "unlawfully deny[ing] or abridg[ing] the voting rights of Navajo citizens residing in defendant counties."[46] The Arizona counties settled the claims by Consent Decree which required the establishment of the Navajo Language Election Information Program including the employment of outreach workers to assist in all aspects of voting by Indians.[47] In 1994, the Department of Justice brought an enforcement action to enjoin Navajo and Coconino Counties from having judicial elections for four new judicial divisions created without seeking preclearance under Section 5. The District Court held that the judgeships constituted a "covered change" and enjoined the judicial elections until preclearance was obtained.[48]

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[41] *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

[42] H.R. REP. NO. 109-478 at 45.

[43] *Id.*

[44] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1379, 1411-1412 (2006) (appendix to the statement of Wade Henderson).

[45] *Id.*

Indian voters in South Dakota also continue to encounter racial hostility, polarized voting, and resistance when participating in state and federal elections. Between 1982 and 2006, Indians in South

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[46] *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

[47] *Id.* (appendix to the Statement of Bradley J. Schlozman).

[48] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) (appendix to the statement of Wade Henderson); *United States v. Arizona*, No. 94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994).

Dakota were subject to *de jure* and *de facto* discrimination, including having their voter registration cards systematically denied by the county registrar[49] and not being able to vote in elections because they were non-white land owners.[50] There have been nineteen Indian voting rights cases brought against South Dakota; out of those cases, eighteen were decided in favor of the Indian plaintiffs or were settled with the agreement of the Indian plaintiffs.[51] Continued discrimination in South Dakota necessitates federal oversight over Shannon and Todd counties through the preclearance protections and language minority provisions.

Indians in both Arizona and South Dakota have been subject to voting schemes that aim to dilute or pack the Indian vote. This Court has recognized that alternative methods have been employed to infringe on the rights of minority voters by "pour[ing] old poison into new bottles."[52] Although this is not outright vote denial, the methods employed have the same effect, to diminish the "minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice."[53]

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[49] *American Horse v. Kundert*, No. 84-5159 (D.S.D. Nov. 5, 1984).

[50] *United States v. Day County*, No. 85-3050 (D.S.D. Oct. 24, 1986); *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2000 (2006) (appendix to the statement of Wade Henderson).

[51] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 264 (2006).

[52] *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part, dissenting in part).

In 1982, in *Goddard v. Babbitt*, the San Carlos Apache Tribe successfully objected to a proposed redistricting plan that aimed to split and dilute the Apache vote.[54] The Department of Justice objected to the plan on the grounds that the plan had a discriminatory effect. The District Court found the proposed plan had "the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest."[55]

In two South Dakota cases not covered by Section 5 preclearance protection, discrimination in redistricting led to prolonged litigation followed by Consent Decrees. In *Kirkie v. Buffalo County,* Buffalo County, South Dakota gerrymandered its three districts by packing 75% of the Indian population into one district.[56] The county, the "poorest in the

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[53] *See* H.R. REP. No. 109-478, at 6 (2006) ("Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same.").

[54] *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982); *Voting Rights Act: Evidence of Continued Need, Vol. III: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3968 (2006) (materials submitted by the Honorable Steve Chabot).

[55] *Id.*

[56] *Kirkie v. Buffalo County*, No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need*

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country,"[57] was comprised of approximately 2,100 people, of which 83% were Indian. This redistricting had the purpose of diluting the Indian vote, as whites controlled both the other two districts and thus County government.[58] The case was settled by a Consent Decree wherein the county admitted its plan was discriminatory and was forced to redraw the district lines.[59] In addition, the county agreed to subject itself to Section 3(c) of the Voting Rights Act, which requires the submission of voting changes for preclearance.[60] As recent as 2005, another South Dakota county was forced to redraw district lines for similar malapportionment of Indian voters.[61] Section

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for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

[57] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

[58] *Kirkie v. Buffalo County,* No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

[59] *Id.*

[60] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2005 (2006) (appendix to the statement of Wade Henderson).

[61] *Blackmoon v. Charles Mix County,* 505 F. Supp. 2d 585 (D.S.D. 2007); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the*

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5 protections could have prevented this type of *de facto* discrimination, because the changes would have needed preclearance approval prior to enactment.[62]

B. Polling Place Discrimination

The Congressional Record demonstrates how Indian voters on reservations in the covered jurisdictions of South Dakota and Arizona have more limited access to polling places and voter registration resulting in lower Indian voter turnout. In Arizona, polling locations and voter registration sites on reservations are often located at substantially greater distances from voters, than sites located off reservation.[63] Further distances means a greater cost incurred to exercise one's vote.[64] Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.[65]

In South Dakota, one county failed to provide sufficient polling locations for a school district election.

H. Comm. on the Judiciary, 109th Cong. 156 (2005) (appendix to the Statement of Laughlin McDonald).

[62] Charles Mix County is not covered by Section 5.

[63] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1380, 1411-1412 (2006) (appendix to the statement of Wade Henderson).

[64] *Id.*

[65] *Id.*

Many Indians traveled up to 150 miles to vote.[66] Only after a federal district court entered a judgment against the County did the County provide additional reservation polling places.[67]

In South Dakota, a hearing in support of a bill to create more on-reservation polling places was scheduled 3 hours away from the reservation at 7:30 a.m., which made it difficult for tribal members to attend and testify.[68] The bill was subsequently defeated. In 2000, the U.S. Commission on Civil Rights noted that "Native Americans do not fully participate in local, state, and federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality" in South Dakota.[69]

The Congressional Record provides evidence that voter intimidation tactics are still employed at various polling places in order to deter language minority voters. The Department of Justice reported instances where observers witnessed language minority voters being harassed and intimidated by polling officials.[70] Congressional testimony described the efforts to discourage the Indian vote by intimidating poll workers and voters at several polling locations on the Navajo Reservation in 2002.[71] In South Dakota, Indian voters have been intimidated by accusations of voter fraud by local officials – that in turn, created a racially hostile environment at the voter registration sites and voting polls.[72]

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[66] *Black Bull v. Dupree School District*, No. 86-3012 (D.S.D. May, 14 1986); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 133 (2005) (appendix to the statement of Laughlin McDonald).

[67] *Black Bull v. Dupree School District*, No. 86-3012 (D.S.D. May 14, 1986).

[68] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2027 (2006) (appendix to the statement of Wade Henderson).

[69] *Id.* at 1989.

C. Ineffective Language Assistance Disenfranchises Indian Voters.

Language has been a significant barrier to voting for Indians. The House Committee Report found that Indians continue to experience hardships when attempting to vote, because of their limited ability to speak English and inability to read the ballots.[73] Testimony highlighted the many Indians, especially elders, who "speak English only as a second language."[74] The minority language protections require that covered jurisdictions provide assistance to Indian voters who may have little or no formal education and who may speak English only as a second language. Testimony revealed that there are numerous jurisdictions that require language translations so that the Indian population can function in the electoral process.[75] The right to language translations is important for Indians to have equal access to the ballot box.[76] In 2006, 88 jurisdictions in 17 states were covered for American Indian languages.[77] Nine Arizona counties are covered under Section 203 for American Indian languages: Apache, Coconino, Maricopa, Mohave, Navajo, Pima, Pinal, Yavapai, and Yuma and must provide all election materials, including assistance and ballots, in the language of the applicable language minority group. Of these counties four – Navajo, Apache, Coconino and Pinal – are covered under Section 5 and must have all materials and procedures precleared.[78]

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[70] H.R. REP. NO. 109-478, at 45 (2006).

[71] *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 16 (2005) (statement of Penny Pew).

[72] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2007 (2006) (appendix to the statement of Wade Henderson).

[73] H.R. REP. NO. 109-478, at 45 (2006).

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[74] *Id.* at 46; *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 309 (2006) (letter by Joe Garcia, NCAI).

[75] *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 35-37, 43-45 (2005) (statement of Benny Weinberg).

[76] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 310 (2006) (letter by Joe Garcia, NCAI).

[77] *Id.* at 309.

Congress reauthorized the temporary, minority language provisions, because there are still language barriers that make it difficult or impossible for citizens to understand election ballots.[79] The Department of Justice identified situations in which ineffective language assistance was offered to Indian voters in Apache County, Arizona.[80] Navajo and Apache Counties agreed to establish minority language programs to better assist Indian voters pursuant to a Consent Decree.[81]

The House Committee found that "Section 203 is intended to remedy . . . unequal educational opportunities afforded [Indians], resulting in high illiteracy and low voting participation."[82] Educational

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[78] *See* Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011).

[79] H.R. REP. NO. 109-478, at 147 (2006).

[80] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[81] *United States v. Arizona,* No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

[82] H.R. REP. NO. 109-478, at 59 (2006); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,*

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discrimination has been broad in scope. There are disparities in funding given to Indian students compared to other students.[83] Sixty percent of Latino and Indian students score below grade level in national testing.[84] There are insufficient adult English as a Second Language courses available in many covered jurisdictions.[85] The illiteracy rate for Arizona Indians is nineteen times the national illiteracy rate.[86] For South Dakota Indians, the illiteracy rate is similarly very high and "[s]ignificant numbers of Indians" require oral and written translation assistance in the Lakota and Dakota languages.[87]

The 2000 Census data reported that 21.4% of American Indians are limited English proficient. The import of the Census Data was included in the testimony of the National Congress of American

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109th Cong. 1380 (2006) (appendix to the statement of Wade Henderson).

[83] H.R. REP. NO. 109-478, at 51 (2006).

[84] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[85] Arizona has inadequate English as a Second Language and adult ELL courses to help bridge the language gap. *Id.* at 1367, 1379.

[86] *Id.*

[87] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2020-2091 (2005) (appendix to the statement of Laughlin McDonald).

Indians.[88] Many Indian languages are oral and are not written.[89] The Section 203 language minority provisions are necessary to ensure that Indians can effectively exercise their right to vote. Section 203 litigation regarding minority language assistance has led to Consent Decrees where Section 203 covered jurisdictions agree to provide bilingual voting materials and translators to assist at polling sites.[90] Between 2001 and 2006, the Department of Justice filed more minority language violation cases than in the previous twenty-one years.[91]

D. Language Minority Provisions Have Had a Beneficial Impact on the Number of Indians Voters.

The House Committee found evidence of increased participation by language minorities in Section 203 covered jurisdictions[92] and that the minority language provisions were "instrumental in fostering progress among language minority citizens."[93] Indian witnesses testified that voter participation had increased in some communities by as much as 50% to 150%.[94] The Department of Justice additionally noted that the gap in electoral participation had narrowed for some minority voters.[95] Furthermore, Indian witnesses testified that there has been some success in electing candidates of their choice.[96]

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[88] *Id.* (many American Indian and Alaska Natives continue to speak in their tribal language and many do not speak English well).

[89] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 498-499 (2006) (statement by Alfred Yazzie); *see also, United States v. McKinley County, New Mexico,* 941 F. Supp. 1062, 1066-1067 (D.N.M. 1996).

[90] H.R. REP. NO. 109-478, at 59 (2006).

[91] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 10 (2006) (testimony of Bradley Schlozman).

The temporary provisions of the Voting Rights Act have helped increase Indian voter turnout on reservations. Continuation of the protections provided by Section 5 and the language minority provisions are vital for maintaining and increasing Indian voter participation. The report on American Indian and Alaska Native progress concluded with the Committee stating, "[t]he Committee believes that these examples reflect the gains that Congress intended language minorities to make under Section 4(f) and 203, and concludes that all American citizens should have the opportunity to participate in the political process."[97]

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[92] *Id.*

[93] *Id.* at 18 (2006).

[94] *Id.* at 20 (2006).

[95] *Id.*

[96] *Id.* (finding that there has been an increase in the number of Native Americans being elected to office; *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 10, 12 (2006) (testimony of Bradley Schlozman).

III. SECTION 5 PRECLEARANCE IS A KEY COMPONENT TO PROTECTING THE FUNDAMENTAL RIGHTS OF INDIANS.

In *Thornburg v. Gingles*, this Court stated that "[b]oth this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."[98] Indian voters continue to suffer from some of the highest poverty rates and unemployment rates in the country. Many Indian reservations are rural. In Shannon County, which includes the Pine Ridge Reservation, 52.3% of the families are below the poverty line, and in Todd County, which includes the Rosebud Sioux Reservation, 48.3% of the families live below the poverty line.[99] On Arizona tribal reservations, poverty rates are above 42% with Fort Yuma's rate exceeding 94%.[100] The need for Section 5's preclearance

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[97] *Id.*

[98] 478 U.S. 30, 69 (1986); *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2020 (2006) (appendix to the statement of Wade Henderson).

[99] *Id.*

[100] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H.*

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provisions in Indian Country is demonstrated by not only the historical impediments to suppress the Indian vote, but the continuing effects of past discrimination and continuing voter suppression efforts that disenfranchise Indian voters.

A. Native American Voter Registration and Turnout Have Increased.

Prior to Section 5 coverage, Indians in covered jurisdictions had little opportunity to vote.[101] The House Judiciary Committee found that the temporary provisions have protected minority voters and helped them to register to vote unchallenged, cast ballots unhindered, and cast meaningful votes. The Committee found "that increased participation levels are directly attributable to the effectiveness of the VRA's expiring provisions."[102] More Indian voters have registered to vote and turned out to vote since the implementation of Section 5.[103] The Voting Rights Act's temporary provisions have resulted in increased participation by

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Comm. on the Judiciary, 109th Cong. 1383 (2006) (appendix to the statement of Wade Henderson).

[101] "Section 5 Covered Jurisdictions," on the U.S. Dep't of Justice Civil Rights Division website, *available at* http://www.usdoj.gov/crt/voting/sec_5/covered.php (seven counties are covered under Section 4(f)(4) for Indian languages and are subject to the preclearance requirements of Section 5 including four in Arizona, two in South Dakota, and one in North Carolina).

[102] H.R. REP. NO. 109-478, at 21.

[103] *Id.* at 20.

Indian voters in the electoral process. Jurisdictions that comply with Section 203's language minority provisions have also improved registration and turnout rates.[104] Enforcement of voting rights through Consent Decrees and the federal observer programs have also increased Indian participation in voting.[105]

B. The Evidence Reveals that There Is a Continued Need for Section 5.

Despite improvements, Indian voters still face obstacles in voting.[106] The need for the continuation of Section 5 was demonstrated by noncompliance, continuing discrimination, Consent Decrees entered in Arizona and South Dakota for covered jurisdictions as late as 1993 and 2005, and the number of voting cases in Indian Country. From 1999-2005, South Dakota was involved in seven cases regarding violations of Indian voting rights.[107]

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[104] *Id.*

[105] The Navajo Language Program precleared by Section 5 and required under a Consent Decree has resulted in more opportunities for Navajos to register to vote and vote on Election Day. *See Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109 Cong. 15 (2005) (statement of Penny Pew).

[106] H.R. REP. NO. 109-478, at 34, 35, 45, 52.

[107] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 259-268 (2005) (materials submitted by Rep. Chabot).

Section 5 has improved the political landscape for tribal participation in elections, but it has not eroded animosity against Indian voters nor has it ended all discrimination in voting. In the Renew the Voting Rights Act Report for Arizona, experts found Arizona still needs to make improvements for Indian voters.

> More than eighty percent of Arizona's twenty-two Section 5 objections have occurred for voting changes enacted since 1982. Four post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002. Since 1982, the Department of Justice has interposed objections to voting changes from nearly half of Arizona's 15 counties that have had the purpose or effect of discriminating against Latino or American Indian voters.[108]

The Indian voters in covered jurisdictions comprise a substantial percentage of the Voting Age Population in those counties. (Todd County 85.6%; Shannon County, 94.2%; Apache County, 76.88%; Navajo County, 47.74%; Coconino County, 28.51%; Jackson County, NC, 10.2%; Pinal County, 6.1%). Therefore, the Indian vote poses a significant threat to the non-Indian voters located in the same political jurisdictions. For these reasons, efforts have been made to suppress the Indian vote.

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[108] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

In this century, Indian voters have been able to ensure the success of candidates in several prominent elections. Recent successes for Indian voters include the 2002 Senate election in South Dakota, in which there was a huge increase in reservation turnout, and Senator Tim Johnson barely won re-election with only 524 votes. In Arizona, reservation voters helped elect Governor Janet Napolitano in 2002.

Successes in Indian voting and threats of Indian voting strength have lead to attacks on Indian voting rights. Arizona and South Dakota passed voter identification laws requiring identification when voting at the polls, restricting Indian voting rights.[109] Individuals testified that the South Dakota voter identification law was passed in response to the Indian voter turnout in 2002, which helped to elect Senator Johnson.[110] The voter identification law in Arizona resulted in a significant decrease in the number of Native Americans who voted during the 2006 elections.

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[109] ARIZ. REV. STAT. ANN. § 16-579; S.D. CODIFIED LAWS § 12-18-6.1.

[110] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 707-710 (2005) (statement of O.J. Semans); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2026 (2006) (appendix to the statement of Wade Henderson).

The Navajo Nation filed a section 2 lawsuit against the State of Arizona challenging the law, which suit was settled by expanding the types of documents that Indian voters can use for identification.[111]

Further attempts to disenfranchise Indian voters occurred during the 2008 Arizona election when the candidacy of Navajo candidates were challenged because the addresses on the signature petitions included post office boxes and not physical addresses, an impossible task for reservation residents who do not have physical addresses. To date, no Indian has been elected to a statewide office.

Despite Section 5's requirement that Todd and Shannon Counties submit election changes for preclearance, South Dakota ignored the requirement for a quarter of a century until tribal members from Todd and Shannon Counties filed a lawsuit to force compliance in 2002.[112] The lawsuit was resolved by Consent Decree. *Quiver* Plaintiffs returned to court in 2005 to enforce the consent order that had been violated by South Dakota's continued failure to comply with Section 5.[113]

Litigation to enforce voting rights is not a sufficient alternative to Section 5 coverage. Litigation is not quick, easy, or cost-efficient. Tribes cannot afford to challenge every law that impacts Indian voting rights.[114]

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[111] *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. May 27, 2008) (order approving settlement agreement and dismissal).

[112] *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027, 1029 (D.S.D. 2005).

[113] *Id.* at 1030.

C. Federal Observers Help to Increase Compliance with the Voting Rights Act in Covered Jurisdictions.

The presence of federal observers at the polls has increased compliance with the Voting Rights Act. The Department of Justice has sent "several thousand Federal observers to participate in 622 election day coverages when it had reason to expect [voter disenfranchisement]. Not only did they sometimes report discrimination, their presence probably discouraged even more."[115] Between 1982 and 2005, "there have been more than 1200 federal observers deployed to Apache, Navajo, and Yuma Counties, identifying substantial non-compliance in the availability and quality of language assistance to American Indian and Latino voting-age citizens."[116]

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[114] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of O.J. Semans).

[115] *Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Chandler Davidson).

[116] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H.*

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The presence of federal observers in polling places increases voter confidence and leads to increased participation in voting for Indian electors who are limited English proficient.[117] As part of the Consent Decree in Apache County for Navajo language compliance, federal observers serve as a check and balance to the Navajo Language Information Program. The Apache County Elections Director testified in support of the reauthorization of the federal observer program because of the program's success in Apache County.[118]

The federal observer program has helped to reveal deficiencies and problems complying with the minority language provisions.[119] A Department of Justice consultant testified how lack of language assistance precludes Indian voters from casting meaningful ballots. When federal observers are not present, officials fail to post the required notices at polls,

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Comm. on the Judiciary, 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[117] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 414, 492, 500 (2006) (statement and response of Alfred Yazzie).

[118] *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109 Cong. 12-17 (2005) (statement of Penny Pew).

[119] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 414, 492, 500 (2006) (statement of Alfred Yazzie).

incorrectly translate ballots, rush voters who are casting ballots, and fail to make assistance available to voters.[120]

D. Section 5 Preclearance Continues to Protect Indian Voters.

Ongoing discrimination in voting demonstrates a need for the continuation of Section 5.[121] The House Report[122] included examples of on-going discrimination in Indian Country.[123] Because covered jurisdictions must submit proposed changes for approval prior to implementation, Section 5 is a deterrent to discrimination.[124] Covered states have noted the preventative benefits of Section 5.

> As a result of Section 5, "minority voters have a greater involvement in decisions about election procedures as they are being

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[120] *Id.* at 500-501.

[121] *Id.*

[122] H.R. REP. NO. 109-478, at 43 (2006).

[123] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 500-501 (2006) (statement of Alfred Yazzie); *Voting Rights Act: Evidence of Continued Need, Vol. I and Vol. II, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1363-1453, 1986-2029 (2006) (appendix to the statement of Wade Henderson).

[124] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 6 (2005) (statement of Laughlin McDonald).

made." In a covered jurisdiction, for example, election officials typically will consult with minority voters before moving a polling place. This dialog strengthens communities and helps ensure that "harmful effect[s] on minority voters are stopped." Such consultations do not typically occur in non-covered jurisdictions, even though they should. In short, Section 5 "plays an important educative function in covered jurisdictions." The communication that flows from a preclearance submission "facilitates public awareness and compliance with the law even short of the provision's affirmative deterrence effects."[125]

E. Section 5's Preclearance Requirements Are Not Onerous.

In 2009, Arizona, along with other covered jurisdictions, submitted a brief urging this Court to uphold the constitutionality of Section 5.[126] Based on the record for reauthorization, Arizona noted that compliance with Section 5 is a minimal burden that does not intrude upon state sovereignty.

The *Amici* States urge his Court to uphold the constitutionality of the 2006 Reauthorization of the Voting Rights Act. Any assertion

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[125] Brief for the States of North Carolina, *et al.*, as *Amici Curiae* in Support of Eric H. Holder, Jr. *et al.*, *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

[126] *Id.* at 14 (internal citations omitted).

> that Section 5 constitutes an undue intrusion on state sovereignty does not withstand scrutiny. Section 5 does not place an onerous burden on States. States have been able to comply with Section 5 without undue costs or expense.[127]

The *Amici* States noted that the process did not impose any undue costs.

> The preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions. Administrative preclearance is expeditious and cost-effective. The process is neither difficult nor complicated. Rather, Section 5 preclearance is one of the most streamlined administrative processes within federal government.[128]

Further, the *Amici* States noted that the time required to comply is minimal.

> As one state election law official explained to Congress, the average submission (excluding redistricting and annexations) requires less than one hour of personnel time to prepare. Some, though not all, submissions may be completed in a few minutes.[129]

Arizona now claims that it should not be required to submit election changes for preclearance and provides the example of the closure of a Motor Vehicle Division office.[130] Arizona residents register to vote and obtain required voter identification at the Motor Vehicle Division offices and such closure is, therefore, subject to Section 5 preclearance. The request for preclearance does not seem burdensome as compared to the benefits of preclearance. It took the Department of Justice approximately one month to approve the request.[131] Furthermore, in the covered, rural Counties of Navajo, Apache and Coconino, the loss of a single Motor Vehicle Division office would result in additional travel and resultant expense for some citizens to register to vote and to obtain voter identification. Such increased expense should be required to undergo Department of Justice review to determine whether the change results in an unacceptable hardship for Indians residing on reservations. Preclearance of such closures are justified under Section 5 of the Voting Rights Act.

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[127] *Id.* at 1.

[128] *Id.* at 2.

[129] *Id.* at 8 (internal citations omitted).

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[130] Brief of Arizona, *et al.*, as *Amici Curiae* in Support of Petitioner, *Shelby County v. Holder* at 25, No. 12-96 (U.S. Dec. 31, 2012).

[131] Letter from T. Christian Herren, Jr., Chief *US DOJ Voting Section*, to Michele L. Forney, *Arizona Assistant Attorney General* (July 30, 2012).

IV. REAUTHORIZATION IS SUPPORTED BY THE RECORD AND A VALID EXERCISE OF CONGRESSIONAL POWER.

The temporary provisions of the Voting Rights Act are a valid exercise of Congressional powers to enforce the Fourteenth and Fifteenth Amendments to the United States Constitution. In reauthorizing Section 5, Congress received evidence of ongoing discrimination. Congress was not willing to jeopardize forty years of progress especially in the face of the evidence of continued discrimination compiled by the record.[132] "With more and more Indian people participating in elections for the first time,"[133] Section 5 preclearance provisions play an important role in ensuring access to the ballot. This case should be resolved with a ruling in Respondents' favor, because reauthorization is supported by the Congressional Record and is a valid exercise of Congressional enforcement powers.

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[132] *See generally*, S. REP. NO. 109-259 (2006).

[133] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 310 (2006) (letter by Joe Garcia, NCAI).

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-96

RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., in his official capacity
as Attorney General of the United States, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, MISSISSIPPI, AND NORTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

Interest of *Amici Curiae* 1

Summary of Argument. 2

Argument 4

I. Preclearance of Voting Changes Continues to Be a Proper Means of Enforcing the Voting Rights Guaranteed by the Fifteenth Amendment 4

A. The preclearance process does not impose undue burdens on covered jurisdictions 4

B. Preclearance is a critical complement to case-by-case litigation 10

II. The Bailout and Bail-in Procedures of the Voting Rights Act Provide a Tailored Response to Changing Local Conditions and Thereby Defeat This Facial Challenge to the Act's Geographic Coverage. 16

Conclusion. 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 13

Alta Irrigation District v. Holder, No. 11-cv-758 (D.D.C. July 15, 2011) 20

Arizona v. United States, 132 S. Ct. 2492 (2012). 23

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 23

Bartlett v. Strickland, 556 U.S. 1 (2009) 12

Branch v. Smith, 538 U.S. 254 (2003) 11

City of Boerne v. Flores, 521 U.S. 507 (1997) 18

City of Lockhart v. United States, 460 U.S. 125 (1983). . 11

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 19

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). 18

Georgia v. United States, 411 U.S. 526 (1973) 11, 12

Holder v. Hall, 512 U.S. 874 (1994) 10

Holland v. Illinois, 493 U.S. 474 (1990) 14

Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990) 21

McConnell v. FEC, 540 U.S. 93 (2003) 13

McDaniel v. Sanchez, 452 U.S. 130 (1981) 10, 13

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 19

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 17, 18

Powers v. Ohio, 499 U.S. 400 (1991) 14

Page

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 17

Reno v. Bossier Parish School Board, 520 U.S. 471 (1997) 10

Reynolds v. Sims, 377 U.S. 533 (1964) 13, 16

Sanchez v. King, No. 82-0067-M (D.N.M. Aug. 8, 1984) 21

South Carolina v. Katzenbach, 383 U.S. 301 (1966) . . .19

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United States v. Georgia, 546 U.S. 151 (2006). 22

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Voting Rights Act, 42 U.S.C.
§ 1973a 17
§ 1973b . . . . *passim*
§ 1973c 8

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28 C.F.R.
§§ 51.26-.28. 11
§§ 51.32-.33. 12

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152 Cong. Rec. H5054 (2006) 6

152 Cong. Rec. S7969 (2006) 15

Page

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Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 97th Cong. 2122 (1981). 23

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 65 (2006). . 14

H.R. Rep. No. 109-478 (2006). 8, 15, 21

Page

Lee, Jessica, *The Effects of Section 5 of the Voting Rights Act: A California Case Study* (May 20, 2009) (unpublished honors thesis, Stanford Univ.), *available at* http://publicpolicy.stanford.edu/node/349. 16

Modern Enforcement of the Voting Rights Act: Hearing before the S. Comm. on the Judiciary, 109th Cong. 96 (2006) 9

Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 13 (2006) 5, 6, 7

S. Rep. No. 109-295 (2006) 8

Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 10 (2006) 5, 7, 9

Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 90 (2005) 20

Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 84 (2005) 15

INTEREST OF *AMICI CURIAE*

Shelby County, Alabama, challenges the preclearance process contained in Section 5 of the Voting Rights Act on the ground that the extraordinary problems of discrimination that led to its enactment in 1965 no longer exist, and that the burdens it imposes on States and localities are no longer justifiable. *Amici* States New York, California, Mississippi, and North Carolina are for several reasons particularly well qualified to provide the Court with a perspective that should inform any effort to resolve that claim.

Mississippi, North Carolina, New York, and California are among the sixteen States covered in whole or in part by Section 5's preclearance process, and thus have extensive first-hand experience with the costs and benefits of its operation. Moreover, *Amici* States contain a substantial number of minority voters affected by the enforcement of Section 5: Mississippi has the largest proportion of African-American voters of any State in the country, North Carolina has the seventh largest proportion of such voters, and New York and California contain some of the largest and most diverse counties among the covered jurisdictions.

In the experience of *Amici* States, claims that the preclearance process imposes substantial burdens on the covered jurisdictions or unreasonably intrudes on state sovereignty are mistaken. Rather, for *Amici* States, "'[t]he benefits of Section 5 greatly exceed the minimal burdens that Section 5 may impose on States and their political subdivisions.'" Pet. App. 276a-277a (quoting *Amicus* Br. for North Carolina, Arizona, California, Louisiana, Mississippi and New York at 17, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815239, at *2). Moreover, those claims wrongly minimize the significant and measurable benefits Section 5 has produced in helping *Amici* States move toward their goal of eliminating racial discrimination and inequities in voting. The Section 5 preclearance process has helped bring about tremendous progress in the covered jurisdictions and continues to be a vital mechanism to assist *Amici* States in working to achieve the equality in opportunities for political participation that is a foundational principle of our democracy.

Amici States share the commitment to eliminating racial discrimination in voting rights that animates the federal Voting Rights Act. The record assembled by Congress to support the reauthorization of Section 5 in 2006 shows what *Amici* States know to be true: that Section 5 continues to play an important role in Mississippi, North Carolina, New York, and California, as well as in the other covered jurisdictions.

SUMMARY OF ARGUMENT

With overwhelming bipartisan support in 2006, Congress reauthorized the preclearance process contained in Section 5 of the Voting Rights Act. Preclearance has historically been a vital safeguard, and it remains today an essential tool for preventing voting discrimination. Tremendous progress has been made in *Amici* States and other covered jurisdictions in protecting the rights of minority voters. Congress reasonably determined in 2006 that the protections of the preclearance process are still necessary to preserve, secure, and extend these historic accomplishments in eliminating voting discrimination, a goal that *Amici* States share.

In *Amici* States' experience, the substantial benefits of the preclearance process have outweighed its burdens on covered jurisdictions. Preclearance is a streamlined administrative process that has been refined over the years to reduce the burden on covered jurisdictions. Moreover, preclearance provides substantial benefits to covered States and localities by serving as a critical means to identify and deter retrogressive and discriminatory voting-related changes. To the extent that Section 5 imposes federalism costs, its compliance burdens are minimal in light of the unique and irreplaceable protections preclearance ensures.

If preclearance were eliminated, case-by-case litigation—principally under Section 2 of the Voting Rights Act—would be the sole means for protecting minority voters in covered jurisdictions. But Congress never intended such a result, and practical experience has confirmed that Section 2 is no substitute for Section 5's preclearance protections. Preclearance fosters governmental transparency and generates the information necessary to assess the impact of voting changes; it suspends enforcement of proposed voting laws before discriminatory changes are implemented; and, by imposing those safeguards, it serves a powerful deterrent function that case-by-case litigation would not provide. Moreover, increased Section 2 litigation would impose federalism costs of its own—replacing the minimal administrative obligations of making preclearance submissions to the U.S. Department of Justice ("DOJ") with the prospect of costly and time-consuming litigation every time a voting change is proposed.

In light of its prophylactic benefits, the geographic coverage of Section 5 is also reasonable. In reauthorizing Section 5, Congress was entitled to look not only to the specific coverage formula contained in Section 4(b) of the Voting Rights Act, but also to the Act's bail-in and bailout provisions, which provide alternative avenues for adjusting preclearance requirements to reflect current conditions. Through bail-in, a noncovered jurisdiction that engages in voting discrimination can be ordered to comply with Section 5's preclearance procedures; and through bailout, a covered jurisdiction that demonstrates a clean record can terminate its preclearance obligations. These tailoring mechanisms are rarely, if ever, included in remedial legislation, and their presence in the Voting Rights Act is sufficient to sustain the Act against facial invalidation of its coverage and preclearance provisions.

ARGUMENT

I. Preclearance of Voting Changes Continues to Be a Proper Means of Enforcing the Voting Rights Guaranteed by the Fifteenth Amendment

A. The preclearance process does not impose undue burdens on covered jurisdictions.

Both the practical experience of *Amici* States and the evidence in the congressional record confirm that the administrative obligations associated with Section 5 compliance are not substantial. At every stage—data compilation, submission of materials to DOJ, and review of the materials by DOJ—the process has been streamlined to minimize the burden on covered jurisdictions.

The materials necessary for DOJ's limited Section 5 review are ordinarily both readily accessible and easy to assemble. In general, covered jurisdictions need only compile enough information to help DOJ determine whether a voting-related change was adopted with a discriminatory purpose or will have the effect of worsening the position of minority voters. The information relevant to that analysis is often part of the legislative record compiled in the period preceding adoption of the new law or change.

Congress heard testimony that preparing Section 5 preclearance submissions is "a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the [election] change to begin with." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) ("*Benefits and Costs*") (testimony of Armand Derfner). As one election official testified, "preclearance requirements are routine and do not occupy an exorbitant amount of time, energy or resources." *Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (quotation marks omitted) ("*Policy Perspectives*") (testimony of Donald Wright).

Nor is the actual submission of the Section 5 preclearance materials a costly undertaking. Although, in the past, covered jurisdictions could make administrative submissions only on paper by postal or other physical delivery service, they can now also submit materials by fax or electronic transmission. Moreover, increasing numbers of jurisdictions maintain the relevant records electronically, facilitating the process of collecting and submitting the necessary materials. State and local officials are also generally able to prepare Section 5 submissions easily using templates from previous submissions. Congress heard evidence from one official that "[t]he ease and cost of such submissions also improves with the use of previous submissions in an electronic format to prepare new submissions. In my experience, most submissions are routine matters that take only a few minutes to prepare using electronic submission formats readily available to me." *Policy Perspectives*, *supra*, at 313 (emphasis omitted) (testimony of Donald Wright).

Nor has Section 5 review of voting changes proven significantly burdensome or intrusive on the time of those officials who prepare materials for submission to DOJ. Generally, counsel and staff personnel familiar with the Section 5 preclearance process prepare administrative submissions. Thus, the Section 5 preclearance process is often both routine and familiar to the relevant submitting officials. *See* 152 Cong. Rec. H5054 (2006) ("Pre-clearance requirements are routine, and do not occupy exorbitant amounts of time, energy or re-sources." (quotation marks omitted)). These officials, given their familiarity and experience with the process, help ensure that the initial submission is complete and contains all of the relevant information that DOJ needs to make its preclearance determination. The evidence before Congress showed that covered jurisdictions often "have staff counsel that prepare submissions as part of their ongoing duties, so additional costs are not incurred in those situations. The costs of submissions are significantly reduced by ensuring that they are promptly and correctly submitted the first time." *Policy Perspectives*, *supra*, at 313. Moreover, Congress also received evidence confirming that election officials in covered jurisdictions "viewed Section 5 as a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.*

In addition, DOJ has administered the Section 5 review process with a significant degree of flexibility and latitude, taking into account the unique circumstances and crises that sometimes emerge within the covered jurisdictions. As some of *Amici* States have experienced, DOJ has expedited its review of voting changes, where possible, recognizing the crises and challenges that sometimes befall covered jurisdictions. For example, after Hurricane Katrina, DOJ issued a letter to Mississippi acknowledging that DOJ would be ready to expedite its review of any last-minute voting changes that may have resulted from the hurricane. *Id.* at 141-42. In other instances, DOJ has made swift preclearance determinations—well before the end of its statutorily required sixty-day review period. *Benefits and Costs*, *supra*, at 10-11 (noting if there is a sudden need for a new polling place, that can be precleared very swiftly if there is an election coming up) (testimony of Armand Derfner); *Policy Perspectives*, *supra*, at 312 (election official noting that he "never had a situation where the USDOJ has failed to cooperate with our agency or local government to ensure that a preclearance issue did not delay an election") (testimony of Donald Wright). *Amici* States have found that DOJ has administered Section 5 in a manner that neither obstructs nor infringes upon the dignity and sovereignty of the States.

Shelby County argues that "Section 5 will foreclose the implementation of more than 100,000 electoral changes unless and until they are precleared." Pet.

Br. 25. But this number vastly exaggerates the actual time and expense associated with Section 5 compliance. Although the preclearance process applies to any changes to voting practices, as a historical matter DOJ has generally reviewed those changes expeditiously and raised objections to only the few voting changes that it found to have a discriminatory purpose or effect. Moreover, submissions of multiple voting changes are often made in a single filing, and this neither slows nor impairs DOJ's ability to conduct a speedy review. DOJ's careful and targeted exercise of its Section 5 review has been a hallmark of its enforcement of preclearance for decades: the objection rate has always been only a fraction of the thousands of voting changes for which it receives notice. *See* H.R. Rep. No. 109-478, at 22 (2006); S. Rep. No. 109-295, at 13 (2006). Thus, as a practical matter, the preclearance process permits the vast majority of voting changes to be implemented as originally enacted, with only minimal delay. *See* 42 U.S.C. § 1973c(a) (permitting voting change if no objection is raised within sixty days).

Finally, there is no basis to conclude that Section 5 as it is implemented today is more burdensome for covered jurisdictions than the alternative proposed by Shelby County and endorsed by the dissent below (Pet. App. 77a): a world in which the preclearance process is replaced by a dramatic increase in the amount of case-by-case litigation.

If every DOJ objection were to be replaced by Section 2 litigation, the burden on covered jurisdictions would arguably be more severe. If a voting change is found to be discriminatory, a court injunction blocking the change under Section 2 is at least as intrusive as a DOJ objection under Section 5 because, as this Court has recognized, a judicial injunction against an election procedure is an "extraordinary and precipitous nullification of the will of the people." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 458 (2008). And the streamlined administrative review of Section 5 is far less onerous than the "'intensely complex . . . costly and time-consuming'" nature of Section 2 litigation, Pet. App. 45a (quoting *Modern Enforcement of the Voting Rights Act: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 96 (2006) ("*Modern Enforcement*")), which can cost millions of dollars and hundreds of hours for States or localities to defend, *see Benefits and Costs*, *supra*, at 80. Indeed, one of the most significant benefits of the preclearance process to covered jurisdictions is that a Section 5 objection will prevent a problematic voting change from taking effect, thereby reducing the likelihood that a jurisdiction will face costly and protracted Section 2 litigation.

Because Section 2 litigation is so costly and burdensome, reliance on case-by-case litigation alone would reduce the overall burdens on covered jurisdictions only if such litigation failed to reach some of the discriminatory voting changes currently caught by the preclearance process. But such a result would reduce the burden on States and localities only by degrading the overall level of protection currently afforded to minority voters—raising the risk that citizens will be denied the right to vote on the basis of their racial or language-minority status, and undermining the States' own interest in preventing discriminatory voting changes. For the reasons given below, the preclearance process provides valuable and irreplaceable protections for minority voters in covered jurisdictions, and Congress reasonably determined in 2006 that preclearance should continue to complement case-by-case litigation in the areas where the two remedies have worked effectively together for decades.

B. Preclearance is a critical complement to case-by-case litigation.

For nearly fifty years, preclearance has operated as an essential complement to case-by-case litigation, serving "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). Shelby County does not contend that remedies for voting discrimination are no longer needed; it contends rather that preclearance is no longer necessary because Section 2 is a sufficient remedy. *See* Pet. Br. 20, 33. But Congress has repeatedly determined that Section 2 is not a sufficient remedy in jurisdictions with a substantial history of voting discrimination, and that determination was amply supported by the record before Congress in 2006.[1]

As this Court has recognized, Sections 2 and 5 "differ in structure, purpose, and application," *Holder v. Hall*, 512 U.S. 874, 883 (1994) (opinion of Kennedy, J.), and they have long been understood "to combat different evils," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997). Section 5's importance as "a prophylactic tool in the important war against discrimination in voting," *id.* at 491 (Thomas, J., concurring), depends on a set of features unique to the preclearance process. As important and effective as Section 2 may be standing alone, it simply does not duplicate the crucial attributes that have made preclearance "[t]he most important . . . remedial measure[]" in the Voting Rights Act, *City of Lockhart v. United States*, 460 U.S. 125, 139 (1983) (Marshall, J., concurring in part and dissenting in part).

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[1] We do not here separately survey the record before Congress of continuing voting discrimination, which others have amply described. *See* U.S. Br. 20-39; Pet. App. 22a-48a, 256a-270a.

As explained above, if the Section 5 preclearance process were replaced by vastly increased litigation activity under Section 2, the result would not significantly reduce the burdens imposed on covered jurisdictions. Moreover, it would greatly reduce the effectiveness of the Voting Rights Act in combating voting discrimination because of at least three important features of preclearance that would be lost without Section 5.

First, the preclearance process makes available information that would otherwise be difficult to obtain, by requiring covered jurisdictions to provide, for every voting change, enough documentation to demonstrate that the proposed change has neither a discriminatory purpose nor effect. *See Branch v. Smith*, 538 U.S. 254, 263 (2003); *Georgia v. United States*, 411 U.S. 526, 540 (1973). That documentation includes not only copies of the new voting rule and its predecessor, but also, *inter alia*, an explanation of the differences between the two, an estimate of the voting change's impact on racial or language minorities, and certain demographic information. *See* 28 C.F.R. §§ 51.26-.28. The amount of information generated by preclearance is significant. "In a typical year, [DOJ] receives between 4,500 and 5,500 Section 5 submissions, and reviews between 14,000 and 20,000 voting changes." Civil Rights Div., DOJ, *Section 5 Resource Guide*, http://www.justice.gov/crt/about/vot/

sec_5/about.php (last visited Jan. 31, 2013). DOJ provides public notice of all Section 5 submissions and solicits comments and information on all proposed voting changes. *See* 28 C.F.R. §§ 51.32-.33; Civil Rights Div., DOJ, *Notices of Section 5 Submission Activity*, http://www.justice.gov/crt/about/vot/sec_5/notices.php (last visited Jan. 31, 2013).

Absent Section 5, it would be difficult or in some cases impossible for interested parties to obtain the information needed to determine whether and where to bring a Section 2 lawsuit, or even to learn that a voting change is contemplated. This is particularly true in the case of smaller governmental entities that may attract less scrutiny. And although Section 5's information-forcing function imposes some costs on covered jurisdictions, the costs of gathering and submitting the information are relatively small because most of the information submitted for preclearance is readily available to covered jurisdictions. See *supra* Point I.A. By contrast, litigation under Section 2 imposes much more substantial costs on both the jurisdiction and those who would challenge voting changes.

Second, Section 5 temporarily suspends enforcement of proposed voting changes until either DOJ or a three-judge district court determines that the change is not discriminatory. *See Georgia*, 411 U.S. at 538. This provisional remedy addresses the significant, irreparable harms caused by the implementation of a discriminatory voting rule. The right to vote is "one of the most fundamental rights of our citizens." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (Kennedy, J., plurality op.). Elections held under unlawful voting rules are often impossible to unwind, making the loss of a vote permanent even if a court subsequently recognizes the election's illegitimacy. *See, e.g.*, *McDaniel*, 452 U.S. at 133 n.5 (noting that district court permitted primary election to occur under challenged change); *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-72 (1969) (declining to set aside already-conducted elections); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (noting that "equitable considerations" might prevent court from interfering with imminent election "even though the existing apportionment scheme was found invalid"). And the results of such elections can alter the distribution of power in far-reaching ways that cannot be remedied by the correction of future voting rules: for example, incumbents incur powerful "[n]ame recognition and other advantages" that often persist so long as they seek reelection, *McConnell v. FEC*, 540 U.S. 93, 307 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). The preclearance process avoids these irreparable injuries by ensuring that new voting rules in the covered jurisdictions do not come into effect until an expedited review determines that a change has neither a discriminatory purpose nor a discriminatory effect.

Case-by-case litigation can provide this kind of interim relief only in the limited situations where there are plaintiffs who are sufficiently knowledgeable and aggrieved about a discriminatory voting change to bring suit in the first place—and who are then willing and able to spend the significant time and resources necessary to "satisfy the heavy burden required for preliminary injunctive relief." Pet. App. 47a. To be sure, individual litigants are sometimes in a position to bring Section 2 cases and obtain preliminary relief. But the obstacles are so great—and the harm from even temporary implementation of a discriminatory voting change so high—that case-by-case litigation is, as Congress recognized, inadequate to protect against that harm.

Private litigants are unlikely to marshal the information, resources, and evidence necessary to obtain preliminary relief from discriminatory voting changes. As with other examples of discriminatory exclusion from the "opportunity to participate in the democratic process," *Powers v. Ohio*, 499 U.S. 400, 406-408, 414-415 (1991) (identifying voting and jury service as the "most significant" such opportunities), individual citizens often "possess[] little incentive or resources to set in motion the arduous process needed to vindicate [their] own rights," *Holland v. Illinois*, 493 U.S. 474, 489 (1990) (Kennedy, J., concurring). That is particularly true in the voting rights context, since Section 2 cases are usually "very, very costly" and complex. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 65 (2006) (testimony of J. Gerald Hebert).

Although DOJ and private litigants may be able to muster the resources in particular cases to obtain preliminary relief, they cannot do so for all of the tens of thousands of voting changes that the preclearance process currently covers. The dissent below suggested that DOJ could simply transfer "whatever resources it stopped spending on § 5" not only to fund its own Section 2 cases, but also to assume the costs of private litigation. Pet. App. 77a. But the costs of litigation are so much greater than the costs of preclearance that it blinks reality to suppose that such a transfer of resources would result in funding litigation on the scale needed to substitute for preclearance.

Third, the prospect that every voting change will be reviewed produces Section 5's "most significant impact": its deterrent effect. 152 Cong. Rec. S7969 (2006) (testimony of Sen. Dianne Feinstein). Officials within the covered jurisdictions know that every voting change will be reviewed by DOJ for the potential effect on minority voters. That review makes officials more mindful, leading them to exercise a greater degree of due diligence in considering the potential impacts of new voting laws. As Congress found, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, *supra*, at 24.

Case-by-case litigation lacks a comparable deterrent effect. Individual plaintiffs will be able to review and challenge a voting change only if they receive notice of that change and then muster sufficient resources to initiate an action. While certain large voting changes (such as redistricting) may regularly attract individual lawsuits, *see* Pet. Br. 20, smaller and more local voting changes will often and predictably escape any genuine scrutiny—even though such changes often have the most significant effect on individual voters' lives. *See Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 84 (2005). Case-by-case litigation thus does not replicate the same powerful deterrent effect that currently prevents discriminatory voting changes from being implemented in the first instance.

For these reasons, case-by-case litigation has not since 1965 stood by itself as the sole remedy for voting discrimination in the covered States. Shelby County and its *amici* do not dispute that the preclearance requirements in covered jurisdictions have been responsible for much of the progress that the Voting Rights Act has achieved during the last fifty years. *See* Pet. Br. 22 ("The Voting Rights Act of 1965 changed the course of history in the covered jurisdictions."); Br. for *Amici Curiae* Arizona et al. 4 ("Section 5 was an important and necessary part of the effort to end voter discrimination in this country. . . .").[2] Eliminating the preclearance process altogether would fundamentally change the legal landscape in the covered States, creating a regulatory vacuum in the space that preclearance once occupied to protect the most fundamental political right. *See Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

II. The Bailout and Bail-in Procedures of the Voting Rights Act Provide a Tailored Response to Changing Local Conditions and Thereby Defeat This Facial Challenge to the Act's Geographic Coverage

1. When Congress enacted Section 5, it limited the application of preclearance through a unique tailoring mechanism. Rather than applying nationwide, the

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[2] For example, one researcher has found a positive statistical correlation between Section 5 and voter registration and turnout in California. *See* Jessica Lee, *The Effects of Section 5 of the Voting Rights Act: A California Case Study* (May 20, 2009) (unpublished honors thesis, Stanford University), *available at* http://publicpolicy.stanford.edu/node/349.

preclearance process was limited to only a discrete number of covered jurisdictions identified by the coverage formula of Section 4(b). 42 U.S.C. § 1973b(b). And rather than being static, Section 5's geographic range has always been subject to revision under two procedures that Congress has periodically liberalized to more accurately reflect current conditions. The bailout procedure, Section 4(a), permits a covered jurisdiction to terminate its Section 5 obligations upon a showing that it no longer suffers from voting discrimination. 42 U.S.C. § 1973b(a). The bail-in procedure, Section 3(c), addresses the opposite concern: it permits noncovered jurisdictions to be brought within the ambit of Section 5 upon a showing that they *do* suffer from voting discrimination. 42 U.S.C. § 1973a(c).

Like the preclearance process, the Voting Rights Act's tailoring mechanism is itself an "extraordinary departure" from Congress's ordinary way of applying legislation. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. 491, 500 (1992). Congress's other remedial legislation rarely, if ever, goes to such lengths to tailor the burdens of a federal law. Outside the voting rights area, when Congress determines that remedial legislation is needed, it generally enacts laws that interfere with state sovereignty *nationwide*, even when the evidence of constitutional violations comes from only a handful of States. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-32 (2003) (explaining the record underlying the Family and Medical Leave Act); *see also id.* at 753 (Kennedy, J., dissenting) (criticizing the legislative record for focusing on only three States).

And Congress's enactments are usually *permanent*, with no opportunity—other than the possibility of legislative amendment—for the States to contend that they no longer fall within the original justification for a law. Thus, this Court has upheld several statutes abrogating state sovereign immunity for civil rights laws on the basis of evidence of state discrimination preceding each enactment. *See Tennessee v. Lane*, 541 U.S. 509, 524-26 (2004) (disability); *Hibbs*, 538 U.S. at 730 (gender); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (race). But this Court has never suggested that these statutes must be reevaluated to determine whether current conditions continue to justify these laws.

The Voting Rights Act's tailoring mechanism departs from both of these ordinary characteristics of federal remedial legislation, and in each case it does so in order to reduce the intrusion on state sovereignty. The targeted rather than nationwide scope of the preclearance process prevents Section 5 from applying more broadly than necessary, confining it to those regions of the country where Congress had specific evidence of voting discrimination. *See City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997) (discussing Voting Rights Act). And the bailout and bail-in procedures permit Section 5's coverage to be adjusted to more accurately reflect current conditions.

2. Shelby County seeks to invalidate here only one part of this integrated scheme, Section 4(b), on the argument that the coverage formula is "outdated." Pet. Br. 13, 57. But the baseline established by Section 4(b) was imperfectly tailored almost from the beginning, and has nonetheless repeatedly been sustained against that challenge. As this Court acknowledged in upholding Section 4(b) in 1966, even at the outset the coverage formula did not include *every* jurisdiction that engaged in voting discrimination,

and evidence of voting discrimination was much stronger for some covered jurisdictions than for others. *South Carolina v. Katzenbach*, 383 U.S. 301, 329-30 (1966).

But Congress never intended Section 4(b) to operate alone to identify covered jurisdictions. Rather, the coverage formula has always been part of a dynamic process of both exempting and including jurisdictions from the preclearance process based on changing conditions and experience. The baseline established by Section 4(b) thus reflected historical experience without giving that history controlling weight. And the bailout and bail-in provisions were enacted and later amended precisely to adapt the actual coverage of Section 5 to current conditions.

Today, the statutory triggers of Section 4(b) no longer accurately describe the areas of the country covered by Section 5 because successful bailouts and bail-ins have updated the list of jurisdictions to which the preclearance process applies. *See* U.S. Br. App. 1a-11a. The progress of this tailoring process may not be as swift as Shelby County and its *amici* prefer. But Congress is permitted to proceed by incremental steps in addressing national problems; it need not "embrace all the evils within its reach" when it legislates, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937), and its decision to do so "warrants considerable deference," *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982). With the Voting Rights Act, Congress built into the statute itself a process to incrementally alter the reach of Section 5. That tailoring mechanism is a virtue of the Act because it is so solicitous of the sovereignty of the covered States; it is not, as Shelby County would have it, a flaw that requires invalidating the preclearance process altogether.

3. The *amici* states opposing the 2006 reauthorization contend that bailout and bail-in are not practically available remedies. *See* Br. for *Amici Curiae* Arizona et al. 27; Br. for *Amicus Curiae* Alaska 29. But *Amici* States' experience demonstrates otherwise. The 1982 amendments to the Act "made bailout substantially more permissive" in two ways: it "allowed bailout by any jurisdiction with a 'clean' voting rights record over the previous ten years"; and it permitted *any* political subdivision within a covered State to seek bailout. Pet. App. 9a; *see* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 § 2(b)(2), 96 Stat. 131, 131 (codified, as amended, at 42 U.S.C. § 1973b(a)(1)). As a result of those amendments, every covered jurisdiction that has requested a bailout since 1984 has received it. Civil Rights Div., DOJ, *Section 4 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 31, 2013).

Congress heard testimony that these bailout applications were neither costly nor time-consuming. "Legal expenses for the entire process of obtaining a bailout are on average about $5000." *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005) (statement of J. Gerald Hebert). And generally it takes less than five months to obtain a court order terminating a political subdivision's Section 5 responsibilities—indeed, one political subdivision in California was bailed out within ninety days of filing its petition, *see Alta Irrigation District v. Holder*, No. 11-cv-758 (D.D.C. July 15, 2011) (consent judgment and decree), *available at* http://www.justice.gov/crt/about/

vot/misc/alta_cd.pdf, although the process has sometimes been more prolonged, *see* Br. for *Amicus Curiae* Merced County, California, in Support of No Party 30-35. This experience demonstrates that the bailout procedure is a workable mechanism that allows eligible jurisdictions to exempt themselves from the requirements of Section 5. *See* H.R. Rep. No. 109-478, *supra*, at 61 (bailout "has proven to be achievable to those jurisdictions that can demonstrate an end to their discriminatory histories").

The bail-in provision has likewise been used to extend preclearance to a number of formerly noncovered jurisdictions, on the basis of specific findings that those jurisdictions suffer from voting discrimination. *See generally* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2010 (2010) (discussing bail-in examples). For example, in *Jeffers v. Clinton*, Arkansas was bailed in after the district court found that "[t]he State ha[d] systematically and deliberately enacted" certain voting laws "in an effort to frustrate black political success in elections traditionally requiring only a plurality to win." 740 F. Supp. 585, 586 (E.D. Ark. 1990). New Mexico was likewise brought within the scope of Section 5 after a district court found that the State's 1982 redistricting plan constituted "a racially-motivated gerrymander." *See Sanchez v. King*, No. 82-0067-M, slip op. at 129 (D.N.M. Aug. 8, 1984). Finally, several political subdivisions have been required to submit voting changes for preclearance, again after specific findings that they engaged in voting discrimination. *See* U.S. Br. App. 1a-3a.

4. Shelby County concedes that the bail-in procedure is a "targeted" and "appropriate means of imposing

preclearance" based on a contemporaneous finding that a noncovered jurisdiction has engaged in "unconstitutional voting discrimination." Pet. Br. 57. But it contends that "bailout is incapable of saving Section 4(b)," in essence because there is not a one-to-one correspondence between the reasons for a jurisdiction's original inclusion, and the criteria for its bailout. Pet. Br. 54-55.

This argument incorrectly assumes that state sovereignty not only mandates a bailout procedure, but also requires that procedure to take a particular form. This Court has never so limited Congress's power. As noted earlier, outside the voting rights area, *none* of the laws that Congress has recently enacted pursuant to its enforcement powers under the Reconstruction Amendments offer an exemption procedure to the States. As a result, the mere existence of bailout and bail-in makes Section 5 more respectful of state sovereignty than other federal legislation enforcing those amendments.

In any event, whatever objections covered jurisdictions may have to the current administration of the bailout procedure, that procedure is more suited than this facial challenge as a mechanism for responding to changing conditions in this country. By providing a specialized process for adjusting the coverage of Section 5, the bailout procedure, along with the bail-in procedure, permits individual jurisdictions to "create a factual record" supporting their claims about the proper reach of the preclearance process. *United States v. Georgia*, 546 U.S. 151, 160 (2006) (Stevens, J., concurring).

Some other state *amici* have also raised objections to DOJ's particular interpretation or enforcement of the Voting Rights Act. *See, e.g.*, Br. for *Amici Curiae* Arizona et al. 25-27; Br. for *Amicus Curiae* Texas 3-4; Br. for *Amicus Curiae* Alabama 14-20. But complaints about individual enforcement efforts—on which this group of *Amici* States takes no position—do not undermine the *facial* validity of Sections 4(b) and 5. This Court has recently made clear that the mere fact that a statute might "in practice" be unconstitutionally enforced does not require its facial invalidation when the statute "could be read" and enforced in a manner that "avoid[s] these concerns." *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012). As a result, the other state *amici*'s complaints about specific, allegedly improper enforcement efforts are best left to individual litigation, where courts can examine the "specific facts" necessary to determine whether DOJ's actions were reasonable. *Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2122 (1981) (statement of Drew Days).

Rejecting Shelby County's facial challenge here would not foreclose future bailout petitions or individual proceedings challenging DOJ's enforcement decisions. In some of those proceedings, individual jurisdictions may be able to prove that preclearance is no longer necessary due to their unique facts, or that DOJ's application of the Voting Rights Act is unreasonable. But that possibility is not a proper basis to forbid the application of Section 5 "wholesale" to *any* jurisdiction, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006); *see Lane*, 541 U.S. at 530 (limiting review of Title II of the Americans with Disabilities Act to the particular application at issue, access to the courts, rather than "its wide variety of applications"). In the meantime, sustaining Sections 4(b) and 5 on their face would permit the unique remedy of preclearance to continue in the covered States—preserving and extending the historic accomplishments that the Voting Rights Act has already achieved.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

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SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR JOHN NIX, ANTHONY CUOMO, AND DR. ABIGAIL THERNSTROM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

BRIEF FOR *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 10

I. SECTION 5 CANNOT BE RATIONALLY JUSTIFIED UNLESS SECTION 2 AND OTHER NORMAL ANTI-DISCRIMINATION LAWS ARE UNIQUELY INADEQUATE IN THE COVERED JURISDICTIONS 10

   A. This Court Previously Upheld Section 5 Only Due To The Extraordinary Need To Bolster Ordinary Anti-Discrimination Remedies In Targeted Jurisdictions 10

   B. Section 5 Is A Gratuitous Burden Wherever Normal Anti-Discrimination Laws Are An Effective Remedy 12

II. SECTION 5'S COVERAGE FORMULA NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2 14

III. SECTION 5'S SUBSTANTIVE STANDARD NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2 17

   A. The Old Preclearance Standard Targeted Backsliding That Undermined Section 2's Enforcement 18

    1. The Old Section 5's Limitation To Retrogressive Changes 18
    2. The Old Section 5's "Totality Of Circumstances" Test For Determining Retrogression 21

  B. The New Preclearance Standard Imposes A Rigid Scheme Of Racial Preferences 28
    1. The New Section 5's "Ability To Elect" Mandate 28
    2. The New Section 5's "Discriminatory Purpose" Objection 34

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 25

Bartlett v. Strickland,
556 U.S. 1 (2009) 24, 25, 26, 27, 30, 37

Beer v. United States,
425 U.S. 130 (1976) 3

Chisom v. Roemer,
501 U.S. 380 (1991) 24, 25

City of Boerne v. Flores,
521 U.S. 507 (1997) ....*passim*

City of Mobile v. Bolden,
446 U.S. 55 (1980) 14, 15

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 9

City of Rome v. United States,
446 U.S. 156 (1980) 11, 12, 18, 22, 28

Easley v. Cromartie,
532 U.S. 234 (2001) 20

Furnco Constr. Corp. v. Waters,
438 U.S. 567 (1978) 22, 25

Georgia v. Ashcroft,
539 U.S. 461 (2003) ....*passim*

Gratz v. Bollinger,
539 U.S. 244 (2003) 34

Grutter v. Bollinger,
539 U.S. 306 (2003) 23

Johnson v. De Grandy,
512 U.S. 997 (1994) 24, 32, 33

Johnson v. Transp. Agency,
480 U.S. 616 (1987) 22

LaRoque v. Holder,
831 F. Supp. 2d 183 (D.D.C. 2011) 1, 33, 34, 37, 38

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 24, 25, 29, 30, 31, 34

Miller v. Johnson,
515 U.S. 900 (1995) .... *passim*

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) .... *passim*

Reno v. Bossier Parish Sch. Bd.,
520 U.S. 471 (1997) 2, 8, 11, 18, 19, 20

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) .... *passim*

Ricci v. DeStefano,
557 U.S. 557 (2009) 22

Shaw v. Hunt,
517 U.S. 899 (1996) 21

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 3, 4, 5, 10, 16

Texas v. United States,
No. 11-1303, --- F. Supp. 2d ----, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) 31, 36

Thornburg v. Gingles,
478 U.S. 30 (1986) .... *passim*

United States v. Stevens,
130 S. Ct. 1577 (2010) 34

STATUTORY AUTHORITIES

42 U.S.C. § 1973 .... 2, 13, 24

42 U.S.C. § 1973a 17

42 U.S.C. § 1973c...*passim*

OTHER AUTHORITIES

H.R. Rep. No. 109-478 (2006)........................29, 31, 34

S. Rep. No. 97-417 (1982)........................19, 20, 24, 25

S. Rep. No. 109-295 (2006)..................................29, 34

Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 Stan. L. & Pol'y Rev. 373 (2012) 1

BRIEF FOR *AMICI CURIAE*

John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom respectfully submit this brief as *amici curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

John Nix and Anthony Cuomo are voters in Kinston, North Carolina, and Nix was a candidate for City Council in 2011 and intends to run in 2013. They previously challenged Section 5 after DOJ denied preclearance for a Kinston referendum adopting nonpartisan elections, but the lawsuit was mooted on appeal when DOJ changed its position. *LaRoque v. Holder*, 831 F. Supp. 2d 183, 192-93 (D.D.C. 2011), *vacated as moot*, 679 F.3d 905 (D.C. Cir. 2012), *cert. denied sub nom. Nix v. Holder*, --- S. Ct. ----, 2012 WL 2955934 (Nov. 13, 2012).

Abigail Thernstrom is the Vice Chair of the U.S. Commission on Civil Rights, an adjunct scholar at the American Enterprise Institute, and a leading commentator on elections and race. *See, e.g.*, Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 Stan. L. & Pol'y Rev. 373 (2012). She is presenting her personal expert opinion, not the Commission's views.

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[1] The parties' letters of consent to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. Section 5 of the VRA exceeds the Reconstruction Amendments' scope in two significant ways. *First*, it imposes in certain jurisdictions a unique preclearance procedure that presumptively invalidates "*all* changes to state election law[,] however innocuous," *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009), which is an extraordinary reversal of the normal presumption of legitimacy afforded to sovereign enactments, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). *Second*, it permanently invalidates changes with a proscribed racial "effect," 42 U.S.C. § 1973c(a), even though the Constitution bars only practices with a "discriminatory purpose," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997) ("*Bossier I*"). Importantly, this extra-constitutional preclearance regime is imposed *on top of* Section 2 of the VRA, which, since 1982, already exceeds the Constitution's "purpose" ban by proscribing voting practices with certain discriminatory "results." 42 U.S.C. § 1973(a); *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

Given that Section 5's requirements markedly exceed the Constitution's, and are (selectively) imposed in addition to Section 2's extra-constitutional "results" ban, how can the preclearance regime be deemed an appropriate effort to "enforce," rather than amend, the Constitution? The answer: only if it targets potentially unconstitutional laws that are somehow beyond the effective reach of Section 2's prophylactic "results" test and other normal anti-discrimination litigation. If the discrimination precluded by Section 5 can be adequately remedied under ordinary Section 2 litigation, then, by definition, its extraordinary preclearance regime is gratuitous and its selective imposition is unjustified discrimination among sovereigns entitled to equal treatment.

Accordingly, this Court upheld Section 5's prior iterations only to bolster Section 2's unique deficiencies in the covered jurisdictions. Section 5 supplemented Section 2 in areas where "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" because of "obstructionist tactics," including, most notably, the "extraordinary stratagem" of replacing a judicially-enjoined discriminatory practice with another discriminatory change. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 334-35 (1966); *accord City of Boerne v. Flores*, 521 U.S. 507, 525-26 (1997). Consequently, while Section 2 litigation seeks to improve the discriminatory status quo, Section 5 preclearance was specially designed just to "freez[e]" the status quo so that it did not worsen while Section 2 cases were pending or after Section 2 decrees had been entered. *See Beer v. United States*, 425 U.S. 130, 140 (1976). Section 5's coverage formula and substantive standard were tailored to that narrow supplemental function. The formula targeted jurisdictions that recently had frustrated normal anti-discrimination litigation through "unremitting and ingenious defiance." *See South Carolina*, 383 U.S. at 309, 315. And the standard had the "limited substantive goal" of "prevent[ing] nothing but backsliding." *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) ("*Bossier II*").

The test for Section 5's validity in 2006 is thus not whether significant voting discrimination still exists in the covered jurisdictions, or even whether it is more prevalent there than elsewhere, but whether Section 5's coverage formula and substantive standard appropriately target discrimination so pervasive and entrenched that it would defy effective remediation under Section 2. If Congress tomorrow requires certain state governments to obtain federal preclearance of all employment and housing policies, the proper inquiry obviously must be whether that oppressive, differential burden is needed to prevent racial discrimination that somehow escapes the federal remedies in Title VII and Title VIII, not merely whether employment and housing discrimination exists in the selected states.

Yet Section 5's reauthorized coverage formula cannot "be justified by [any] current need[]" to bolster Section 2 in 2006, *see Nw. Austin*, 557 U.S. at 203, and regardless, its substantive standard as amended in 2006 is not designed to bolster Section 2, *see* Pet.App. 72a-77a (Williams, J., dissenting).

II. Section 5's reauthorized coverage formula is no longer "rational in both practice and theory." *See South Carolina*, 383 U.S. at 330. The 2006 Congress, unlike its predecessors, did not target the jurisdictions which recently engaged in the most pervasive discrimination, let alone those where discrimination is so entrenched that Section 2 is currently inadequate. Nor did Congress otherwise find, much less marshal evidence to prove, that the specific "evil that § 5 is meant to address"—*i.e.*, ineffective Section 2 litigation—was somehow still "concentrated in the jurisdictions singled out for preclearance" more than three decades earlier. *See Nw. Austin*, 557 U.S. at 203-04.

This evidentiary void is unsurprising. *First*, Section 2 itself is significantly more effective now. Whereas the statute previously imposed the "inordinately difficult" burden of proving *intentional* discrimination, Congress in 1982 adopted a prophylactic ban on discriminatory "results" that broadly ensnares all arguably unconstitutional discrimination. *See Gingles*, 478 U.S. at 43-44. And *second*, the covered jurisdictions themselves "have unquestionably improved" in significant ways, such that "the record suggests ... more similarity than difference" between covered and non-covered jurisdictions. *See Nw. Austin*, 557 U.S. at 203-04.

Thus, the 2006 reauthorization of Section 5 would have been invalid even without the substantive amendments, because the coverage formula is no longer "aimed at areas" where "case-by-case litigation [is] inadequate." *See South Carolina*, 383 U.S. at 315, 328.

III. Even assuming that Section 5's coverage formula identifies the recalcitrant jurisdictions recently engaged in a "set of invidious practices" that thwart normal anti-discrimination litigation, the 2006 substantive amendments still render Section 5 invalid, because it is no longer "directed at preventing" such practices. *See Miller*, 515 U.S. at 925. The 2006 Congress, by abrogating this Court's decisions in *Ashcroft* and *Bossier II*, fundamentally expanded Section 5 beyond its proper function of supplementing Section 2.

As noted, Section 5 originally played a distinct, complementary role: whereas Section 2 improved the status quo, Section 5 merely preserved it. Specifically, Section 5's preclearance standard was *limited to retrogression* and thus "prevent[ed] nothing but backsliding" from the status quo achieved through Section 2 litigation: so long as a jurisdiction could prove that its preferred change did not have the purpose or effect of making minority voters worse off, it was entitled to preclearance, *regardless of whether* a different change would have made them *better off*. *See Bossier II*, 528 U.S. at 328-36. Furthermore, retrogression itself was analyzed under a *"totality of circumstances" inquiry* modeled on Section 2's "results" test: even where the change would reduce a minority group's ability to elect its preferred candidates, the jurisdiction could prove that the reduction was *justified* by offsetting increases in the group's overall political power or *excused* by traditional governance principles. *See Ashcroft*, 539 U.S. at 479-85.

Thus limited, Section 5 was an appropriate supplemental enforcement scheme. *First*, the retrogression standard only back-stopped the status quo for Section 2 litigation, rather than gratuitously duplicating Section 2's efforts to improve the status quo. *Second*, any changes that, without legitimate explanation, *worsened* the deplorable status quo in the Jim Crow South (or the improved status quo mandated by federal courts) could reliably be deemed intentionally discriminatory. And *third*, jurisdictions otherwise retained autonomy to make any non-retrogressive changes that they validly preferred, without first having *to prove* why they had rejected ameliorative alternatives preferred by minorities.

In 2006, however, Congress eviscerated the crucial substantive limitations cabining Section 5. And it did so despite having been warned of the serious constitutional concerns that these precise amendments would raise. *See Bossier II*, 528 U.S. at 336; *Ashcroft*, 539 U.S. at 491-92 (Kennedy, J., concurring).

Abrogating *Ashcroft*'s Section-2-like "totality of circumstances" retrogression standard, Congress prohibited any change that for any reason "diminish[es]" minority voters' "ability ... to elect their preferred candidates." 42 U.S.C. § 1973c(b),(d). As Judge Williams' dissent explained, this inflexible "ability to elect" standard "mandates" a "particular brand" of "race-conscious decisionmaking"—*i.e.*, a rigid quota-floor for minorities' expected electoral success—that "aggravates both the federal-state tension ... and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." *See* Pet.App. 73a-75a. Simply put, a mandatory quota-floor preserving predicted minority electoral success for 25 years cannot be a congruent, proportional, or rational means of *enforcing* the Constitution's nondiscrimination guarantees, both because it is in *stark tension* with those guarantees and because it ignores *obvious nondiscriminatory reasons* why voting changes may justifiably diminish minorities' electoral prospects.

Moreover, abrogating *Bossier II*'s retrogression limitation, Congress prohibited even non-retrogressive voting changes where the jurisdiction cannot convince federal authorities that it lacked "any discriminatory purpose" when rejecting a more ameliorative alternative for minorities. 42 U.S.C.

§ 1973c(c). This expansion exceeded Section 5's limited role of back-stopping the status quo for Section 2. It thus was gratuitous, because Congress did not and could not rationally find that Section 2's prophylactic "results" ban fails to effectively remedy purposeful discrimination. Moreover, the expansion beyond retrogression markedly increases Section 5's burdens and race-consciousness. It imposes on jurisdictions "the difficult burden" of "prov[ing] [the] negative" that they lacked a discriminatory purpose when refusing an alternative change, *Bossier I*, 520 U.S. at 480; *Bossier II*, 528 U.S. at 336, which is a difficulty DOJ exploited prior to *Bossier II* by objecting whenever jurisdictions failed to satisfy its "policy of maximizing majority-black districts," *see Miller*, 515 U.S. at 924-25. Thus, as Judge Williams's dissent explained, the new "discriminatory purpose" standard, "at worst, restored [DOJ's] implicit command that States engage in presumptively unconstitutional race-based districting, and at best, exacerbated the substantial federalism costs that the preclearance procedure already exacts." *See* Pet.App. 75a-76a.

Both 2006 amendments therefore have the "fundamental flaw" that DOJ "is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with [the] statutory directive." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Notably, this Court in *Nw. Austin* invoked that concurrence when suggesting that the preclearance standard raises "[a]dditional constitutional concerns" about Section 5. *See* 557 U.S. at 203. More generally, though, *any* expansion of the substantive standard in 2006 is inherently an "unwarranted response," because there is no rational basis for concluding that covered jurisdictions needed "[s]trong[er]" oversight in 2006 than the South did in the 1960's. *See Boerne*, 521 U.S. at 530.

In sum, Congress' persistent failure to heed this Court's constitutional teaching underscores that the 2006 version of Section 5 is not valid enforcement legislation. Congress ignored the lesson of *South Carolina*, *Boerne*, and *Nw. Austin* that the coverage formula must target jurisdictions where normal anti-discrimination laws currently are inadequate. And Congress ignored the lesson of *Bossier II*, *Ashcroft*, and *Nw. Austin* that the preclearance standard must target voting changes that implicate the statute's supplemental role in protecting the status quo achieved by normal anti-discrimination laws. Collectively, this reveals that the 2006 Congress' goal was not to remedy unconstitutional discrimination, but to provide minorities in jurisdictions with ancient histories of discrimination with an affirmative-action-like scheme to improve their electoral success, by explicitly banning voting changes that reduce their electoral chances and by implicitly coercing changes that increase their chances. *See Miller*, 515 U.S. at 924-27. Rather than a "remedial or preventive object," therefore, Congress was "attempt[ing] a substantive change in constitutional protections," by prohibiting changes that impose "incidental burdens" on minorities or that fail to confer potential benefits, without any true "concern" whether "the object or purpose of the [change]" was intentionally discriminatory. *See Boerne*, 521 U.S. at 531-32; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989).

ARGUMENT

I. SECTION 5 CANNOT BE RATIONALLY JUSTIFIED UNLESS SECTION 2 AND OTHER NORMAL ANTI-DISCRIMINATION LAWS ARE UNIQUELY INADEQUATE IN THE COVERED JURISDICTIONS

The fundamental question here is what would justify imposing Section 5's extraordinary preclearance regime on selected jurisdictions. The answer is that the only rational justification would be the unique inadequacy of ordinary anti-discrimination laws in the covered jurisdictions.

A. This Court Previously Upheld Section 5 Only Due To The Extraordinary Need To Bolster Ordinary Anti-Discrimination Remedies In Targeted Jurisdictions

In *South Carolina*, this Court held that the 1965 Congress was justified in creating Section 5, but only because "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *See* 383 U.S. at 328, 334-35. Specifically, traditional anti-discrimination litigation was stymied by "the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [such] lawsuits," including "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 328, 335. Given such "unremitting and ingenious defiance of the Constitution," "the unsuccessful remedies ... [of] the past [had] to be replaced by sterner and more elaborate measures" "where voting discrimination ha[d] been most flagrant." *Id.* at 309, 315.

This Court thus held that the 1965 Congress acted permissibly "[u]nder the compulsion of these unique circumstances." *Id.* at 334-35; *see also City of Rome v. United States*, 446 U.S. 156, 180-82 (1980) (concluding that the 1975 Congress' 7-year extension of the 10-year-old provision "was necessary to preserve the 'limited and fragile' achievements" that likely would have been "destroyed through new procedures and techniques"). Notably, this Court in *Boerne* reaffirmed that it had upheld Section 5 due to the demonstrated inadequacy of Section 2 in the covered jurisdictions. "The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws ... and the slow, costly character of case-by-case litigation." *See Boerne*, 521 U.S. at 525-26.

Consistent with Section 5's special function of "bolster[ing]" Section 2 by protecting the status quo achieved through the latter's enforcement, *see Nw. Austin*, 557 U.S. at 198, this Court repeatedly emphasized before 2006 that Section 5 had a more "limited purpose" and "combat[ed] different evils" than Section 2. *Bossier I*, 520 U.S. at 477; *accord Ashcroft*, 539 U.S. at 478 ("[T]he § 2 inquiry differs in significant respects from a § 5 inquiry."). Specifically, Section 5 "prevent[ed] nothing but backsliding." *Bossier II*, 528 U.S. at 335; *accord Ashcroft*, 539 U.S. at 477 ("Section 5 ... ha[d] [the] limited substantive goal ... [of] insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *Miller*, 515 U.S. at 925 ("Section 5 was directed at preventing a particular set of invidious practices that had the effect of 'undoing or defeating the rights recently won by nonwhite voters.'"). Accordingly, unlike Section 2, Section 5 was not designed to eliminate *unconstitutional* voting *laws*, but only *retrogressive* voting *changes*. *Ashcroft*, 539 U.S. at 477 ("[A] voting change with a discriminatory but nonretrogressive purpose or effect does not violate § 5[,] ... *no matter how unconstitutional it may be*." (quoting *Bossier II*, 528 U.S. at 336)).

B. Section 5 Is A Gratuitous Burden Wherever Normal Anti-Discrimination Laws Are An Effective Remedy

It is common-sense why this Court previously upheld Section 5 only given the inadequacy of Section 2 and other anti-discrimination laws in the covered jurisdictions. If such laws *already effectively remedy* "intentional racial discrimination in voting," Congress cannot "rationally ... conclude[]" that Section 5 preclearance is *also* needed, *see Rome*, 446 U.S. at 177, because that "is so out of proportion ... that it cannot be understood as ... designed to prevent[] unconstitutional behavior," *see Boerne*, 521 U.S. at 532. Accordingly, the mere existence of intentional discrimination, if redressable through normal litigation, does *not* "[]warrant[]" the "[s]trong measure[]" of federal preclearance. *See id.* at 530.

To be sure, the persistence of unconstitutional discrimination justifies Section 2 and other laws that employ "case-by-case" litigation to eradicate practices that are likely intentionally discriminatory. Unlike such laws, however, Section 5 does not ban practices that plaintiffs demonstrate are likely discriminatory, but rather presumptively prohibits *all* changes until the jurisdiction proves they are *not* discriminatory.

This "extraordinary burden-shifting procedure[]" is what must be justified, *Bossier II*, 528 U.S. at 335, and it must be justified *on top* of Section 2's prophylactic ban on discriminatory "results," 42 U.S.C. § 1973(a). That justification burden cannot possibly be satisfied based on discrimination that Section 2 effectively redresses, because otherwise Section 5 is necessarily a gratuitous intrusion.

For example, this Court has upheld prophylactic federal remedies concerning access to state courts and family leave for state employees. *See* Pet.App. 17a-18a. But the burden of justifying those remedies was obviously far less than would have existed to justify a *preclearance* requirement compelling states *to suspend all policies* affecting such topics until they could convince federal authorities that their policies lacked any discriminatory "purpose" or "effect." And the justification burden would have been exponentially more difficult if that intrusive preclearance requirement were added *on top* of the prophylactic remedies already upheld by this Court. The only remedial purpose conceivably served would be to reach discrimination that somehow escaped the grasp of the other prophylactic remedies.

Notably, the majority below nominally *agreed* with this analysis. It recognized that Congress would have "no justification for requiring states to preclear their voting changes" "if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions," because the "critical factor" in this Court's cases upholding Section 5 was that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *See id.* 25a-26a.

The 2006 Congress, however, failed to apply, let alone satisfy, that standard. Section 5's old coverage formula does not target jurisdictions where Section 2 litigation is inadequate, and its new substantive standard does not target unconstitutional practices that would evade effective Section 2 remediation.

II. SECTION 5's COVERAGE FORMULA NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2

The 2006 Congress' decision not to update the coverage formula is irrational in theory, because there is no conceivable basis for presuming that the jurisdictions where Section 2 was inadequate *between 1964 and 1972* are remotely the same as the jurisdictions where Section 2 was inadequate *in 2006* (let alone will be *until 2031*). *See* Pet.App. 69a-70a (Williams, J., dissenting). Unsurprisingly, therefore, the retained coverage formula is irrational in practice, because the covered jurisdictions do not currently pose a meaningful and distinguishable threat of intentional discrimination that evades Section 2. *See id.* 79a-99a. Judge Williams's dissent and Petitioner's brief detailed the factual basis for these conclusions, so *amici* focus on four fundamental legal errors underlying the majority's contrary conclusions.

First, the majority ignored that the burden of demonstrating Section 2's inadequacy is significantly *higher* than when *South Carolina* and *Rome* were decided, because Section 2 is now far *more effective* at preventing unconstitutional discrimination. Before 1982, Section 2 required a *finding* of discriminatory intent. *City of Mobile v. Bolden*, 446

U.S. 55, 60-63 (1980) (plurality opinion). But because that old intent requirement "place[d] an 'inordinately difficult' burden of proof on plaintiffs," Congress in 1982 adopted a prophylactic standard banning even *unintentionally* discriminatory "results." *Gingles*, 478 U.S. at 43-44.

Second, the majority had no legitimate basis for concluding that Section 2 is inadequate in the covered jurisdictions. While the majority emphasized the continued existence of discrimination there, it identified no congressional "finding" or evidence that such residual discrimination would overwhelm Section 2 litigation. *See* Pet.App. 44a-45a. Instead, it relied on *generic* evidence that raising Section 2 claims "is both costly and time-consuming." *See id.* 45a-48a. But what matters is not the *normal* burdens of bringing anti-discrimination litigation, but rather "the *inordinate amount* of time and energy required to overcome the *obstructionist tactics invariably encountered*" in "case-by-case litigation ... to combat widespread and persistent discrimination in voting." *See South Carolina*, 383 U.S. at 328 (emphases added). The 2006 Congress obviously did not believe that the *typical* burdens of Section 2 litigation rendered it *generally* inadequate, because, like all other Congresses, it relied exclusively on case-by-case litigation in *non-covered* jurisdictions. Indeed, under the majority's illogical contrary reasoning, preclearance is *always* justified because it is always cheaper and quicker *for plaintiffs* than normal litigation. For example, because Title VII litigation against state employers requires time and money, federal preclearance of all state employment decisions would be warranted.

Third, the majority had no legitimate basis for concluding that the coverage formula is a rational dividing line separating the jurisdictions where Section 2 is inadequate from the jurisdictions where it is adequate. As noted, the 2006 Congress itself concluded that Section 2 was generally effective in the non-covered jurisdictions, and Congress' "record" itself belies the notion that Section 2 was somehow *specially* ineffective in the covered jurisdictions, because it suggests "more similarity than difference" between the non-covered and covered jurisdictions. *See Nw. Austin*, 557 U.S. at 204. Indeed, the majority's primary evidence justifying the statute's "departure from the fundamental principle of equal sovereignty" (*id.* at 203) was the allegedly greater incidence of successful Section 2 lawsuits in the covered jurisdictions. *See* Pet.App. 49a-55a. But that logic is upside-down. Even if the showing is accurate, *but see id.* 90a-95a (Williams, J., dissenting), it simply confirms that Section 2 is a highly effective remedy in the covered jurisdictions.

Finally, the majority heavily relied on the separate provisions giving courts limited authority to "bail-out" and "bail-in" jurisdictions. *See* Pet.App. 61a-66a. But Congress has the constitutional obligation to justify the "*statute's* disparate geographic coverage," *see Nw. Austin*, 557 U.S. at 203 (emphasis added), and so it cannot foist the duty on courts and covered jurisdictions to redraw the map on an *ad hoc* basis. For example, Congress could not arbitrarily impose Section 5 only on jurisdictions east of the Mississippi River and then defend that irrational choice by giving courts limited "bail-out" and "bail-in" powers. In any event, consideration of these powers further indicates that

Section 5's "disparate geographic coverage is not "sufficiently related to the problem that it targets." *See id.* The majority emphasized that "the pace of bailout[s]" has been increasing recently. *See* Pet.App 63a. But that only proves the 2006 Congress was grossly over-inclusive in failing itself to remove those jurisdictions from coverage. Likewise, the majority emphasized that "[f]ederal courts" have imposed "bail-in" as a remedy for adjudicated constitutional violations. *See id.* 61a-62a; *see also* 42 U.S.C. § 1973a(c). But it is patently irrational to try to capture non-covered jurisdictions where case-by-case litigation is *inadequate* by requiring that a *successful* lawsuit be brought, *let alone* one satisfying the "inordinately difficult" burden of proving *intentional* discrimination, *see Gingles*, 478 U.S. at 44.

III. SECTION 5's SUBSTANTIVE STANDARD NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2

Even assuming that *perpetuating* Section 5 would have been constitutional, the 2006 *expansion* of the substantive standard confirms the statute's lack of congruence, proportionality, and rationality. Initially, *any* strengthening of Section 5 in 2006 would be irrational, because Section 2 obviously was not *less* effective than in the 1960's South. More importantly, the specific amendments adopted show that the 2006 Congress' goal was neither bolstering the inadequacies of Section 2 nor even attacking unconstitutional discrimination. The amended standard instead transforms Section 5 into a rigid entitlement scheme that mandates and coerces electoral preferences for minorities until 2031.

A. The Old Preclearance Standard Targeted Backsliding That Undermined Section 2's Enforcement

1. The Old Section 5's Limitation To Retrogressive Changes

Section 5's "effect" and "purpose" prongs previously were limited to retrogression from the status quo. *Bossier I*, 520 U.S. at 476-80; *Bossier II*, 528 U.S. at 333-36. That distinct, narrow anti-backsliding role complemented Section 2's effort to improve the status quo, reduced jurisdictions' federalism costs, and prevented DOJ from coercing increased minority electoral success.

a. Because Section 5 substantively addressed "different evils" than Section 2, *Bossier I*, 520 U.S. at 477, it was a useful supplement rather than a gratuitous redundancy. Section 2 addressed whether the status quo was worse for minorities than some "hypothetical alternative." *Bossier II*, 528 U.S. at 334. In contrast, Section 5 inherently and "uniquely" addressed *alterations* to the status quo, because it "deal[t] only and specifically with *changes* in voting procedures," and asked whether they were worse *than the status quo. Id.* "[F]reezing" the status quo was appropriate, because the covered jurisdictions were "undoing or defeating" Section 2 litigation "by passing new discriminatory voting laws," *see Miller*, 515 U.S. at 925-26, and such changes carried an overwhelming "risk of purposeful discrimination," *see Rome*, 446 U.S. at 177.

b. The retrogression limitation also decreased jurisdictions' compliance burdens and increased their autonomy. Section 5 imposes "the difficult burden" of "prov[ing] a negative"—namely, "proving the *absence* of [the prohibited] purpose and effect." *Bossier I*, 520 U.S. at 480. Limiting the inquiry to retrogression eased the burden: proving a change lacked a retrogressive effect only "require[d] a comparison of [the] jurisdiction's new voting plan with its existing plan," *id.* at 478; proving instead the absence of a discriminatory dilutive effect would have "impose[d] a demonstrably greater burden" by "necessitat[ing]" comparisons with "hypothetical, undiluted plan[s]" selected from among countless electoral alternatives, *id.* at 480, 484. Jurisdictions thus retained greater autonomy. They could more freely select valid changes that demonstrably would not retrogress from the status quo "benchmark," *see id.* at 480, since they did not first have to perform the more "complex undertaking" of *proving* that the changes also would not be worse than possible alternatives, *see Bossier II*, 528 U.S. at 332.

Importantly, these benefits were heightened under the "purpose" prong. Proving the absence of retrogressive purpose required only the relatively "trivial" task of showing that jurisdictions were not "incompetent retrogressor[s]" that had inadvertently adopted non-backsliding changes. *See id.* at 331-32. Proving instead the absence of discriminatory purpose would have imposed the "demonstrably greater burden," *Bossier I*, 520 U.S. at 484, of showing that jurisdictions' refusal to select "a hypothetical, undiluted plan" was not intentionally discriminatory, *Bossier II*, 528 U.S. at 336. Congress itself has warned that it is "inordinately difficult" to ascertain whether a voting practice has a discriminatory "purpose," given overlapping interests of different legislators selecting among various proposals. *See Gingles*, 478 U.S. at 44; S. Rep. No.

97-417, at 36-37 (1982). For example, "race [often] correlates closely with political behavior," rendering it difficult to distinguish between those motives. *See Easley v. Cromartie*, 532 U.S. 234, 257 (2001). It therefore would have been even more "inordinately difficult" to "prov[e] the *absence* of discriminatory purpose" concerning non-retrogressive changes, since "it is never easy to prove a negative." *See Bossier I*, 520 U.S. at 480. That effectively would have forced jurisdictions to prove that the status quo lacked a discriminatory "result" compared to the hypothesized alternative—*i.e.*, the very Section 2 analysis that *Bossier I* held would dramatically complicate the Section 5 process, *id.*—and then *additionally* prove that none of their myriad officials eschewed that alternative for discriminatory reasons. *Bossier II* thus held that requiring jurisdictions to disprove "discriminatory purpose" would have "exacerbate[d] the 'substantial' federalism costs" of "the extraordinary burden-shifting procedure[]," "perhaps to the extent of raising concerns about § 5's constitutionality." 528 U.S. at 335-36.

Equally important, DOJ's coercive power during administrative preclearance would have greatly increased. As the pre-*Bossier II* period illustrates, the difficulty of disproving discriminatory motive gave DOJ virtually unbridled discretion to deem "discriminatory" the failure to adopt any alternative that better enhanced minority electoral success.

c. Before *Bossier II*, this Court in *Miller* found that DOJ frequently objected on "discriminatory purpose" grounds *to coerce* racially gerrymandered changes that increased minority electoral success, even adopting a "policy of maximizing majority-black districts" and "accept[ing] nothing less than abject surrender to its maximization agenda." 515 U.S. at 917, 924-27. For example, DOJ had claimed that Georgia's "refusal ... to create a third majority-minority district" was intentionally discriminatory, even though that district violated "all reasonable standards of compactness and contiguity." *Id.* at 919, 923-24. Georgia thus was forced to adopt a "[g]eographic[] ... monstrosity." *Id.* at 908-09; *see also Shaw v. Hunt*, 517 U.S. 899, 903, 912 (1996).

Miller admonished that DOJ's "policy" of increasing minority electoral success "seem[ed] quite far removed from" the anti-backsliding "purpose of § 5." 515 U.S. at 926. Instead, "[DOJ]'s implicit command that States engage in [such] presumptively unconstitutional race-based [decisionmaking] br[ought] [Section 5] ... into tension" with the Constitution's nondiscrimination guarantees. *Id.* at 927. Tellingly, therefore, *Bossier II* cited *Miller* when it held that "discriminatory purpose" objections would "exacerbate ... federalism costs" and "concerns about ... constitutionality." *See* 528 U.S. at 335-36.

2. The Old Section 5's "Totality Of Circumstances" Test For Determining Retrogression

Section 5's "retrogression" analysis previously entailed a "totality of circumstances" test modeled on Section 2's analogous "results" test. *Ashcroft*, 539 U.S. at 479-85. That nuanced and flexible inquiry helped avoid creating a rigid quota-floor for minority electoral success, which would have limited jurisdictions' autonomy without plausibly redressing intentional discrimination, let alone the invidious backsliding justifying Section 5.

a. Two constitutional concerns are implicated when Congress purportedly "enforces" a constitutional ban on *intentional* discrimination through a statutory ban on facially neutral laws with a *disparate effect*.

First, in *all* contexts, "effects" tests must be examined to prevent Congress from "attempt[ing] a substantive change in constitutional protections." *See Boerne*, 521 U.S. at 532. The inquiry is whether the test improperly bans the proscribed "effect" for its own sake, or as an appropriate means for smoking out practices carrying "the risk of purposeful discrimination." *See Rome*, 446 U.S. at 177. The test can "be fairly characterized in [the latter] fashion" if it allows the presumptively proscribed effect to be justified on legitimate, race-neutral grounds. *See Ricci v. DeStefano*, 557 U.S. 557, 594-95 (2009) (Scalia, J., dissenting). If such nondiscriminatory explanations are an available defense, then the failure to provide one creates the requisite "infer[ence]" of a potential "discriminatory" motive. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

Second, in the *group-representation* context, "effects" tests must be especially scrutinized, because there they contain the additional risk of becoming a "powerful engine of ... discrimination" *against non-minorities*. *See Johnson v. Transp. Agency*, 480 U.S. 616, 676-77 (1977) (Scalia, J., dissenting). In particular, banning practices with the "effect" of *diluting the representation* of a minority *group* in a legislature (*e.g.*, district boundaries) is critically different than banning practices with the "effect" of *denying* the ability of *individual* minorities *to access* *the ballot* (e.g., voter or candidate qualifications). Whereas the latter "effects" ban expands opportunities for *all* individuals, minorities and non-minorities alike, the former ban necessarily entails *limiting opportunities for non-minorities*, because group representation is a *zero-sum* game. For example, banning practices with the "effect" of diluting minority-preferred representatives below 20% necessarily caps majority-preferred representatives at 80%. And, of course, if there are no exceptions to that "effects" test, then it is a *quota*: prohibiting *any* practice with the "effect" of reducing the minority share below 20% is the same as mandating that the minority share be 20%.

Accordingly, it is especially critical that "effects" tests concerning minority vote *dilution* (as opposed to ballot *denial*) allow the presumptively proscribed effect to be justified on legitimate, race-neutral grounds. Whether described as an "effects" test or a quota, an unconditional mandate to avoid diluting minorities' opportunities for "electable" legislative seats *regardless* of the reasons for dilution is a "patently unconstitutional" cap on non-minorities' opportunities to exceed that guaranteed "racial balanc[e]." *See Grutter v. Bollinger*, 539 U.S. 306, 329-30 (2003). So it cannot possibly be a congruent, proportional, or rational means of "enforcing" the Constitution's nondiscrimination guarantees.

b. Section 2 exemplifies how a holistic and flexible "effects" test targets practices that are likely intentionally discriminatory, while avoiding conferring electoral advantages on minorities.

Section 2's "results" test does not mandate "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *See Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*"); *Gingles*, 478 U.S. at 96-97 (O'Connor, J., concurring in the judgment); *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). Rather, the "ultimate right of § 2 is *equality* of opportunity," *LULAC*, 548 U.S. at 428 (emphasis added), reflecting the statutory command that "political processes" must be "*equally* open to participation" and cannot provide "*less* opportunity" for minorities, 42 U.S.C. § 1973(b) (emphases added); *accord Bartlett*, 556 U.S. at 20 (plurality opinion). Indeed, even an unequal ability for minorities *to elect* their preferred candidates is not *alone* an unlawful "result," because minorities must "have less 'opportunity' than others 'to participate in the political process *and* to elect representatives of their choice.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

Consistent with overall "equality of opportunity," Section 2 requires a "fact-intensive" inquiry into "the totality of the circumstances," including the "tenuous[ness]" or strength of the "policy underlying the ... contested practice." *See Gingles*, 478 U.S. at 44-46 (citing S. Rep. No. 97-417, at 29); *see also* 42 U.S.C. § 1973(b). And this Court has "structure[d] ... the statute's 'totality of circumstances' test" (*De Grandy*, 512 U.S. at 1010) to avoid conferring electoral advantages on minorities and to target likely intentional discrimination.

First, threshold requirements narrow Section 2's focus to practices reflecting a high potential for intentional discrimination. Specifically, plaintiffs bringing a vote-dilution claim to redraw district lines must initially prove that there is a "geographically compact" minority community, *Abrams v. Johnson*, 521 U.S. 74, 91 (1997), that could constitute a majority of the electorate, *Bartlett*, 556 U.S. at 12-16 (plurality opinion), in a district adhering to "traditional districting principles[,] such as maintaining communities of interest and traditional boundaries," *Abrams*, 521 U.S. at 92; *LULAC*, 548 U.S. at 433. These preconditions essentially establish a *prima facie* case of disparate treatment. Race-neutral line-drawers presumably would draw a compact "majority-minority" district that complies with traditional principles, just as such districts are routinely drawn for non-minority groups. Thus, once the "prima facie" elements are satisfied, the failure to create such an intuitive district is an "action[] ... from which one can infer, if [it] remain[s] unexplained, that it is more likely than not that [the] action[] ... [was] discriminatory." *Cf. Furnco*, 438 U.S. at 576.

Second, even after Section 2 plaintiffs have satisfied the preconditions, Section 2 defendants can justify the seemingly disparate treatment under the "totality of circumstances" analysis, essentially *rebutting* the inference of discriminatory motive. For example, defendants can show there was a strong "policy underlying [their] ... contested practice," *Gingles*, 478 U.S. at 45 (citing S. Rep. No. 97-417, at 29), or that minorities retain an *equal* "opportunity ... to participate in the political process" *despite* any inequality in their ability to *elect* their preferred candidates, *see Chisom*, 501 U.S. at 397.

In short, Section 2's "results" test ensures that minorities receive *equal* treatment, while denying them *preferential* treatment—*i.e.*, refusing to mandate districts favorable to minorities when such districts would *not* be formed for others under traditional principles. *See Bartlett*, 556 U.S. at 20-21 (plurality opinion).

c. Of course, the "effects" tests in Section 2 and Section 5 necessarily differ in that Section 2's dilutive "results" test compares a jurisdiction's existing plan with a "hypothetical, undiluted plan," whereas Section 5's "retrogression" test compares a new plan to the "jurisdiction's existing plan." *Ashcroft*, 539 U.S. at 478-79. Apart from that different baseline though, *Ashcroft* held that the same flexible approach was required: just as "*in the § 2 context*, a court or [DOJ] should assess the totality of circumstances in determining retrogression under § 5." *Id.* at 484 (emphasis added); *see also id.* at 479-85 (primarily relying on *Gingles* and *De Grandy*, which are Section 2 cases). Consequently, as under Section 2, the inquiry "should not focus solely on the comparative ability of a minority group to elect a candidate of its choice," but must "examin[e] ... all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process[] and the feasibility of creating a nonretrogressive plan." *Id.* at 479-80.

Moreover, in structuring that "totality of circumstances" analysis, *Ashcroft* avoided preferential treatment of minorities and preserved jurisdictions' autonomy where intentional discrimination was not implicated.

First, on the *election* of minority-preferred candidates, *Ashcroft* afforded jurisdictions significant *discretion* to draw district lines based on different theories of representation. Rather than maintaining "a small[] number of safe majority-minority districts," jurisdictions could "spread[] out minority voters over a greater number of districts" where they were a numerical minority but "may have [had] the opportunity to elect a candidate of their choice ... by creating coalitions [with nonminority] voters." *Id.* at 480-81; *see also Bartlett*, 556 U.S. at 13 (plurality opinion) (terming these "cross-over" districts). *Ashcroft* thus held that "Section 5 g[ave] States the flexibility to choose one theory of effective representation over the other," even if that choice put at some risk minorities' past electoral successes because majority-minority districts were "safer" than "cross-over" districts. 539 U.S. at 482.

Second, and more important, *Ashcroft* held that minorities' increased ability "to participate in" and "influence" the "political process" was a "highly relevant factor," which could *offset and justify* an indisputable reduction in their power "to win[] elections." *Id.* Thus, even where a new plan had more districts "where minority voters may not be able to elect a candidate of choice," no retrogression occurred if the plan "increase[d] the number of representatives sympathetic to the[ir] interests," *id.* at 482-83, or potentially even just "[m]aintain[ed] or increase[ed] legislative positions of power for [their] representatives of choice," *id.* at 483-84.

Third, and most important, *Ashcroft* held that, even where a change indisputably diminished minorities' overall voting power, that still could be *excused* depending on "the *feasibility* of creating a nonretrogressive plan." *Id.* at 479 (emphasis added). Section 5 thus did not force jurisdictions to preserve minority voting power if that would subordinate sufficiently important race-neutral interests, such as traditional districting principles.

In sum, by employing Section 2's "totality of the circumstances" approach in the retrogression context, *Ashcroft* did not mandate preservation of minorities' ability to elect, but flexibly allowed electoral diminution if justified by an offsetting increase in political influence or excused by infeasibility under traditional governance principles. Because Section 5 thus allowed the "effect" of diminution where explained by nondiscriminatory factors, it targeted practices suggesting a "risk of purposeful discrimination," *see Rome*, 446 U.S. at 177, and thereby reduced the "tension" with the Constitution's nondiscrimination guarantees, *see Miller*, 515 U.S. at 927. Indeed, Justice Kennedy's concurring opinion in *Ashcroft* was explicit about the necessity of avoiding interpretations where "what save[s] [a change] under § 5" are "considerations of race that would doom [it] under the Fourteenth Amendment or § 2." 539 U.S. at 491.

B. The New Preclearance Standard Imposes A Rigid Scheme Of Racial Preferences

1. The New Section 5's "Ability To Elect" Mandate

The 2006 Congress required that preclearance be denied whenever jurisdictions "diminish[]" a minority group's "ability ... to elect their preferred candidates," 42 U.S.C. § 1973c(b),(d), thereby abrogating *Ashcroft*'s critical "totality of circumstances" retrogression standard. More than forty years after Section 5's enactment, Congress was unwilling to "permit[] [jurisdictions] to break up districts where minorities form a clear majority of voters and replace them with vague concepts such as influence, coalition, and opportunity." S. Rep. No. 109-295, at 19-20 (2006). It believed that "spread[ing] minority voters" out of such safe districts would "turn[] Section 5 on its head" and "turn black and other minority voters into second class voters." H.R. Rep. No. 109-478, at 69-71 (2006). Thus, because "Congress explicitly *reject[ed]* all that logically follows from [*Ashcroft*]'s statement" that electoral diminution "cannot be dispositive," "the relevant analysis" is now an inflexible "comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change." *Id.* at 71.

a. Unlike Section 2's "results" test and Section 5's old "retrogression" standard, the new "ability to elect" standard is an unyielding *quota-floor* tied to past minority electoral success.

First, the new standard does not preserve "*equality* of opportunity," instead decreeing a "*guarantee* of electoral success for minority-preferred candidates." *See LULAC*, 548 U.S. at 428 (emphases added). Minorities now have a *federal entitlement* until 2031 that no voting change may "diminish[]" their "ability ... to elect their preferred candidates." 42 U.S.C. § 1973c(b). Of course, that floor on minorities' expected electoral success is necessarily a ceiling for non-minorities. *Supra* at 22-23.

Second, the new standard accordingly mandates far more race-based decisionmaking than ever before. Most obviously, every existing "safe" majority-minority and "cross-over" district must be preserved. Such districts "virtually guarantee the election of a minority group's preferred candidate," *see Ashcroft*, 539 U.S. at 480-81, so even shifting to a slightly less "safe" district—where the group need only "pull, haul, and trade" for a few more non-minority votes, but still "may lose," *see id.*—would necessarily "*diminish*" the group's "ability to elect." The legislative history confirms Congress' abhorrence of dismantling such districts. *Supra* at 29. But "entrench[ing]" them "by statutory command ... pose[s] constitutional concerns." *See Bartlett*, 556 U.S. at 21, 23-24 (plurality opinion).

The new standard also requires preserving every functioning "influence" district. Although reducing the minority population in such districts had *never* properly been found retrogressive before, *compare, e.g.*, *LULAC*, 548 U.S. at 445-47 (plurality opinion), *with id.* at 478-81 (Stevens, J., dissenting in relevant part), doing so now will indisputably "diminish" the remaining minorities' "ability to elect." After all, minorities in such districts "can play a substantial or decisive role in the electoral process," and can at least sometimes, if not "always[,] elect the candidate of their choice," even if not *guaranteed* to do so. *See Ashcroft*, 539 U.S. at 488-89. Reducing their population thus would lower their chances of winning (from, say, 25% to virtually nil), which plainly would "*diminish*" their "ability to elect."

Accordingly, Section 5's ambit will be greatly expanded, because districts with minority voting-age populations as small as 20-30% typically function as "influence" districts. *See id*; *LULAC*, 548 U.S. at

443-46 (plurality opinion); *id.* at 479-81 & n.15 (Stevens, J., dissenting in relevant part). So the new standard "unnecessarily infuse[s] race into virtually every redistricting, raising serious constitutional questions." *See id.* at 446 (plurality opinion).

Indeed, this is well illustrated by *Texas v. United States*, No. 11-1303, --- F. Supp. 2d ----, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), *appeal filed*, No. 12-496 (U.S. Oct. 19, 2012). The court held that the "ability to elect" standard prohibits Texas from changing an *overwhelmingly white district* without racially polarized voting that elected a *white Democrat* into a district more likely to elect a Republican, simply because the *34.4%* of minority voters also supported that white Democrat in general elections. *See id.* at *38-43. This exemplifies how, even in districts with relatively small minority populations, the "ability to elect" standard is a preferential quota-floor that protects any "electoral advantage" of the political party disproportionately supported by the minorities--namely, Democrats.

Third, the new standard does not permit departures from the quota for *any* reason. The plain text of the "diminish[] the ability ... to elect" standard, 42 U.S.C. § 1973c(b), unambiguously eliminates *Ashcroft*'s inquiries into "feasibility" or "the minority group's opportunity to participate in the political process," *see* 539 U.S. at 479; *supra* at 26-28. And that was a deliberate decision. H.R. Rep. No. 109-478, at 71 ("Congress explicitly *rejects* all that logically follows from [*Ashcroft*]'s statement" that electoral diminution "cannot be dispositive.").

Thus, for example, jurisdictions must entirely subordinate traditional districting principles if needed to preserve majority-minority districts weakened by natural demographic shifts, like recent residential integration and suburban migration. *Contra Miller*, 515 U.S. at 916, 919. Indeed, preservation is required even if minorities are statistically *over-represented*, because the existence of "proportional representation" is *irrelevant* to whether the group's "ability to elect" has been "diminished." *Contra De Grandy*, 512 U.S. at 1020-24. Perhaps most perversely, the number of minority-preferred officials elected must be unthinkingly preserved even if *opposed by the minority community itself* due to their preference for more political "influence" overall. *Contra Ashcroft*, 539 U.S. at 480-84.

In sum, the "ability to elect" standard bars changes that merely impose the types of "incidental burdens" on minorities that other voters face, *see Boerne*, 521 U.S. at 531, or that may even *benefit* minorities' overall voting power. Such changes clearly do not "have a significant likelihood of being unconstitutional." *See id.* at 532. Moreover, in banning such changes, Section 5 now makes "[r]ace ... the predominant factor" in electoral decisionmaking. *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Even before the 2006 amendments, this tendency of Section 5 was viewed as "a fundamental flaw" by Justice Kennedy, *id.*, and this Court notably emphasized that perceived defect in *Nw. Austin*, 557 U.S. at 203.

b. Judge Williams's dissent below agreed with these arguments, Pet.App. 73a-75a, but the majority refused to consider them, *id.* 66a-67a. And while the district court in the Kinston litigation rejected them, *LaRoque*, 831 F. Supp. 2d at 214-28, 232-38, its two primary reasons were meritless.

First, the court reasoned that rigidly limiting the retrogression inquiry to minorities' "ability to elect" their preferred candidates "was necessary to avoid giving cover to intentional discrimination and to prevent an administrability nightmare." *Id.* at 228. That was so because *Ashcroft*'s "amorphous 'totality of the circumstances' factors" were too "subjective" and "unpredictable." *See id.* at 226. This reasoning is entirely flawed.

A rigid "effects" test that eliminates *any* justification is obviously unnecessary to prevent pretextual or speculative justifications, because *Ashcroft* already foreclosed them by requiring the jurisdiction *to prove* its justification. Electoral diminution was allowed only if the jurisdiction *persuaded DOJ or D.C. federal judges* that it was warranted by legitimate factors. *Ashcroft*, 539 U.S. at 471, 479. Similarly, *Section 2's* analogous "totality of circumstances" test is obviously effectively applied by courts to defeat inadequate justifications. Regardless, Congress was obligated to address any alleged problems with *Ashcroft*'s vagueness or administrability the same way this Court handled Section 2's "results" test: by "structur[ing] ... the statute's 'totality of the circumstances' test," *De Grandy*, 512 U.S. at 1010, to ensure *only* "equality of opportunity," *LULAC*, 548 U.S. at 428, rather than replacing it with a clear but rigid quota. Indeed, this Court has squarely held that "the fact that the implementation of a program capable of providing individualized consideration [of race] might present administrative challenges does not render constitutional an otherwise problematic system" that "makes race a decisive factor." *Gratz v. Bollinger*, 539 U.S. 244, 274-75 (2003).

Second, the court claimed that the "ability to elect" standard "do[es] not create [a] facial quota" because it is not an "utterly inflexible prohibition on retrogression." *LaRoque*, 831 F. Supp. 2d at 236-37. But that claim is refuted by the statutory text, which unambiguously and intentionally bans *any* "diminish[ment]" of minorities' "ability to elect." *Supra* at 31. Likewise, while DOJ currently claims that it will not apply the standard as a quota, *LaRoque*, 831 F. Supp. 2d at 236-37, this Court cannot "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly," *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

2. The New Section 5's "Discriminatory Purpose" Objection

The 2006 Congress further required that preclearance be denied whenever jurisdictions fail to disprove "any discriminatory purpose," 42 U.S.C. § 1973c(c), thereby abrogating *Bossier II*'s critical limitation to retrogressive changes. Congress complained that the old "purpose" prong was too narrow because it would catch only "incompetent retrogressor[s]" while forcing "the federal government" to "giv[e] its seal of approval to practices that violate the Constitution." H.R. Rep. No. 109-478, at 67; S. Rep. No. 109-295, at 16.

a. Congress eviscerated the unique supplemental function that traditionally justified Section 5, and its new justifications for expanding Section 5 are inadequate.

As noted, Section 5 preclearance was designed merely to *preserve* the status quo, while Section 2 litigation analyzed whether proposed *improvements* to the status quo were rejected in circumstances suggesting likely discriminatory motives. *Supra* at 11-12, 18. By injecting that Section 2 analysis of *deficiencies with the status quo* into the Section 5 inquiry through the "discriminatory purpose" standard, the 2006 Congress created a novel substantive overlap between the provisions, which required a novel justification for why Section 5 needed to duplicate Section 2.

Such justification is impossible, because subjecting non-retrogressive changes to further preclearance review is at best unwarranted and at worst gratuitous and even absurd. It is "an unwarranted response to [the] lesser" "evil presented" by jurisdictions that concededly have not *worsened* minorities' electoral chances, even if they have not *improved* them to DOJ's satisfaction. *See Boerne*, 521 U.S. at 530. Indeed, it is entirely gratuitous, since purposefully discriminatory changes are now easily reachable through Section 2's prophylactic "results" test. Moreover, in many circumstances, it is absurd "[t]o deny preclearance to a plan that is *not* retrogressive" based on the mere existence of a *more* ameliorative alternative, because that would "leav[e] in effect a status quo that is even worse." *Bossier II*, 528 U.S. at 335-36.

Congress' contrary concerns are meritless. There can be no symbolic perception that the Government bestows "approval" on non-retrogressive changes that are discriminatory, because this Court "ha[s] repeatedly noted" that "preclearance under § 5 affirms nothing but the absence of backsliding." *Id.* at 335. Likewise, the narrowness of the constraint imposed by the retrogressive-purpose standard is not a vice, but a constitutional *virtue*. *Id.* at 336.

b. Specifically, Congress blithely "exacerbate[d] the 'substantial' federalism costs that the preclearance procedure already exacts," apparently indifferent as "to the extent" that doing so "rais[ed] concerns about § 5's constitutionality." *Id.* Without any legitimate "enforcement" justification for "curtailing [jurisdictions'] traditional general regulatory power" or "imposing a heavy litigation burden on [them]," *see Boerne*, 521 U.S. at 534, the "discriminatory purpose" standard forces them to consider proposed alternatives to their preferred non-retrogressive change and imposes the difficult duty to prove that they lacked an invidious motive for eschewing those alternatives, *supra* at 18-20.

Again, this is well illustrated by the Texas redistricting decision. The court held that Texas failed to prove that its changes to a Senate district's boundaries "were wholly partisan" and "untainted by considerations of race." *Texas*, 2012 WL 3671924, at *26. But the *only* reason the court gave for questioning that explanation was that "the legislature deviated from typical redistricting procedures and excluded minority voters from the process." *Id.* Of course, that does not even remotely suggest, let alone prove, discriminatory purpose, especially since the court found that the changes *did not diminish* minorities' ability to elect their preferred candidates, *id.* at *21-23. Accordingly, even in the few districts with minority populations so small that the "ability to elect" quota is not a barrier, the "discriminatory purpose" standard still "infuse[s] race into ... [the] redistricting, *see Bartlett*, 556 U.S. at 21 (plurality opinion), by coercing jurisdictions to adopt the districts that best promote the minority-preferred political party, on pain of costly and difficult litigation to justify the partisan configurations of majority-white districts.

Furthermore, the difficulty of disproving discriminatory intent enables DOJ to "implicit[ly] command that States engage in presumptively unconstitutional race-based" decisionmaking, *see Miller*, 515 U.S. at 927, by prioritizing changes that improve minorities' expected electoral success. *Supra* at 20-21. Tellingly, *Bossier II* cited *Miller* to suggest that "discriminatory purpose" objections would "rais[e] concerns about § 5's constitutionality." *See* 528 U.S. at 336. Section 5 thus now contains the "fundamental flaw" of "a[] scheme in which," as a practical matter, "[DOJ] is permitted ... to encourage ... a course of unconstitutional conduct." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

b. Again, the dissent below agreed with these arguments, Pet.App. 75a-76a, but the majority refused to consider them, *id.* 66a-67a, and the Kinston district court rejected them, *LaRoque*, 831 F. Supp. 2d at 207-14, 232. And again, the district court's two primary reasons were meritless.

First, the court concluded that the "discriminatory purpose" preclearance standard is not too "intrusive" because it merely "shift[s]" the burden to covered jurisdictions to prove the absence of "unconstitutional conduct." *Id.* at 213. That facile response ignores this Court's warning that this particular burden-shift is an "extraordinary" reversal of federal-state relations that raises serious constitutional concerns by unduly burdening jurisdictions' preclearance efforts and constraining their local autonomy. *Supra* at 20.

Second, the court refused to consider DOJ's ability to employ "discriminatory purpose" objections "to extract its preferred results" from jurisdictions, reasoning that this risk "is not the proper subject of a facial challenge." *LaRoque*, 831 F. Supp. 2d at 213-14. But DOJ's coercive *capabilities* are an important reason why the "discriminatory purpose" standard *facially* imposes a "heavy litigation burden." *See Boerne*, 521 U.S. at 534. That DOJ is practically "*permitted* ... to encourage ... a course of unconstitutional conduct" is thus a "fundamental flaw" in the 2006 "scheme." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) (emphasis added).

CONCLUSION

Accordingly, this Court should hold that Section 5, as reauthorized and amended in 2006, is unconstitutional, and it should reverse the judgment below.

Respectfully submitted,

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No. 12-96

In the
Supreme Court of the United States

◆

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General, et al.,

Respondents.

◆

**On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND AMERICAN CIVIL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE EFFECTS TEST VIOLATES EQUAL PROTECTION 7

A. The Effects Test Contravenes the Individual Right to Equal Protection 8

B. Section 5's Effects Test Fails Strict Scrutiny 10

II. SECTION 5 IS NO LONGER USED TO ENFORCE RIGHTS GUARANTEED BY THE FIFTEENTH AMENDMENT 15

A. DOJ Enforces Section 5 to Produce "Safe Districts" Through Constitutionally Suspect Racial Gerrymandering 16

B. Section 5 Is Rarely Used to Eliminate Intentional Discrimination 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

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Page

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TABLE OF AUTHORITIES—Continued

Page

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Page

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Page

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and American Civil Rights Foundation (ACRF) respectfully submit this brief amicus curiae in support of Petitioner Shelby County.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980). PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports colorblind public policies, and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193; *Bartlett v. Strickland*, 556 U.S. 1; and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during hearings on the 2006 reauthorization of the Voting Rights Act.

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

ACRF is a nonprofit public benefit corporation, with members nationwide, created to monitor and enforce laws that preclude the use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRF has participated as amicus curiae in this Court in *Fisher v. Univ. of Texas*, No. 11-345 (U.S. 2012). ACRF has a keen interest in ensuring that state and local governments are not forced into race-conscious decisions by the Voting Rights Act.

This case raises the important issue of whether the 2006 reauthorization of the Voting Rights Act is a constitutional exercise of congressional power under the Fourteenth and Fifteenth Amendments. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

America is not the same country it was in 1964 when "the majority of blacks remained unable to cast a ballot in almost every southern state." Abigail Thernstrom, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* 4 (2009). Thanks in large part to the Voting Rights Act of 1965 (Act), the intentionally discriminatory barriers to black enfranchisement "have been [largely] eliminated." *Bartlett*, 556 U.S. at 10. Today, for most Americans, it is difficult to imagine that forty-seven years ago, state and local governments deliberately disenfranchised blacks in the Deep South, and that the Act—"the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction"—was necessary to end it. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 745 (2006). Adopted as an extreme temporary measure, Section 5 of the Act required every political subdivision targeted by the Act to obtain permission from the federal government before any change to election procedures, no matter how minor, could take place.

"Past success alone, however, is not adequate justification to retain [Section 5]." *Nw. Austin*, 557 U.S. at 202. In *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997), this Court explained that when Congress invokes its remedial authority under the Fourteenth and Fifteenth Amendments, there must be a congruence and proportionality between the injury to be prevented and the means adapted to that end. Here, that indicates that Section 5's "current burdens" must be adapted to its "current needs." *Nw. Austin*, 557 U.S. at 203. Section 5, designed as a temporary measure to combat the extensive intentional voting discrimination pervasive throughout the Deep South, can no longer be seen as a congruent or proportional means to enforcing Fifteenth Amendment rights.

The reasons for this conclusion have been well documented and extensively briefed in this case. The deplorable conditions that once justified Section 5's extraordinary measures are no longer present in the South (or the United States generally). *See* Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148, 148-49 (2007) (comparing conditions in the South before the Act to contemporary conditions). Section 5's coverage formula bears little resemblance to current discriminatory voting practices and is becoming both more underinclusive and more overinclusive each day. *See* Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 723-24 (2006) (detailing the constitutional problems with Section 5's "outdated" coverage formula). Section 5 also fails to address contemporary claims of discrimination in voting. *See* Pildes, *supra*, at 751-52 (explaining how Section 5 fails to address "barriers today to African American suffrage").

When these glaring problems are coupled with the significant federalism costs that accompany Section 5, it is clear that Section 5 is no longer a congruent and proportional means to enforce Fifteenth Amendment rights. *See, e.g.*, *Nw. Austin*, 557 U.S. at 203 (explaining how Section 5 encroaches on federalism); *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring) (explaining how Section 5 requirements conflict with other anti-discrimination measures); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (detailing Section 5's federalism costs). Accordingly, this Court should hold that Section 5 is beyond Congress's power to enforce the Fifteenth Amendment. *See* U.S. Const. amend. XV, § 2.

Moreover, Section 5 suffers additional constitutional infirmity under the equal protection guarantees of the Fifth and Fourteenth Amendments. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. On its face, Section 5 requires covered jurisdictions to embark on a race-first inquiry to ensure their voting practices do not "have *the effect* of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c(a) (2006) (emphasis added). This "effects test," along with the "preferred candidate of choice" guidance in subsection (b), force covered jurisdictions to make voting decisions *because of* the resultant racial outcomes.[2] Thus, the effects test must be subjected to strict scrutiny, and is only constitutional if narrowly tailored to further a compelling government interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

This Court has long questioned the legality of racial preference in voting. "[T]he Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). Only two years after *Gray*, Congress enacted the Voting Rights Act to enforce the Fifteenth Amendment's right to vote regardless of an individual's race. The Act opposed the principle that districts must be represented by individuals of specific racial groups. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting). The whole concern of the Act was to ensure nondiscriminatory access to the ballot. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 582-94 (1969) (Harlan J., dissenting). But when the Act has been used for discriminatory purposes, this Court has not hesitated to declare those measures unconstitutional. *See Miller*, 515 U.S. 927-28 ("It takes a shortsighted and unauthorized view of the Voting Rights Act to . . . demand the very racial stereotyping the Fourteenth Amendment forbids.").

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[2] In the court below, Judge Williams argued that the effects test was itself an overt racial classification. *Shelby County, Alabama v. Holder*, 679 F.3d 848, 903 (D.C. Cir. 2012) (Williams, J., dissenting) ("But the implied 'they' of § 5 is not a polity in itself; nor is it an association freely created by free citizens. Quite the reverse: It is a group constructed artificially by the mandate of Congress, entirely on the lines of race or ethnicity.").

For decades,[3] the effects test—not purposeful discrimination—has been the Department of Justice's (DOJ) primary, nearly exclusive, Section 5 enforcement mechanism. Further, in the few instances where DOJ finds a discriminatory purpose, it requires little direct evidence of intentional discrimination. Instead, DOJ simply *infers* a discriminatory intent when a covered jurisdiction fails to adopt a "max-black" plan. Put simply, enforcement of Section 5 has morphed from ending racially discriminatory voting practices to forcing specific racial outcomes.

The effects test classifies people on the basis of race and requires covered jurisdictions to do the same. Thus, the effects test must be subjected to strict scrutiny. Because the government uses the effects test to create racially "safe" districts—and not to secure Fifteenth Amendment rights—the effects test is not narrowly tailored to any compelling governmental interest. Accordingly, this Court should hold that the effects test violates the guarantee of equal protection of the laws embodied in the Fifth and Fourteenth Amendments.

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[3] DOJ has been using disproportionate racial impact as a basis to deny preclearance for years. It was this Court's rejection of DOJ's approach in *Ashcroft*, 539 U.S. at 490-91, that prompted Congress to expand the effects test in 2006.

ARGUMENT

I

THE EFFECTS TEST VIOLATES EQUAL PROTECTION

The Fifteenth Amendment to the Constitution guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Congress passed the Voting Rights Act of 1965 to enforce this Amendment. In order to combat southern state legislatures that were bent on intentionally discriminating on the basis of race, Section 5 of the Act requires covered jurisdictions to preclear any voting change with the federal government. Over time, the DOJ's enforcement of Section 5 began to focus solely on the racial impact of proposed voting changes, and not on discriminatory intent. This Court subsequently clarified that intent must be at the heart of all preclearance decisions. *Ashcroft*, 539 U.S. at 490-91. In response, Congress amended Section 5 so that a proposed voting change would be precleared only if it "*neither* has the purpose *nor* will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a) (2006) (emphasis added). Explicitly addressing the Court's *Ashcroft* opinion, Congress added a second—more racially explicit—effects test that mandates preclearance denial to any voting practice which "will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b) (2006).

Section 5 enforcement is designed—and effective—at ending the intentionally discriminatory practices so prevalent throughout the 1960s Deep South. It is not aimed at racially balancing modern voting districts. By placing racial group rights over individual rights, the effects test violates the equal protection rights of all voters and constituents of every race. *See Miller*, 515 U.S. at 911-12. Further, it necessarily denies equal protection rights to individuals of all races.

A. The Effects Test Contravenes the Individual Right to Equal Protection

The effects test focuses on a racial group's ability to vote as a bloc and elect the "candidate of [its] choice." 42 U.S.C. § 1973c(b) (2006). In the court below, Judge Williams recognized that Section 5's group-rights concept is at odds with the individual right to vote "embodied in the 15th Amendment." *Shelby County*, 679 F.3d at 902-03 (Williams, J., dissenting).

Like the Fifteenth Amendment right to vote, equal protection guarantees in the Fifth and Fourteenth Amendments also protect individuals, "not groups." *Adarand*, 515 U.S. at 227. The intent of equal protection is to ensure that all persons are treated as individuals, not "as simply components of a racial . . . class," because "[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the

Constitution." *Miller,* 515 U.S. at 911-12 (citation and quotation marks omitted). By focusing on the effects a proposed voting change will have on a "racial group," Section 5 contravenes an *individual's* right to equal protection.

Instead of reinforcing the individual right to vote irrespective of one's race, the effects test eschews individual rights in favor of a perceived group right to elect a racial group's "candidate of [its] choice." There is little doubt that this language—which has been included in Section 2 of the Voting Rights Act since 1982—is designed to facilitate racial bloc voting. *See Shelby County*, 679 F.3d at 903-04 (Williams, J., dissenting). By transforming the right to vote from an individual right into a racial-group right, individuals only count insofar as they embody their racial group identity.[4] The effects test "bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Not only is the racial-group right enforced by the effects test contrary to the very concept of individual rights, but it "literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies to others." Roger Clegg, *The Future of the Voting Rights Act after Bartlett and NAMUDNO*, 2008-09 Cato Sup. Ct. Rev. 35, 40. It also denies equal protection to many individuals within a "benefitted" racial group by forcing them to adopt candidates that are not "of their choice." In the court below, Judge Williams asked "what happened to the minority group's *own minority*—those who dissent from the preferences of the minority's majority?" *Shelby County*, 679 F.3d at 902-03 (Williams, J., dissenting). The answer—according to the effects test—is that those individuals are not entitled to Section 5 protections.

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[4] Of course, these broad categories are unjustifiable, insofar as there is nothing intrinsic in these categories that assures a commonality of experience. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003) (demonstrating how contemporary racial group classifications, *i.e.*, "black," "Asian," "Hispanic," etc., fail to identify any common factor inherent to individuals within those groups).

Accordingly, any notion that Section 5 is still designed to protect the individual's right to vote irrespective of race is belied by the text of the effects test. The effects test elevates group rights over individual rights. It denies equal protection to individuals in nonpreferred racial groups. And it even denies equal protection to individual minority voters—those individuals who comprise the "minority group's own minority."

B. Section 5's Effects Test Fails Strict Scrutiny

Adarand reinforced the truth that the right to equal protection is held by the individual, and rejected the idea that a group-right to equal protection could trump that individual right. 515 U.S. at 227. From this principle, the Court held that any law that elevates racial group rights over an individual's right to equal protection must "be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."

Id. (emphasis added). Section 5, which is race-conscious on its face and is used principally to encourage race-based actions, directly conflicts with the constitutional guarantee of equal protection. This Court should subject the effects test to strict scrutiny.

The core purpose of equal protection is to eliminate governmentally sanctioned racial distinctions. The need for strict scrutiny is evident. Courts must inquire into the justification for race-based measures to determine which "classifications are in fact motivated by illegitimate notions of racial inferiority or . . . *racial politics*." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (emphasis added). Thus, insofar as the effects test embodies an explicit racial classification, *Shelby County*, 679 F.3d at 903 (Williams, J., dissenting), it is inherently suspect and presumptively invalid. *See Adarand*, 515 U.S. at 223; *Shaw v. Reno*, 509 U.S. at 643-44. To survive strict scrutiny review, it must be necessary to further a compelling government interest.

While securing Fifteenth Amendment rights to all Americans may certainly be a compelling interest, Congress "had no evidence on which it could base a conclusion that the . . . 'effects' test" was necessary to securing those rights. Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol'y 561, 571 (2007). Not only did Congress lack any evidence linking the necessity of the effects test to practices that denied Fifteenth Amendment rights, but the evidence that it did have pointed in the opposite direction. *See* Edward Blum & Lauren Campbell, American Enterprise Institute, *Assessment of Voting Rights*

Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act (May 17, 2006).[5] Because the effects test is counter productive to securing Fifteenth Amendment rights, it necessarily cannot be needed—or "narrowly tailored"—to secure those rights. On its face the effects test is a racial classification; it fails strict scrutiny review, and this Court should find it unconstitutional. *See Johnson v. California*, 543 U.S. 499, 505 (2005).

Even if this Court rejects Judge Williams's reasons for finding the effects test facially discriminatory, it takes little digging to uncover its discriminatory purpose. This Court has long held that both the Fourteenth and Fifteenth Amendments only ban disparate treatment—*i.e.*, intentional discrimination—on the basis of race, not disparate impact. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality op.) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'"). While both the Fourteenth and Fifteenth Amendments only reach intentional discrimination on the basis of race, Section 5 specifically targets racially disparate impacts. It therefore "goes beyond the prohibition of the Fifteenth Amendment." *Nw. Austin*, 557 U.S. at 202.

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[5] *Available at* http://www.aei.org/files/2006/05/15/20060515_BlumCampbellreport.pdf (last visited Dec. 20, 2012).

However, because disparate impact alone cannot justify a government's race-based action, the effects test is constitutionally suspect. It requires the federal government to engage in race-based decisionmaking where a disparate impact is found, and without more, there is no compelling government interest to make it constitutional. In this respect, the effects test is identical to the disparate impact provisions of Title VII. It "not only permits but affirmatively *requires*" race-conscious decisionmaking where an otherwise benign voting change will have a disproportionate *effect*. *See Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

The federal government cannot discriminate on the basis of race, nor can it enact laws requiring covered jurisdictions to do so. *See id.* (Scalia, J., concurring). But by forcing covered jurisdictions to avoid all racially disproportionate *effects*—even in the absence of past discriminatory behavior—that is precisely what the effects test requires. Like Title VII's disparate impact provisions, the danger of the effects test is that it "place[s] a racial thumb on the scales," requiring covered governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.*; *see also* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-09 Cato Sup. Ct. Rev. 53, 61-70 (discussing the conflict between equal protection and disparate impact); Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1344-45 (2010) (same). Insofar as equal protection is concerned, there is little practical difference between a civil rights law that mandates race-conscious decisions in employment, and a civil rights law that mandates race-conscious decisions in voting.[6]

Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). There is little doubt that the effects test is designed to produce districts that are "safe" along racial lines. Further, as demonstrated below, there is no doubt that DOJ's Section 5 enforcement—done primarily through the effects test—is racially discriminatory in fact. Even if the test is not suspect on its face, in its application it forces covered jurisdictions to make decisions because of race and, therefore, must also be subjected to strict scrutiny review. *Vill. of Arlington Heights*, 429 U.S. at 264-65. For the same reasons outlined above, the effects test cannot meet this demanding standard.

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[6] One difference between Title VII's disparate impact and the Section 5 effects test is worth highlighting. In a disparate impact challenge, the defendant can avoid liability if it demonstrates that the challenged practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The effects test contains no similar rebuttal stage, rendering it even more constitutionally suspect. For example, in 2007 the state of Michigan decided to close one of its Secretary of State branch offices. Letter from Grace Chung Becker, Assistant Attorney General, to Brian DeBano (Dec. 26, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122607.pdf (last visited Dec. 21, 2012). DOJ refused to preclear the change because it would have a disproportionate effect on minority voters. *Id.* at 2-3. DOJ was clear that any change with a "retrogressive effect" will not survive Section 5 review. *Id.*

II

SECTION 5 IS NO LONGER USED TO ENFORCE RIGHTS GUARANTEED BY THE FIFTEENTH AMENDMENT

The battle for true civil rights based on moral equality was fought and won many years ago. Like any fundamental human achievement, these rights cannot be taken for granted and must be safeguarded. However, some permutations of civil rights have become divorced from the moorings of moral equality:

> [C]ivil rights are not protected or enhanced by the growing practice of calling every issue raised by "spokesmen" for minority, female, elderly, or other groups, "civil rights" issues. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right.

Thomas Sowell, *Civil Rights: Rhetoric or Reality?* 109 (William Morrow & Co., N.Y., 1984) (Rhetoric or Reality). Today, political and social conditions are far different from those forty years ago when certain jurisdictions did whatever was necessary to ensure the continued disenfranchisement of black voters. Government action approaching such blatantly racist conduct could not even exist today given this country's growing shift to a color-blind society, the increasing intolerance for racism among most Americans, and the ever present scrutiny of news media. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 74 (2007) (describing decline of white racism). Today, every voting change cannot be presumed to have a discriminatory purpose. Nevertheless, that is how Section 5 continues to operate.

A. DOJ Enforces Section 5 to Produce "Safe Districts" Through Constitutionally Suspect Racial Gerrymandering

Section 5's pre-clearance requirements were adopted to address the pervasive problem of black disenfranchisement by government officials through literacy tests and other cleverly crafted rules designed to exclude blacks from the polls. *See South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). That is why Section 5's coverage was originally limited to jurisdictions in the Deep South. In the context of this "unremitting and ingenious defiance of the Constitution," it was possible to infer that any change in voting procedures that occurred in certain southern jurisdictions was for a discriminatory purpose. *See Katzenbach*, 383 U.S. at 309 (describing the "insidious and pervasive evil" in parts of the South).

Section 5, when it was used for its intended purpose—to eliminate deliberate racial discrimination by stubborn Southern governments—was an unquestionable success. It specifically targeted and eradicated the overt discriminatory voting practices of the South. *See Nw. Austin*, 557 U.S. at 226-29 (Thomas, J., dissenting). However, in the past twelve years, only three DOJ enforcement actions even allege exclusion of minorities from the polls.[7] Instead, DOJ employs the extraordinary federal powers of Section 5 to enforce racial and political gerrymandering. *See* Clegg, *supra*, at 40. Of the 67 Section 5 objections pursued since 2000, 39 have centered on redistricting efforts.[8] The minutia upon which these preclearance decisions turn indicates a larger concern with racial politics, and maintaining "safe districts," than with protecting Fifteenth Amendment rights. *Id.*

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[7] These three objections all involved voter ID laws. Of course, this is not to say that voter ID laws are illegal, only that the charge—that they are designed to deny minorities the right to vote—is akin to the type of problem Section 5 was designed to

(continued...)

For example, in 2002 DOJ rejected a proposed redistricting plan in Virginia that lowered the black population in one district from 55.7% to 55.2%. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Darvin Satterwhite, County Attorney (July 9, 2002).[9] DOJ conceded that population changes had altered the

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[7] (...continued)

remedy. Indeed, this Court has already ruled that voter ID laws are constitutional. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). This, in turn, raises two legitimate concerns: (1) To what extent should Section 5's discouragement of legitimate voting practices counsel against its constitutionality as a congruent and proportional means of enforcing Fifteenth Amendment rights; and (2) How can Section 5 be congruent and proportional to secure Fifteenth Amendment rights if an identical law is legal in one state and illegal in another? Thus, in addition to encouraging race-based decisionmaking, an effects test also inevitably discourages legitimate criteria whenever they happen to have a disproportionate racial effect. *See Clegg*, *supra*, at 40.

[8] *See generally* United States Department of Justice, Section 5 Objection Determinations, *available at* http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Dec. 21, 2012). This webpage catalogs all the "Section 5 objections interposed, continued or withdrawn by the Attorney General since 1965" on a state-by-state basis. *Id.*

[9] *Available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_070902.pdf (last visited Dec. 21, 2012).

racial makeup of the area, *id.* at 2, but nonetheless declared that the county had a duty to manipulate the district to prevent even a minor decrease in black voting strength to maintain the ability of the black population in that area to "elect their candidate of choice." *Id.* at 2-3.

An Arizona redistricting plan met a similar fate when, due to population growth, it split one majority-Hispanic district into two majority-Hispanic districts. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Lisa T. Hauser and José de Jesús Rivera (May 20, 2002).[10] Looking at the plan, DOJ concluded that the elimination of one district with a Hispanic population of 65% in favor of two districts with Hispanic populations of 51.2% and 50.6%, violated Section 5 because Hispanic voting populations at those levels were deemed insufficient to "elect their candidate of choice." *Id.* at 3.

Even redistricting plans that do not reduce minority voter strength at all have been (and are) denied preclearance under DOJ's understanding of Section 5. In 2001, DOJ rejected a proposed redistricting plan in Charleston, not because it reduced black voter strength at present, but because hypothetical population growth within the proposed district might reduce black voter strength in the future. Letter from R. Alex Acosta, Assistant Attorney

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[10] *Available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_052002.pdf (last visited Dec. 21, 2012).

General, to Francis I. Cantwell (Oct. 12, 2001).[11] DOJ acknowledged that redistricting was necessary due to population changes, and also that the proposed plan maintained the requisite number of majority-minority districts. *Id.* at 2. However, because hypothetical population changes could result in an increased number of white voters in one of the "black" districts, the plan was deemed retrogressive. *Id.* at 2-3.

Instead of guaranteeing individuals the right to vote irrespective of race, Section 5's primary function today is to create districts defined by race. In addition to the illegal and immoral purpose of racial gerrymandering, the unintended side effects of such racial gerrymandering are abundant.[12]

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[11] *Available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_101201.pdf (last visited Dec. 21, 2012).

[12] Many scholars have written at length about the effects of race-based gerrymandering. *See generally* Clegg & Chavez, *supra* (citing, *inter alia*, Christopher M. Burke, *The Appearance of Equality: Racial Gerrymandering, Redistricting, and the Supreme Court* 32-33 (1999); Katharine Inglis Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. Rev. 749, 780-81 (2006)). *See also* Jim Sleeper, *Liberal Racism* 43-66 (1997); Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 Wash. U. J.L. & Pol'y 71, 90 (2006); Roger Clegg & Joshua Thompson, *Overturn unconstitutional Voting Rights Act*, Wash. Times, Nov. 14, 2012; Abigail Thernstrom, *Racial Gerrymandering*, National Review, Apr. 29, 2011, *available at* http://www.nationalreview.com/articles/265956/racial-gerrymandering-abigail-thernstrom (last visited Dec. 21, 2012).

By destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions, segregating political districts by race only deepens racial divisions. Black candidates are easily elected in safe black districts while white candidates are elected in safe white districts. Neither whites nor blacks have any incentive to seek support from the other's constituency. *Holder v. Hall*, 512 U.S. 874, 906-09 (1994) (Thomas, J., concurring).

> We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.

United States v. Dallas Cnty. Comm'n, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially).

As this Court recognized in *Shaw*, 509 U.S. at 648, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Justice Douglas also bluntly made this point:

> When racial . . . lines are drawn by the State, the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate

> to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 67 (Douglas, J., dissenting).

A state-imposed racial gerrymander also assumes that, given a choice, black voters would not exercise broader influence over a number of competitive districts. One of the obvious (if indirect and unintended) effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one—or a member of a small, heavily outnumbered and consequently ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History* 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pursuit of Equality); D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 96 (Basic Books, Inc. N.Y., 1987) (proportional representation would "worsen racial tensions because it distorts the political process in order to create targeted entities less likely to engage in the coalition building that is the hallmark of American politics.").

Given the polarizing nature of a racial gerrymander, one might inquire just what is the minority representative supposed to contribute? It is inappropriate to treat people simply as bearers of some imagined racial or ethnic perspective—to treat them, in other words, as categories. True diversity is not achieved by looking to "personal qualities crude enough to be obvious to sense perception." Terry Eastland & William Bennett, *Counting By Race: Equality from the Founding Fathers to* Bakke *and* Weber 152 (1979) (Counting By Race) (citing Benjamin Martin, "*The Parable of the Talents*," 256 *Harper's* 18, 21 (Jan. 1978)).

Racial gerrymanders prescribe disharmony among the races. It draws attention to racial differences and, though not intending to do so, exacerbates them in some minds. The failures of the Great Society amply demonstrate that drawing attention to race cannot draw us closer to the realization of a color-blind society. Racial gerrymandering simply is not necessary for achieving moral equality in the voting rights context. The Voting Rights Act is designed to provide individual minorities, who may choose to form coalitions on any basis they choose, a real chance and a real opportunity to participate in the electoral process. Racial gerrymandering distorts the abilities of minority candidates and political organizations and also denigrates the real and substantial achievements they have recorded during the past decades, as well as their expected real and substantial achievements in the future. *See* Counting By Race at 157. *Cf.* Rhetoric or Reality at 49-50 (demonstrating historical trend of increasing black representation in professional, technical, and other high-level occupations both prior and subsequent to the Civil Rights Act of 1964). The Fifteenth Amendment does not countenance such legislation, and equal protection forbids it.

B. Section 5 Is Rarely Used to Eliminate Intentional Discrimination

It is no longer tenable to argue that Section 5 is needed to remedy widespread intentional discrimination by covered jurisdictions. By 2009, African-Americans occupied 628 seats in state legislatures nationwide. National Conference of State Legislatures, *Legislators & Legislative Staff Information: Number of African American Legislators.*[13] In some states, like Mississippi, Alabama, and Georgia, nearly one-fourth of all state legislative seats were occupied by African-Americans. *Id.* That number is comparable to the percentage of African-Americans in those states. In other states, such as Ohio, Illinois, Nevada, and California, there is a larger percentage of African-Americans in the state legislature than there is in the population of the state as a whole. *Id.* In 2009, there was not a single state with a population of African-Americans greater than 3% that failed to elect an African-American to its state legislature. *Id.*

Given these numbers, it is unsurprising that in the past twelve years, only thirteen redistricting cases have involved arguments concerning purposeful discrimination by a covered jurisdiction—and even that number is overinflated. During the redistricting process, outside groups often submit proposed plans that maximize their political prospects. Of the thirteen cases purporting to involve intentional discrimination in the past twelve years, at least five inferred discrimination simply because the jurisdiction failed to adopt a plan proposed by the NAACP or some other interest group.[14]

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[13] *Available at* http://www.ncsl.org/legislatures-elections/legisdata/african-american-legislators-2009.aspx (last visited Dec. 21, 2012).

In 2002, for example, DOJ claimed that a Virginia county failed to show that its redistricting plan was not motivated by a discriminatory purpose, primarily because it did not adopt proposed alternative plans favored by the "black community." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to William D. Sleeper (Apr. 29, 2002) at 3. DOJ claimed that the county's reasons for rejecting the proposed plans were "pre-textual," but DOJ gave no evidence or explanation to support its belief. That same year, DOJ announced that "the state's failure to fully account for not considering these alternatives implies an intent to retrogress." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones (Sept. 3, 2002) at 2. Notably, DOJ never explained what action—short of adopting the proposed alternative plans—would not be deemed an intent to retrogress.

---

[14] Letter from Thomas E. Perez, Assistant Attorney General, to Everett T. Sanders (Apr. 30, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_043012_ms.pdf (last visited Dec. 21, 2012) (rejection of NAACP plan was indicative of intent to discriminate); letter from Thomas E. Perez, Assistant Attorney General, to Tommie S. Cardin (Oct. 4, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_100411.pdf (last visited Dec. 21, 2012) (rejection of plan and anecdotal interviews sufficient to show discrimination); letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Charles T. Edens (June 27, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_062702.pdf (last visited Dec. 21, 2012) (rejection of proposed plan and 3-3-1 district); letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones (Sept. 3, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_090302.pdf (last visited Dec. 21, 2012) (failure to adopt plan shows "intent to retrogress"); letter from Ralph F. Boyd, Jr., Assistant Attorney General, to William D. Sleeper (Apr. 29, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_042902.pdf (last visited Dec. 21, 2012) (failure to adopt the proposed plan).

Covered jurisdictions are under no duty to "establish minority districts wherever possible." *Miller*, 515 U.S. at 925 (Kennedy, J., concurring). In *Miller*, DOJ repeatedly refused to preclear a Georgia redistricting plan because it failed to mirror DOJ's proposed plans maximizing majority-black districts—*i.e.*, a "max-black plan." The state responded by adopting a plan which mirrored the "max-black plan" offered by DOJ. DOJ approved that modified plan, but the plan was later successfully challenged as violating equal protection because it was created with the purpose of drawing districts along racial lines. This Court agreed with the challengers, noting that DOJ's Section 5 enforcement strategy is precisely the type of action forbidden by equal protection. *Miller*, 515 U.S. at 927. Since *Miller*, DOJ has been less overt in asking states to adopt "max-black" plans, or other plans pushed by outside interest groups. Yet, the overarching purpose of DOJ enforcement remains the same—to force the adoption of racially gerrymandered districts. Clegg, *supra*, at 40. This Court should stop Section 5 from thwarting equal protection, by striking down the effects test as unconstitutional under equal protection.

CONCLUSION

The government asks this Court to uphold Congress's determination that Section 5 remains a necessary way to enforce the individual rights guaranteed by the Fifteenth Amendment. But requiring only selected jurisdictions to preclear a voting change by demonstrating that their neutral decision will not have a "racial effect," bears no resemblance to the Fifteenth Amendment's guarantee of an individual right to vote. Worse, the race-conscious effects test, and the race-based decisionmaking it requires, violate the Fifth and Fourteenth Amendments' guarantee of equal protection of the laws. As Congress has refused to bring Section 5 into compliance with the Constitution, Amici respectfully request this Court to declare it unconstitutional. It is long overdue.

DATED: December, 2012.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF APPENDICES iii

TABLE OF CITED AUTHORITIES iv

BRIEF OF *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

- I. Negative Racial Attitudes Among Whites Are More Prevalent in Covered Jurisdictions 6
  - A. American National Election Study and Racial Stereotypes 7
  - B. Cooperative Congressional Election Study and Racial Resentment 13
  - C. Additional Social Science Research 14
- II. Racially Polarized Voting is More Prevalent in Covered Jurisdictions 16
  - A. Racially Polarized Voting in State Elections 17

Page

B. Racially Polarized Voting in National Elections 22

III. Covered Jurisdictions Are More Likely to Adopt Vote Denial and Suppression Measures 26

IV. Non-White Voters in Covered Jurisdictions Are Vulnerable Due to SocioEconomic Disparities 31

A. States Fully Covered by Section 5 33

B. States Partially Covered by Section 5 34

C. Covered States & Employment Discrimination Charges 35

CONCLUSION 39

TABLE OF APPENDICES

Page

APPENDIX A
Table of group population and proportions. 1a

APPENDIX B
Summary of Census statistics for 2000 and 2010 for Fully Covered States 2a

APPENDIX C
Summary of Census statistics for 2000 and 2010 for Partially Covered States 3a

APPENDIX D
Racial attitudes among White respondents in Cooperative Congressional Election Study, 2010 . . .4a

APPENDIX E
Polarized voting among Whites in 2000 – 2008 Presidential election 5a

APPENDIX F
Sources 6a

TABLE OF CITED AUTHORITIES

Page

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Baldus v.
Members of Wis. Gov't Accountability Bd.,
849 F. Supp. 2d 840 (E.D. Wis. 2012) 18

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553 U.S. 181 (2008) 4, 29

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Page

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Page

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Page

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BRIEF OF *AMICI CURIAE*

Professors Kareem Crayton, Matthew Barreto, Luis Fraga, Jane Junn, Terry Smith, and Janelle Wong respectfully submit this brief as *amici curiae* in support of Respondents.[1]

INTEREST OF *AMICI CURIAE*

Amici Curiae are all nationally recognized university research scholars whose collective studies on electoral behavior, public opinion, and voting rights in the United States have been published in leading scholarly journals and books.

Professor Kareem Crayton is an associate professor of law and political science at the University of North Carolina at Chapel Hill. Professor Matthew Barreto is an associate professor of political science at the University of Washington. Professor Luis Fraga is a professor of political science at the University of Washington. Professor Jane Junn is a professor of political science at the University of Southern California. Professor Terry Smith is a professor of law at the DePaul College of Law. Professor Janelle Wong is a professor of American studies at the University of Maryland.

Amici have shared their expertise with the courts to inform voting rights cases as well as with Congress in the

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[1] The parties' letters of consent to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2006 reauthorization of the temporary provisions of the Voting Rights Act. Their extensive professional knowledge and experience in these areas are relevant to the question before the Court.

SUMMARY OF ARGUMENT

Congress acted within its constitutional authority in 2006 by reauthorizing Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 *et. seq.*, to safeguard the rights of every American citizen, regardless of race or color, to vote. Reliance on the coverage formula in Section 4(b), 42 U.S.C. § 1973b(b), which has been approved by the Court on multiple occasions, is justified by the distinct conditions that are present in covered jurisdictions due to race-based discrimination. This point is evident in the prevalence of racially discriminatory attitudes, the incidence of racially polarized voting, the enactment of voter dilution and voter disqualification devices, and data on the socioeconomic conditions of minority voters.

Amici present a comprehensive summary of empirical evidence showing the ongoing differences between covered and non-covered jurisdictions. The systematic divergence represents the legacy of racially discriminatory practices in the political system that characterizes covered jurisdictions.

In light of its 2006 legislative record and the continuing differences between covered and non-covered areas, this Court should find that Congress rightly determined that maintaining Section 5 would ensure that the movement toward equal enjoyment of the right to vote is not reversed.

ARGUMENT

The presence of higher levels of discrimination in covered jurisdictions compared with non-covered locations represents the continuing legacy of the institutionalization of racial discrimination in the political arena. The jurisdictions identified by Section 4(b) were the country's most committed purveyors of formal and informal policies to disenfranchise non-White voters. This Court has repeatedly recognized that these states created "exceptional conditions [that] justified extraordinary legislation." *NW Austin Mun. Util. Dist. No. 1 v. Holder,* 557 U.S. 193, 211 (2009); *see also South Carolina v. Katzenbach* 383 U.S. 301, 308, 310-15, 328 (1966).

Petitioner's brief acknowledges this long history of the most blatant forms of discrimination that compelled Congress to specify federal authority in Section 5 for voting rights enforcement. "In 1965, 95 years after the Fifteenth Amendment's ratification, African-Americans were still widely denied the right to vote throughout the South." Pet. Br. at 1-2.

Two specific arguments by Petitioner are considered in this brief. Petitioner first argues that in Alabama and other jurisdictions, institutionalized race discrimination has now been addressed by the VRA and that exceptional treatment is no longer justified. To the extent that any residual effects from this era do exist, Petitioner argues that they are neither qualitatively or quantitatively different from the voting discrimination present in non-covered jurisdictions. Pet. Br. at 24-28. These assertions are unsupported by the weight of empirical data.

Amici present a systematic analysis of empirical data that are closely related to voting discrimination – including socioeconomic antecedents to political participation, the prevalence of racially discriminatory attitudes, racially polarized voting, and patterns of devices that limit voting access – from recent and comprehensive data sources.[2]

All of the findings discussed herein corroborate the 2006 legislative record and the prudent conclusion that the jurisdictions targeted for Section 5 review should remain unchanged. Congress's obligation was to identify systemic discrimination in voting and to create a remedy or deterrent that was both congruent and proportional. *Nw. Austin*, 577 U.S. at 204. Because Petitioner attacks Section 5 facially, it "bear[s] a heavy burden of persuasion" to demonstrate that the statute lacks a "legitimate sweep." *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200-202 (2008).[3]

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[2] For the sake of the reader, *Amici* provide summary tables within the argument section to highlight the major trends cited in the analysis. More detailed presentations of these same data, corresponding to the tables presented, are available in the appendices.

[3] Given its decision to challenge Section 5 facially, Petitioners' complaint that "aggregating [evidence of discrimination] denies equal dignity to each sovereign State by obscuring each State's individual record," *see* Pet. Br. at 62, is puzzling. First, as measured by the data in this Brief, Alabama ranks among the nation's most discriminatory states by almost every metric. Thus, according to Petitioner, "equal dignity" would almost certainly mean it should remain covered by Section 5. The "aggregating" that Petitioner complains of actually helps to obscure its own discrimination and to cherry-pick instances of over- and under-inclusiveness among covered and non-covered jurisdictions. But the facial nature of its challenge to Section 5 means that Petitioner must show more than an aberration here or there; it must demonstrate that Section 5's "sweep" is plainly unconstitutional.

Petitioner also characterizes Section 5's differential treatment of covered states as an affront to states' "equal dignity." Pet. Br. at 49. It is not states which are entitled to equal dignity but rather the people—including its minority citizens—from each state to whom equal treatment is due: "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992).[4]

Thus, Petitioner's focus on the equal dignity of states obscures a basic question in this litigation: Are non-White voters in covered jurisdictions more vulnerable to voting discrimination than those living in non-covered jurisdictions? Unless Petitioner can show that minorities in covered jurisdictions receive the "equal dignity" to which they are entitled in the electoral realm, Section 5 must be deemed a congruent and proportional response to voting discrimination. *Amici* now turn to the empirical data demonstrating the heightened vulnerability of minority voters in Section 5 jurisdictions.

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[4] This point is equally relevant in any consideration of the Guarantee Clause. U.S. Const. art. IV § 4. To the extent this provision entrenches any judicially cognizable right to the people, *but see Luther v. Borden*, 48 U.S. 1 (1849) (finding that this provision was non-justiciable), any public right to responsive or accountable governance was surely violated by the long term use of election and governance systems that sanctioned the wholesale denial of the right to vote on the basis of race. The institutionalized harms to these citizens are neither hypothetical nor episodic – nor are they in dispute. Thus, the remedy devised in Section 5, which protects these excluded groups from continued violations, is fully consistent with Article IV's principle of assuring democratic governance to every citizen of a given state.

Section I considers survey data on the prevalence of negative racial attitudes among White citizens, which are more pronounced in Section 5 areas than elsewhere. Section II addresses more direct evidence of racially polarized voting, which shows that the landscape remains different in the covered jurisdictions than other states. Section III provides greater detail about how preclearance jurisdictions are more likely to employ voter disqualification policy measures than elsewhere. Finally, Section IV reviews several categories of socioeconomic data showing significant racial disparities in covered jurisdictions on metrics associated with political participation.

I. Negative Racial Attitudes Among Whites Are More Prevalent in Covered Jurisdictions

An enduring feature of the era of institutionalized exclusion that preceded the Voting Rights Act is the enshrinement of racial animosity toward non-White groups. Racial animosity is embedded in the very ideology of segregation – deeming some groups unworthy of equal status as citizens. Thus, the views of antipathy or resentment for groups serve as the building blocks for establishing the structures that enforce political exclusion.

Petitioner and associated *Amici* suggest that discrimination and hostile racial attitudes today are pervasive nationwide and that the conditions in Section 5 covered jurisdictions are no different than in other states. However, data from reputable national studies on political behavior prove Petitioner's claim to be empirically false. In this section, *Amici* examine survey data on negative racial attitudes and demonstrate that such attitudes are substantially more pervasive among Whites living in jurisdictions covered by Section 5 than elsewhere.

A. American National Election Study and Racial Stereotypes

Racially polarized voting is well known and well documented as an indicator of discrimination in states and jurisdictions covered by Section 5. But it does not occur in a vacuum. Social science research has documented extensively that the underlying catalysts triggering bloc voting are racial attitudes and stereotypes.[5] The judiciary has routinely relied on measures like these as evidence of discrimination in voting lawsuits.[6]

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[5] Edward G. Carmines & James A. Stimson, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (Princeton Univ. Press 1989); Thomas B. Edsall & Mary D. Edsall, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (W.W. Norton 1991); Michael W. Giles & Kaenan Hertz, *Racial Threat and Partisan Identification*, 88 Am. Pol. Sci. Rev. 317 (1994); Robert Huckfeldt & Carol Weitzel Kohfeld, RACE AND THE DECLINE OF CLASS IN AMERICAN POLITICS (Univ. of Illinois Press 1989); Martin Gilens, Paul M. Sniderman, & James H. Kuklinski, *Affirmative Action and the Politics of Realignment*, 28 Brit. J. Pol. Sci. 159 (1998).

[6] *See, e.g.*, *Busbee v. Smith*, 549 F.Supp. 494, 501 (D. D.C. 1982) (finding state reapportionment committee's use of the term "nigger districts" to be probative of an intent to discriminate against Black voters).

Survey data on the subject leaves little doubt that these negative attitudes persist and that they are more prevalent in covered jurisdictions. A chi-square test of statistical significance finds that negative racial attitudes are statistically more widespread in Section 5 jurisdictions, and this trend holds true for data taken on multiple occasions between 2000 and 2010.

Table 1 summarizes results from White respondents in the American National Election Study (ANES), the leading national study of political attitudes, across various measures related to race. These data track the state and county of each respondent, which allows for a direct comparison of racial attitudes of Whites living in Section 5 jurisdictions with those living in outside Section 5 jurisdictions. Across all available measures of bias, reported in Table 1, Whites in Section 5 jurisdictions exhibit more negative viewpoints toward African Americans and immigrants. This regional pattern is consistent when comparing responses in studies conducted in 2000 as well as in 2008.

Table 1:

Racial attitudes among Whites in ANES, 2000 & 2008

Statement	2008 ANES			2000 ANES		
	Sec 5	Not Sec 5	Diff	Sec 5	Not Sec 5	Diff
"Government should not make any special effort to help Blacks because they should help themselves."	51	39	12**	43	29	14**
"Other minorities overcame prejudice and worked their way. Blacks should do the same without any special favors."	48	34	14**	42	32	10**
"Generations of slavery and discrimination have created conditions that make it difficult for Blacks to work their way up" – percent who disagree	61	47	14**	57	43	14**
"If Blacks would only try harder they could be just as well off as Whites."	66	57	9*	54	45	9*

Table 1:

(continued)

Racial attitudes among Whites in ANES, 2000 & 2008

"It is not the federal government's business to see to it that Black people get fair treatment in jobs."	36	27	9*	38	32	6†
"Do you personally hope the United States has an African American president in your lifetime."	48	56	-8*	--	--	--
"Oppose the U.S. government making it possible for undocumented immigrants to become U.S. citizens."	45	33	12**	--	--	--

Chi-square test results are statistically significant: ** P>.010 * P>.050, †P>.100
Source: American National Election Study, 2000 and 2008, data among White respondents

In fact, the measures for White attitudes in Section 5 jurisdictions actually became more negative towards Blacks between 2000 and 2008. For example, in 2000, 42% of Whites in Section 5 jurisdictions agreed with the statement that Blacks should work their way up "without any special favors" while in 2008, 48% of Whites in Section 5 jurisdictions agreed. Likewise, in 2000, 54% of Whites in Section 5 areas agreed that if Blacks would only "only try harder they could be just as well off as Whites" and in 2008, the percentage who agreed rose by 12 points to 66%. This hardening of prejudicial attitudes towards Blacks in Section 5 jurisdictions comports with evidence that White vote preferences in the 2000 and 2008 elections became more polarized against Barack Obama in 2008 than it was against Albert Gore in 2000 (discussed in greater detail in Section II below).

Other questions from this study included measures on viewpoints concerning Latinos, immigrants and other groups, which are summarized in Table 2. For example, in the 2000 ANES respondents were asked whether they thought different groups had too much influence in American politics today; too little influence; or just about the right amount. Compared to Whites living elsewhere, White respondents in Section 5 locations were more likely to report that Blacks, Latinos, Asians and Jews had too much influence in American politics today, but less likely to think Whites had too much influence.

Table 2:

Perceptions of group influence among Whites in ANES, 2000

Statement (percent who agree)	2000 ANES		
	Section 5	Non-Section 5	Diff
"Blacks have too much influence in American politics today"	37	21	16**
"Latinos have too much influence in American politics today"	15	8	7*
"Asians have too much influence in American politics today"	10	5	5†
"Jews have too much influence in American politics today"	22	14	8*
"Whites have too much influence in American politics today"	16	23	-7*

Chi-square test results are statistically significant: ** P>.010 * P>.050 †P>.100

Source:American National Election Study, 2000 data among White respondents

B. Cooperative Congressional Election Study and Racial Resentment

More recent data from a major social science study provides further evidence highlighting the distinctions present in Section 5 areas. The 2010 Cooperative Congressional Election Study (CCES) interviewed more than 50,000 respondents across the 50 states and examined attitudes towards Blacks and immigrants. The results are summarized in Table 3.

Table 3:

Racial attitudes among Whites in CCES, 2010

Percent Reporting	**Section 5**	**Non Sec 5**	**Diff**
Racial Resentment	66%	53%	13%***
Anti-immigrant attitudes	46%	35%	11%***

Chi-square test results are statistically significant: *** P>.001 ** P>.010 *P>.050
Source: Cooperative Congressional Election Study, 2010, data among White respondents

The first relevant measure is the degree of racial resentment expressed by voters based on an eight-point scale of animosity. Among White respondents in Section 5 covered jurisdictions, an average of 66% reported high levels of racial resentment towards Blacks – a full thirteen points higher than the measure for Whites living in non-Section 5 areas. Among all of the states, White respondents in Alabama, Louisiana, Mississippi and Georgia rated highest on their quotient of racial resentment. These four states are fully covered by Section 5. *See* Appendix D.

The same pattern emerged on the two questions that tracked attitudes towards immigrant groups. White respondents in Section 5 states were significantly more likely to report anti-immigrant attitudes than Whites in non-Section 5 states and localities. Once again, the individual states that registered the highest degree of anti-immigrant attitudes among White respondents were all covered by Section 5. Alabama, Mississippi, Texas, Georgia, Louisiana, Alaska, and Arizona were the seven states with the highest degree of anti-immigrant attitudes in the CCES 2010 data.

C. Additional Social Science Research

The survey results reviewed here are consistent with an abundance of published research in leading academic publications.[7] Scholarly research in the last decade alone has produced several findings showing that prejudice and discriminatory attitudes towards Blacks and Latinos persists and that it is strongest among Whites in states covered by Section 5.[8]

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[7] Dana Ables Morales, *Racial Attitudes and Partisan Identification in the United States, 1980-1992*, 5 Party Politics 191 (1999); Nicholas A. Valentino & David O. Sears, *Old Times There Are not Forgotten: Race and Partisan Realignment in the Contemporary South*, 24 Am. J. Pol. Sci. 672 (2005).

[8] M. V. Hood & Seth C. McKee, *Gerrymandering on Georgia's Mind: The Effects of Redistricting on Vote Choice in the 2006 Midterm Election*, 89 Soc. Sci. Q. 60 (2008); Richard Skinner & Philip Klinkner, *Black, White, Brown and Cajun: The Racial Dynamics of the 2003 Louisiana Gubernatorial Election*, The Forum 2 (1) (2004).

Further, a preponderance of the scholarship concludes that harboring negative racial attitudes is the underlying mechanism responsible for producing racial bloc voting among Whites, against minority candidates for elected office. For example, in a large-scale study of racial attitudes and voting, Professor Keith Reeves finds that "a significant number of Whites harbor feelings of antipathy toward Black Americans as a categorical group – feelings and sentiments that are openly and routinely expressed.... And where such prejudices are excited....they constitute the critical linchpin in Black office-seekers' success in garnering White votes."[9] Writing more than 10 years later about the 2008 presidential election, Michael Tesler and David Sears find the same pattern. Even after controlling for partisanship and ideology, they find "the most racially resentful were more than 70 percentage points more likely to support McCain in March 2008 than were the least racially resentful."[10]

Other scholarly work also supports the finding that discriminatory attitudes and racial prejudice play key roles in driving White party identification, and this is especially strong in Section 5 covered jurisdictions.[11]

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[9] Keith Reeves, VOTING HOPES OR FEARS? WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA 74 (Oxford Univ. Press 1997).

[10] Michael Tesler and David Sears, OBAMA'S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA 61 (Univ. of Chicago Press 2010).

[11] Jonathan Knuckey, *Racial Resentment and the Changing Partisanship of Southern Whites*, 11 Party Politics 5 (2005); Edward G. Carmines & James A. Stimson, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (Princeton Univ.

The most recent evidence on racial attitudes reveals a very clear and consistent pattern indicating a continuing repercussion of institutionalized exclusion. Accepted survey measures of racial resentment and animosity toward other groups find more pronounced negative attitudes in this region than elsewhere. Not only are there significant differences between Whites in the two regions, the fully covered jurisdictions rank highest among all states where these viewpoints among White voters are most common. These clear examples of the prevalence of negative racial attitudes in preclearance states fully support Congress's decision in 2006 to maintain the formula targeting the existing covered jurisdictions.

II. Racially Polarized Voting is More Prevalent in Covered Jurisdictions

Another significant point of dispute in this case is whether the contemporary evidence of racially polarized voting shows a significant distinction between Section 5 locations and the rest of the country. While most of the parties draw different interpretations from the study of data recently published by Professor Ellen Katz, *Amici* present additional data that support the legislative finding that racially polarized voting remains more prevalent in Section 5 jurisdictions.

Congress noted in its 2006 report supporting reauthorization that the sustained pattern of racially polarized voting is a key factor of present discrimination.

Press 1989); Dana Ables Morales, *Racial Attitudes and Partisan Identification in the United States, 1980-1992*, 5 Party Politics 191 (1999); Nicholas A. Valentino & David O. Sears, *Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 24 Am. J. Pol. Sci. 672 (2005).

The House Report, for example relied upon evidence, "that 'the degree of racially polarized voting in the South is increasing, not decreasing . . . [and is] in certain ways re-creating the segregated system of the Old South, albeit a de facto system with minimal violence rather than the de jure system of late.'" H.R. Rep. No. 109-478, at 34 (2006). Additionally, the same noted that "every statewide election since 1988 where voters were presented with a biracial field of candidates has been marked by racially polarized voting." *Id.* at 33.

Numerous social science studies have also described the ways in which polarized voting impedes the ability of voters in protected groups to realize their political power – e.g., allying with different constituencies, competing for statewide offices, and advancing broader policy interests.[12] In *Thornburg v. Gingles*, this Court noted that polarized voting is among the clearest markers of a jurisdiction in need of a federal anti-discrimination remedy. 478 U.S. 30, 52-54 (1986).

A. Racially Polarized Voting in State Elections

Judicial findings of racially polarized voting offer even more clear evidence of ongoing discrimination. Covered jurisdictions constitute far fewer states, counties and townships, and far less of the U.S. population, than non-covered jurisdictions. *See Shelby Cnty. v. Holder*, 679 F.3d 848, 874 (D.C. Cir. 2012) (noting that covered jurisdictions constitute less than 25% of the country's population). Yet judicial findings of racially polarized voting from 2006 to the present have been disproportionately in Section 5 jurisdictions.[13] The district court in the instant case made clear the importance of the continued existence of racially polarized voting: where it exists, minority populations are especially vulnerable to retrogressive and discriminatory electoral conduct because their political preferences diverge from the majority. *See Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 487 (D.D.C. 2011).

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[12] *See* Kareem Crayton, *Beat 'Em or Join 'Em? White Voters and Black Candidates in Majority-Black Districts*, 58 Syracuse L. Rev. 548, 554-58 (2008) (summarizing social science data).

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[13] The following cases found racially polarized voting in non-covered jurisdictions: *United States v. Osceola Cnty.*, 475 F. Supp. 2d 1220, 1232 (M.D. Fla. 2006); *United States v. Vill. of Port Chester*, No. 06 Civ. 15173, 2008 WL 190502, at *28 (S.D.N.Y. Jan. 17, 2008), *aff'd* 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 603 (N.D. Ohio 2008); *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1207 (D. Wyo. 2010), *aff'd* 670 F.3d 1133 (10th Cir. 2012); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 856 (E.D. Wis. 2012).

The following cases found racially polarized voting in covered jurisdictions: *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427 (2006); *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (suit by Native Americans against State of South Dakota, a partially covered jurisdiction under Section 5 of the Voting Rights Act, over legislative redistricting); *United States v. Brown*, 494 F. Supp. 2d 440, 485 n.72 (S.D. Miss. 2007) (in intentional discrimination case brought under Section 2 of Voting Rights Act against African American political officials for "episodic," "one of a kind" conduct, court acknowledged racially polarized voting in Noxubee County, Miss., and finds intentional discrimination), *aff'd* 561 F.3d 420 (5th Cir. 2009); *Jamison v. Tupelo*, 471 F. Supp. 2d 706, 713 (N.D. Miss. 2007); *Fairley v. Hattiesburg*, No. 2:06cv167-KS-MTP, 2008 WL 3287200, at *4 (S.D. Miss. Aug. 7, 2008) (finding racially polarized voting but no Section 2 violation because a remedial district could not be drawn to satisfy traditional redistricting criteria), *aff'd*, 584 F.3d 660 (5th Cir. 2009); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 726 (N.D. Tex. 2009); *Fabela v. City of Farmers Branch*, No. 3:10–CV–1425–D, 2012 WL 3135545, at *12 (N.D. Tex. Aug. 2, 2012); *Texas v. United States*, No. 11–1303, 2012 WL 3671924, at *21, *32 (D.D.C. Aug. 28, 2012) (preclearance action by State of Texas in which three-judge court found the existence of racially polarized voting and an intent to discriminate by Texas in enacting its new congressional redistricting), *juris. statement filed*, 81 USLW 3233 (October 19, 2012).

Indeed, contrary to the notion that minority political success obviates Section 5, racially polarized voting offers strong evidence that this same success renders the provision as necessary as ever. As Justice Stevens has observed: "[I]t is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group's political interests." *Rodgers v. Lodge*, 458 U.S. 613, 651 (1982) (Stevens, J., dissenting). This Court acted in accord with this sensible principle when it recently found that the state of Texas unlawfully had sought to dilute Latino voting strength in a congressional district in which Hispanics were "becoming increasingly politically active and cohesive." *League of Latin American Citizens v. Perry*, 548 U.S. 399, 439 (2006). The emergence of a politically active and cohesive non-White polity in jurisdictions prone to racially polarized voting is more, not less, reason for the prophylactic protections of Section 5. Structures that guarantee the opportunity to participate and to elect candidates of choice can help to offset and to diminish racially polarized voting, *see* Crayton at FN 12, but as this data shows, the effects are not immediate.

Racially polarized voting in many covered jurisdictions continues to be extreme. In addition to the racially polarized voting in covered jurisdictions in the past three presidential elections, *see* Table 4, post-reauthorization data also reveal extraordinary polarization in other statewide contests. For instance, in post-reauthorization United States Senate contests in Mississippi, the White crossover vote for the Black-preferred candidate has averaged only 13%.[14] In the 2011 gubernatorial race in Mississippi, the Black candidate, Mayor Johnny L. DuPree, received a share of the total vote (39.02%) that was almost identical to the Black population of the state (37.3%).[15] Further analysis indicates that DuPree won an estimated 20% of the White vote, but more than 80%

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[14] *See* CNN, Election Center 2008 Local Exit Polls, Mississippi Results, http://www.cnn.com/ELECTION/2008/results/polls/#val=MSS01p1 (last visited Jan. 16, 2013); Election Center 2008 Local Exit Polls, Mississippi Special Results, http://www.cnn.com/ELECTION/2008/results/polls/#val=MSS02p1 (last visited Jan. 16, 2013); Election Center 2012, Mississippi Senate Race, http://www.cnn.com/election/2012/results/state/MS/senate (last visited Jan. 16, 2013). To arrive at the 13% figure, we averaged the crossover vote from the three Senate elections that occurred in Mississippi from 2008 to 2012.

[15] *See* Mississippi Secretary of State, *Official Tabulation of the Vote for State Office of Governor*, http://www.sos.ms.gov/links/elections/results/statewide/Governor_Statewide%20-%20General%20Election%202011%20Results.pdf (last visited Jan. 29, 2013); *See also* U.S. Census Bureau, *State & County Quick Facts, Mississippi*, http://quickfacts.census.gov/qfd/states/28000.html (last visited Jan. 29, 2013). This pattern of extraordinarily racially polarized voting is continuation of the pre-re-authorization voting behavior in Mississippi. In 2003, a Black candidate for lieutenant governor, Barbara Blackmon, received a mere 8% of the White vote in the general election. *See* Terry Smith, *Autonomy v. Equality: Voting Rights Reconsidered*, 57 Ala. L. Rev. 261, 278 (2005). A Black candidate running for state treasurer received just 22% of the White vote despite being widely regarded as more qualified for the position than his twenty-nine-year-old White opponent. *See id.*

of the Black vote.[16] No Black political candidate has been elected statewide in Mississippi since Reconstruction.[17]

Alabama, from which the instant controversy has arisen, is another exemplar of the continuing scourge of racially polarized voting and its diminishment of minority voter opportunity. In her 2008 contest for the U.S. Senate, state senator Vivian Figures (who is Black) received only 11% of the White vote, just as presidential candidate Barack Obama carried a mere 10%.[18] Against the backdrop of numbers such as these, it is not possible to argue that covered jurisdictions are indistinct from non-covered jurisdictions in terms of minority political opportunity. Although racially polarized voting exists elsewhere in our country, *the most extreme instances of it continue to occur in covered jurisdictions.* Moreover, such polarized voting is disproportionately found in Section 5 jurisdictions.

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[16] *See* Public Policy Polling, *Mississippi Governor, November 6, 2011*, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_MS_1106925.pdf (last visited Jan. 28, 2013).

[17] *See The Mississippi Governor's Race: A Welcome First*, The Economist (Aug. 27, 2011), http://www.economist.com/node/21526911(last visited Jan. 16, 2013).

[18] *See* CNN, Election Center 2008 U.S. Senate Exit Polls, Alabama Results, http://www.cnn.com/ELECTION/2008/results/polls/#val=ALS01p1 (last visted Jan. 16, 2013, 10:57 AM); Election Center 2008 Presidential Exit Polls, Alabama Results, http://www.cnn.com/ELECTION/2008/results/polls/#ALP00p1 (last visited Jan. 16, 2013).

B. Racially Polarized Voting in National Elections

The legislative record on racially polarized voting at state and local levels finds additional support from the analysis of more recent national elections. One clear way of illustrating the effect of polarization in covered jurisdictions is by looking to survey data in national contests. Table 4 summarizes the level of support for Democratic candidates among White voters, broken out by state, in election contests for U.S. President in 2000, 2004 and 2008.[19]

The most apparent pattern from this data is that the level of White support for the Democratic nominee varies significantly between covered and non-covered states. In each year, the difference between these regions is statistically significant. The 2000 election shows an average level of white voter support for the nominee in non-covered states that was fourteen points higher than in covered states. In 2004, the average level of White support in the covered states was 25%, compared with 43% in non-covered states (a difference of 18.2 percentage points). In 2008, the level of White support in Section 5 states was 23% compared to an average of 48% in the rest of the country.

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[19] A complete test of racially polarized voting would search for a sharp contrast in the level of support for a candidate among Whites compared to other racial groups. Here, *Amici* examine the preferences of White voters alone as an indicator, since well over a majority of the relevant non-White groups supported the Democratic ticket in each of the presidential elections at issue.

Table 4:
Polarized voting among Whites in 2000 – 2008 Presidential election

State	% Gore '00	% Kerry '04	% Obama '08	04-08 Chg	00-08 Chg	% Dem	% Ind	% Rep
Section 5	29	25	23	-2	-6	32	13	55
Non-	43	43	48	5	5	39	12	49
Difference	-14**	-	-25***	-7*	-11*	-7	1	6

Chi-square test results are statistically significant: *** P>.001 ** P>.010 *P>.050

Sources: National Exit Poll vote among White respondents 2000, 2004, 2008; and CCES 2010 for party identification among White voters

It is equally instructive to observe the extent to which White support diminished in the 2008 election – the first year that a major party's nominee for President was Black. On average, White support in pre-clearance states dropped an additional two percentage points below that of the nominee in 2004. The extent of this drop-off provides another way to assess the extent to which White voters remain unwilling to vote for candidates due to race.

What is also noteworthy about this data is how closely the results track the geographic pattern subject to Section 5's requirements. The group of states with the largest drop-off of White support for the Democratic nominee in 2008 includes several Section 5 jurisdictions. In fact, more than half of the nine total states where the measure dropped for the Democratic nominee between 2004 and 2008 were covered jurisdictions. The state of Louisiana had the nation's steepest decline in support among Whites, dropping ten points during this period -- from 24% to 14%.

One might be inclined to characterize these findings simply as the product of partisanship rather than racial bloc voting, but additional data refute any serious suggestion that ideology accounts for these changes. About 32% of Whites in Section 5 states identified as Democrats, yet only 23% of them supported the presidential nominee in 2008 (the lowest share of the three elections studied).

A simple comparison of different states with similar patterns of Republicanism illustrates the point. About the same percentage of White voters in the states of Utah (non-covered) and Georgia (covered) reported their affiliation with the Republican Party. *See* Appendix E. Yet in comparing the performance of the Black Democratic candidate in 2008, one observes a marked difference among White voters. The Democratic ticket lost both statewide contests, but a much smaller share of White voters in Georgia supported the candidate than in Utah – one of the nation's most Republican states. Party affiliation alone simply cannot account for this difference in states with roughly similar patterns of allegiance to Republican ideology.

These findings comport with other existing research that has noted the pattern of polarized voting in national elections. The newest published research by political scientists finds evidence that Barack Obama received less support in 2008 than John Kerry did in 2004 among White voters in many Section 5 states as a direct result of racial prejudice and discriminatory attitudes.[20]

In his analysis of the White vote for Obama in Southern states, Professor Ben Highton notes, "at the state level, the influence of prejudice on voting was comparable to the influence of partisanship and ideology. Racial attitudes explain support for Obama and shifts in Democratic voting between 2004 and 2008."[21] This finding is corroborated by Professor Spencer Piston's individual-level analysis of voter attitudes and support for Barack Obama in Southern states: "Negative stereotypes about Blacks significantly eroded White support for Barack Obama. Further, racial stereotypes do not predict support for previous Democratic presidential candidates or current prominent Democrats, indicating that White voters punished Obama for his race rather than his party affiliation."[22]

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[20] Michael S. Lewis-Beck, Charles Tien, & Richard Nadeau, *Obama's Missed Landslide: A Racial Cost?*, 43 Pol. Sci. & Politics 69 (2010); Todd Donavan, *Obama and the White Vote*, 63 Pol. Res. Q. 863 (2010); Anthony G. Greenwald, Colin Tucker Smith, N. Sriram, Yoav Bar-Anon, & Brian A. Nosek, *Implicit Race Attitudes Predicted Vote in the 2008 U.S. Presidential Election*, 9 Analysis of Soc. Issues & Pub. Pol.'y, 241 (2009); Tom Pyszczynski, Carl Henthorn, Matt Motyl, & Kristel Gerow, *Is Obama the Anti-Christ? Racial Priming, Extreme Criticisms of Barack Obama, and Attitudes Towards the 2008 U.S. Presidential Candidates*, 46 J. of Experimental Soc. Psychol., 863 (2010).

Quite apart from the evidence linking White bloc voting in the covered jurisdictions to racial animus, this Court has long recognized that racially polarized voting is independently significant as measure of the lack of minority political opportunity, regardless of what may motivate such polarization. Thus, Congress correctly focused on racially polarized voting in concluding in 2006 that the covered jurisdictions should remain unchanged.

III. Covered Jurisdictions Are More Likely to Adopt Vote Denial And Suppression Measures

In originally fashioning the Act in 1965, Congress developed a targeting formula for Section 5 that employed both the measures of political participation and the presence of certain disqualification devices. While these devices were not facially invalid as a matter of law, Congress determined that these legal measures were relevant to identifying the group of states that tended to employ a racially unequal electoral system.

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[21] Ben Highton, *Prejudice Rivals Partisanship and Ideology When Explaining the 2008 Presidential Vote across the States*, 44 PS: Pol. Sci. & Politics 530 (2011).

[22] Spencer Piston, *How Explicit Racial Prejudice Hurt Obama in the 2008 Election*, 32 Pol. Behavior 431 (2010).

The distinct pattern of current legal devices now present in Section 5 states similarly demonstrates the heightened risk posed to minority voters in these jurisdictions. Covered and partially-covered jurisdictions are more likely than others to impose an array of restrictions on the exercise of the franchise. These restrictions, in turn, have a disparate impact on minority access to the polls.

The data in Table 5 show that the differences between states with varying levels of Section 5 coverage are stark. Across all varieties of institutional measures to restrict voting rights, states that are fully covered by Section 5 are more than twice as likely as non-covered states to adopt policies that make voting more difficult for citizens. Fully covered states are more likely to employ a combination of these restrictive measures, which amplifies the disqualification effect on voters.

Table 5. States with Limits on Enfranchisement by Section 5 Coverage

	States Fully Covered by Sec 5	States Fully or Partially Covered by Sec 5	States NOT Covered by Sec 5
Percent of states that currently require identification to vote[1]	25%	30%	11%
Percent that require or request photo ID to vote, current and pending clearance[2]	50%	50%	16%
Percent requiring proof of citizenship to vote[3]	25%	13%	8%
Percent that currently have permanent or partial limits on voting if felony conviction[4]	38%	31%	16%
States with most restrictive immigration-control legislation as current law[5]	50%	29%	6%
Number of states	8	16	34

[1] National Conference of State Legislators, Oct. 2012

[2] National Conference of State Legislators, Oct, 2012 and Ballotpedia.com, Jan 2013

[3] Lawyers Committee for Civil Rights June 2011

[4] ACLU Map of State Felon Disenfranchisement Laws (n.d.)

[5] National Conference of State Legislatures, Aug., 2012

States that are fully covered by Section 5 or that include a significant proportion of covered jurisdictions are much more likely to institute policies that require citizens to produce potentially burdensome documentation proving their identities or citizenship before they are allowed to vote. This Court has recognized that states may not impose "excessively burdensome requirements" on any class of voters. *See Crawford v. Marion County Election Bd.*, 553 U.S. at 202 (citations omitted). The disproportionate impact that restrictive voter identification requirements have on Black and Latino voters is well-established in both the scholarly literature and more general analysis.[23] Indeed, a three-judge panel recently found that Texas's photo identification law retrogressed Latinos' right to vote. *Texas v. Holder*, Civ. No. 12-128, 2012 WL 3743676, *33 (D.D.C. 2012) (describing Texas's photo ID law as "the most stringent in the country" and finding that it "would almost certainly have retrogressive effect").

States covered by Section 5 are also more likely to adopt laws that permanently or partially limit the rights of convicted felons to vote. States that are not covered by Section 5 are much more likely to allow convicted felons to vote as soon as their sentences are completed. Because Blacks and Latinos are overrepresented in the criminal justice system, felon disenfranchisement laws disproportionately deprive minority citizens of the right to vote.

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[23] Gabriel Sanchez, Stephen Nuno, and Matt Barreto. "Racial and Ethnic Differences in Access to Photo-ID in Texas," Latino Decisions Blog, March 12, 2012; Matt Barreto, Stephen Nuño, and Gabriel Sanchez, 2007, "Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters." Paper presented at the Midwest Political Science Association, Annual Conference, Chicago, IL.

While Blacks and Latinos make up about 30% of the U.S. population, these groups account for nearly 60% of people in prison. Not surprisingly, then, nearly 15% of Black men are denied the right to vote due to felony-disenfranchisement laws.[24] During the prior extension of Section 5, this Court found that Alabama, the state in which Petitioner is situated, unconstitutionally maintained a felony disenfranchisement statute, the original purpose of which was to discriminate against Black citizens and the continuing impact of which was to disproportionately disenfranchise them. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Amici recognize that states may maintain voter identification and felony disenfranchisement laws for legitimate purposes. But the far greater instances of such laws in the very jurisdictions where racial prejudice among White voters is highest, where minority socioeconomic disadvantage is greatest, and where White bloc-voting is most persistent and extreme, underscores the need for Section 5's prophylactic review of these jurisdictions' voting laws to determine their impact and intent.

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[24] *See*, The Sentencing Project, *Racial Disparities*, http://www.sentencingproject.org/template/page.cfm?id=122 (last visited Jan. 29, 2013); *see also*, American Civil Liberties Union, *Mass Incarceration: The Facts*, http://www.aclu.org/combating-mass-incarceration-facts-0 (last visited Jan. 29, 2013).

IV. Non-White Voters In Covered Jurisdictions Are Vulnerable Due To Socioeconomic Disparities

The negative racial attitudes, White bloc voting, and barriers to voting discussed in the foregoing sections place severe burdens on those Americans who are socioeconomically disadvantaged. The material condition of non-White citizens is therefore a core issue in assessing minority political equality. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (specifying as relevant to a determination of vote dilution "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process"). Economic circumstance affects citizens' ability to comply with voting requirements that covered jurisdictions may implement. *See Texas v. Holder*, Civ. No. 12-128, 2012 WL 3743676, at *19 (D.D.C. Aug. 30, 2012); *see also Harper v. Va. State Board of Elections*, 383 U.S. 663, 668 (1966) ("The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors, by analogy, bars a system which excludes those unable to pay a fee to vote or who fail to pay").

Wealth and educational attainment affect the responsiveness of the political parties to the needs of voters. *See* Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, 72 Law & Contemp. Probs. 197, 209-210 (2009) (examining empirical studies of the political process's responsiveness to the concerns of the poor and concluding that "[t]he poor, at least according to these empirical studies, have essentially become an excluded group in the political process.").[25]

Where economic and educational disadvantage correlate with race, as they do in the covered jurisdictions, non-White voters are the most vulnerable to retrogressive or intentionally discriminatory voting practices and non-responsiveness by government officials. Moreover, because these conditions of racialized economic and educational disparities are concentrated in covered jurisdictions, where a majority of the three major non-White groups protected by Section 5 resides, Congress has correctly focused its remedial authority in these locations.[26]

In this section, *Amici* compare U.S. Census data for 2000 and 2010 in states that are fully covered and partially covered by Section 5. On key metrics of socioeconomic well-being—including education, household income, home ownership, and employment—racial disparities remain substantial in fully covered and partially covered jurisdictions. The implications of these current data on the present legal question are plain: Minorities in covered jurisdictions continue to suffer from substantial socioeconomic disparity, "which hinder[s] their ability to participate effectively in the political process." See *Gingles*, 478 U.S. at 45.

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[25] 25. *See also* Sidney Verba, Kay L. Schlozman, & Henry L. Brady, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (Harvard Univ. Press 1995); Raymond E. Wolfinger, & Steven J. Rosenstone, WHO VOTES? (Yale Univ. Press 1980); Katherine Tate, BLACK FACES IN THE MIRROR: AFRICAN AMERICANS AND THEIR REPRESENTATIVES IN THE U.S. CONGRESS (Princeton Univ. Press 2003); Angus Campbell, et al., THE AMERICAN VOTER (Wiley Press 1960); Louis DeSipio, COUNTING ON THE LATINO VOTE: LATINOS AS A NEW ELECTORATE (Univ. of Virginia Press 1998).

[26] 26. A majority of persons belonging to each of the three largest protected non-White groups in the United States reside in states where Section 5 now applies. Approximately two-thirds of Blacks, 63.3% in 2000 and 2010, and almost three-quarters of Hispanics (as defined in the Census), 74.6% in 2000 and 72.3% in 2010, live in fully and partially covered states. *See* Appendix A.

A. States Fully Covered by Section 5

In fully covered states, 84% of all Whites compared to only 69% of Blacks had at least a high school education as of 2000. *See* Appendix B. In this same year, Whites were almost twice as likely as Blacks to have a bachelor's degree or higher. The share of Whites with a high school education or higher exceeded the percentage for Hispanics by 24 percentage points. And the share of those with a college degree or higher was 11 percentage points better for Whites than Hispanics. These racial differences in educational attainment persisted in 2010.

Substantial disparities also appear in differences among these groups, in median household income, percent home ownership, and percent unemployed. In 2000, Whites had a median household income that was $16,169 greater than that of Blacks, and $9,918 greater than that of Hispanics. In that same year, the percentage of homeownership among Whites exceeded the measure for Blacks (as a percent of all Blacks) by 33 points, and the difference between White and Hispanic homeownership was 28 percentage points. The unemployment rate for Whites in 2000 was half, or three percentage points lower, the comparable measure for Blacks. Further, the unemployment rate during this year was two points lower among Whites than it was in the Hispanic community.

Differences in home ownership rates held over the decade. In 2010, the proportion of Whites who owned homes remained far greater than the comparable figure for Blacks, and White homeownership surpassed Hispanic homeownership by 27 percentage points. The differences in unemployment rates persisted as well. In this same year, the unemployment rate of Whites was half that of Blacks, a difference of four percentage points, and White unemployment rate was two percentage points lower than that of Hispanics. In 2010, the gap between Whites and Blacks in median income grew to nearly $21,000, and increased to more than $15,000 between Whites and Hispanics.

B. States Partially Covered by Section 5

Socio-demographic disparities also appear in states that are partially covered under Section 5. The data for these states appears in Appendix C. In 2000, 86% of all Whites had a high school education or higher compared to 76% of Blacks in these states. The difference between the rates for Whites and Hispanics was even greater at 27 percentage points. Differences in the percent of each group with a bachelor's degree were also present: 10 percentage points separated the percentage of Whites and Blacks with a bachelor's degree or more, and Whites held a 14 percent advantage over Hispanics with a college degree or higher. In 2010 these differences in educational attainment were still apparent.

A similar pattern appears when one assesses median household income, home ownership, and unemployment in 2000 and in 2010. In 2000, Whites had incomes that were $13,306 greater than Blacks and $11,221 greater than

Hispanics. Thirty-one percent more Whites than Blacks own homes; Whites outpaced Hispanics in owning their homes (72% vs. 40%, or a difference of 32 percentage points). Substantial differences in unemployment rates are evident. The unemployment rate of Blacks was more than twice that of Whites as was the unemployment rate of Hispanics.

In 2010, Whites had median household incomes that were on average $19,698 greater than that of Blacks and $16,056 greater than that of Hispanics. Differences in homeownership also remained. With respect to rates of home ownership, Whites outpaced both Blacks and Hispanics by 33 and 29 percentage points respectively. Finally, the unemployment rate of Blacks was more than double that of Whites, a difference of five percentage points, and the difference of three points between Whites and Hispanics indicates that 50% more Hispanics than Whites were unemployed.

C. Covered States & Employment Discrimination Charges

While these continuing disparities in education, household income, home ownership, and unemployment are indications of the contemporary consequences of historical discrimination, they also reflect continuing present-day discrimination in the covered jurisdictions. For instance, it is well understood among scholars and experts that the higher Black unemployment rate is in part a function of job discrimination.[27]

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[27] Terry Smith, Barack Obama, Post-Racialism, and the New Politics of Triangulation 94 (Palgrave MacMillan 2012).

The United States Equal Employment Opportunity Commission (EEOC) maintains state-specific data on the outcomes of job discrimination and retaliation charges filed with the agency against both private and government employers. This data provides important evidence that the pattern of discriminatory behavior in employment appears more frequently in preclearance locations than one might otherwise expect.

An examination of two categories of administrative action on these charges reveals that covered jurisdictions are the sites of a disproportionate share of job discrimination and retaliation findings. As shown in Table 6, from 2006 through 2012, fully covered jurisdictions accounted for a quarter of all merit resolutions by the EEOC, significantly in excess of their collective 19% share of U.S. adult population. Merit resolutions are "Charges with outcomes favorable to charging parties and/or charges with meritorious allegations."[28] In the period from 2006 to 2012, the EEOC was also statistically more likely to find "reasonable cause" in charges filed in covered states. An EEOC determination of reasonable cause means "cause to believe that discrimination occurred based upon evidence obtained in investigation."[29]

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[28] U.S. Equal Employment Opportunity Commission, *Definition of Terms*, http://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm (last visited Jan. 29, 2013).

[29] *Id.*

Table 6:
Rate of EEOC Claims with Reasonable Cause or Merit Resolutions: Comparing outcomes in Section 5 covered and non-covered States

	EEOC Data 2006 – 2012		
	Section 5	Non-Section 5	Diff
Percent of Adult Population	19	81	--
Percent of all Reasonable Cause Determinations 2006-12	25	75	6**
Percent of all Merit Resolutions 2006-2012	26	74	7**
Rate of Reasonable Cause Determinations per 1000 Adults	0.166	0.103	0.064**
Rate of Merit Resolutions per 1000 Adults	0.718	0.457	0.261***

Note: For items 2 and 3, difference column represents difference in percent of adult population in Section 5 states (19%) and percent of EEOC outcomes in these states. For items 4 and 5, difference represents gap between Section 5 and non-Section 5 states going across the row.

Chi-square test results are statistically significant: *** P>.001 ** P>.010 *P>.050

Sources: EEOC Data by State on Resolution of Claims

The concentration of these claims follows an unmistakable pattern. Based on the same EEOC statistics, six of the nine fully covered jurisdictions have earned the unenviable sobriquet of being among the twenty states with the most workplace discrimination.[30] Here again, sheer population size alone simply cannot account for the frequency of such claims in these states. Mississippi is only the thirty-first (31st) largest state, yet it ranks eighteenth (18th) in workplace discrimination. Alabama is only the twenty-third (23rd) largest state, yet is ranked eleventh (11th) in workplace discrimination. And while Texas is the second (2nd) largest state, it ranked first (1st) in workplace discrimination.[31]

In sum, the disparities along with the distinct pattern of employment discrimination charges discussed above paint a portrait of heightened socioeconomic vulnerability in the covered states, a vulnerability which is magnified by the high concentration of racial minorities living in the covered jurisdictions. This vulnerability, in turn, adversely affects political participation and opportunity and justifies Congress's determination that Section 5 is still needed to guarantee that state and local governments do not limit the voting rights of Blacks and Hispanics.

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[30] *See* Business Week, *Twenty States With the Most Workplace Discrimination*, http://images.businessweek.com/slideshows/20110728/twenty-states-with-the-most-workplace-discrimination (last visited Jan. 16, 2013).

[31] *Id.*

CONCLUSION

No party in the present litigation disputes the fact that Congress' intervention in 1965 to rid the country of race discrimination in the political arena was warranted. While Petitioner asserts that the time has arrived for this project to end, the factors on which petitioner relies are woefully incomplete. Petitioner mistakes the project at hand as a very limited one – removing the legal barriers on non-White citizens from registering to vote. What Petitioner ignores, but what should not be lost on this Court, is the fact that this was only one aspect of a prolonged project to end institutionalized political exclusion based on race. The data presented here offer a clear picture that, both in 2006 and now, the decision to maintain Section 5 was a reasonable one based on sound evidence.

Congress prudently recognized that dismantling the enduring features of racial discrimination demanded continued vigilance. And it reached this conclusion for good reason. Because this project was sponsored by and often executed by well-entrenched state government actors, the effects of their efforts could not be reduced to the formal denial of access to ballots.

Amici therefore respectfully urge the Court to take account of the variety of evidence that shows that Section 5 remains a work in progress in much of our country and to affirm the decision below.

Respectfully Submitted,

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APPENDIX

APPENDIX A

Table of group population and proportions for Full Coverage States: AL, AK, AZ, GA, LA, MS, SC, TX, VA

	2000 total population of group	% of group in Full coverage states in 2000	2010 total population of group	% of group in Full coverage states in 2010
% Non-Hispanic White	194552774	18.0	196817552	18.7
% Black or African American	34658190	32.2	37685848	33.5
% Hispanic	35305818	25.7	50477594	26.9
% Asian alone	10242998	12.2	14465124	13.1

Table of group population and proportions for Partially covered states: CA, FL, NY, NC, MI, NH, and SD

	2000 total population of group	% of group in Partially covered states in 2000	2010 total population of group	% of group in Partially covered states in 2010
% Non-Hispanic White	194552774	27.4	196817552	26.8
% Black or African American	34658190	31.1	37685848	29.8
% Hispanic	35305818	48.9	50477594	45.5
% Asian alone	10242998	51.9	14465124	46.1

Table of group population and proportions for BOTH Fully covered and Partially covered states: AL, AK, AZ, GA, LA, MS, SC, TX, VA, CA, FL, NY, NC, MI, NH, and SD

	2000 total population of group	% of group in selected states in 2000	2010 total population of group	% of group in selected states in 2010
% Non-Hispanic White	194552774	45.4	196817552	45.5
% Black or African American	34658190	63.3	37685848	63.3
% Hispanic	35305818	74.6	50477594	72.3
% Asian alone	10242998	64.2	14465124	59.2

APPENDIX B

Summary of Census statistics for 2000 and 2010 for Fully Covered States							
	Fully covered states average: 2000 Census						
	Whites	Blacks	Diff. (W-B)	Hispanics	Diff. (W-H)	Asians	Diff. (W-A)
% High school or higher	84	69	15	60	24	78	6
% College or higher	26	14	12	15	11	41	-15
Median household income	$44,806	$28,637	$16,169	$34,888	$9,918	$45,935	-$1,129
% Home ownership	74	41	33	46	28	54	21
% unemployment rate	3	6	3	5	2	4	1
	2010 Census						
	Whites	Blacks	Diff. (W-B)	Hispanics	Diff. (W-H)	Asians	Diff. (W-A)
% High school or higher	88	80	8	63	25	84	4
% College or higher	30	17	13	15	15	46	-16
Median household income	$57,125	$36,310	$20,815	$41,708	$15,417	$59,759	-$2,634
% Home ownership	74	49	25	47	27	61	13
% unemployment	4	8	4	6	2	4	0

Sources: See Appendix F

APPENDIX C

Summary of Census statistics for 2000 and 2010 for Partially Covered States							
	Partially covered states average: 2000 Census						
	Whites	Blacks	Diff. (W-B)	Hispanics	Diff. (W-H)	Asians	Diff. (W-A)
% High school or higher	86	76	10	59	27	80	6
% College or higher	27	17	10	14	13	46	-19
Median household income	$45,797	$32,491	$13,306	$34,575	$11,221	$49,600	-$3,803
% Home ownership	72	41	31	40	32	49	23
% unemployment rate	3	6	3	6	3	3	0
	Partially covered states average: 2010 Census						
	Whites	Blacks	Diff. (W-B)	Hispanics	Diff. (W-H)	Asians	Diff. (W-A)
% High school or higher	91	82	9	66	25	85	6
% College or higher	31	20	11	16	15	51	-20
Median household income	$57,313	$37,615	$19,698	$1,258	$16,056	$3,435	-$6,122
% Home ownership	72	39	33	43	29	55	17
% unemployment rate	4	9	5	7	3	5	1

Sources: See Appendix F

APPENDIX D

Racial attitudes among White respondents in Cooperative Congressional Election Study, 2010

State	Section Five	Rank	Racial Resent
Alabama	Y	1	72
Louisiana	Y	2	69
Mississippi	Y	3	69
Georgia	Y	4	69
West Virginia		5	66
Texas	Y	6	66
Tennessee		7	65
Arkansas		8	63
South Carolina	Y	9	62
South Dakota	P	10	61
Nevada		11	61
Arizona	Y	12	60
Alaska	Y	13	59
North Carolina	P	14	59
Virginia	P	15	59
Pennsylvania		16	59
Ohio		17	59
Delaware		18	59
Florida	P	19	59
Oklahoma		20	58
Idaho		21	58
Indiana		22	58
Missouri		23	58
Michigan	P	24	57
North Dakota		25	57
Maryland		26	56
Kansas		27	56
Montana		28	55
New Jersey		29	55
Kentucky		30	55
Iowa		31	54
Colorado		32	53
Illinois		33	53
Nebraska		34	53
Wyoming		35	53
New Mexico		36	53
Utah		37	52
Wisconsin		38	50
New Hampshire	P	39	50
Minnesota		40	50
New York	P	41	50
Connecticut		42	50
California	P	43	48
Maine		44	48
Rhode Island		45	47
Oregon		46	47
Massachusetts		47	45
Washington		48	44
Vermont		49	37
Hawaii		50	33
D.C.		51	23
Section 5 states			**66**
Non-Section 5			**53**
Difference			**13****

State	Section Five	Rank	Anti-Immig
Alabama	Y	1	51
Mississippi	Y	2	47
Texas	Y	3	47
Georgia	Y	4	46
Louisiana	Y	5	46
Alaska	Y	6	46
Arizona	Y	7	46
Tennessee		8	45
Arkansas		9	44
Oklahoma		10	44
Nevada		11	42
Virginia	P	12	41
Indiana		13	40
North Carolina	P	14	40
South Carolina	Y	15	40
Florida	P	16	40
New Mexico		17	40
Iowa		18	39
Montana		19	39
Missouri		20	38
Kentucky		21	38
West Virginia		22	37
Idaho		23	36
New Hampshire	P	24	36
South Dakota	P	25	36
Michigan	P	26	35
Kansas		27	35
Colorado		28	35
Pennsylvania		29	35
Ohio		30	35
Illinois		31	35
Nebraska		32	35
North Dakota		33	35
Wisconsin		34	35
California	P	35	35
Oregon		36	34
Maryland		37	34
Delaware		38	33
New Jersey		39	33
Maine		40	33
Minnesota		41	32
Hawaii		42	32
Rhode Island		43	32
Wyoming		44	31
Massachusetts		45	31
Utah		46	31
Connecticut		47	30
Washington		48	30
New York	P	49	29
D.C.		50	21
Vermont		51	14
Section 5 states			**46**
Non-Section 5			**35**
Difference			**11****

Chi-square test: results are statistically significant: ** P> .010 * P> .050 P> .100

Source: Cooperative Congressional Election Study, 2010, data among White respondents

APPENDIX E

Polarized voting among Whites in 2000 – 2008 Presidential elections

State	Sec 5	Gore '00	Kerry	Obama	04-08	00-08	Dem	Indep	Repub
Alabama	Y	28	19	10	-9	-18	20	13	67
Mississippi	Y	27	14	11	-3	-16	25	11	64
Louisiana	Y	26	24	14	-10	-12	25	11	64
Arkansas		38	36	30	-6	-8	29	15	56
Oklahoma		37	29	29	0	-8	31	7	62
Georgia	Y	27	23	23	0	-4	27	12	61
North Carolina	P	38	27	35	8	-3	35	13	52
West Virginia		43	42	41	-1	-2	44	13	43
Connecticut		53	51	51	0	-2	44	12	44
Tennessee		36	34	34	0	-2	29	11	60
South Carolina	Y	28	22	26	4	-2	27	14	59
Virginia	P	40	32	39	7	-1	32	12	56
Arizona	Y	41	41	40	-1	-1	33	10	57
Texas	Y	27	25	26	1	-1	26	11	64
Pennsylvania		48	45	48	3	0	42	11	47
Florida	P	42	42	42	0	0	38	10	52
Kentucky		35	35	36	1	1	41	10	49
Maine		57	53	58	5	1	44	14	42
New Mexico		40	43	42	-1	2	40	10	50
Rhode Island		56	57	58	1	2	43	23	34
Missouri		40	42	42	0	2	39	11	51
Maryland		46	44	49	5	3	42	9	50
New Jersey		46	46	49	3	3	41	12	48
Delaware		50	45	53	8	3	42	9	50
Iowa		48	49	51	2	3	37	13	50
Massachusetts		54	59	57	-2	3	49	14	37
California	P	48	47	52	5	4	44	9	47
South Dakota	P	37	37	41	4	4	31	14	55
Michigan	P	47	44	51	7	4	41	13	46
Nevada		41	43	45	2	4	36	12	52
Indiana		40	34	45	11	5	32	15	52
Kansas		35	34	40	6	5	35	13	53
Ohio		41	43	46	3	5	41	10	49
Wyoming		27	28	32	4	5	42	9	49
New York	P	47	49	52	3	5	47	11	42
Illinois		46	48	51	3	5	43	10	47
Idaho		27	29	33	4	6	24	18	58
Minnesota		47	50	53	3	6	48	11	42
Utah		25	24	31	7	6	30	12	58
Alaska	Y	25	33	32	-1	7	31	9	61
Nebraska		32	33	39	6	7	30	14	56
North Dakota		33	35	42	7	9	37	13	50
Wisconsin		45	47	54	7	9	42	13	45
New Hampshire	P	45	50	54	4	9	38	15	47
Washington		49	52	59	7	10	47	11	42
D.C.		75	80	86	6	11	76	5	18
Montana		33	39	45	6	12	36	20	44
Colorado		38	42	50	8	12	40	10	50
Oregon		47	50	60	10	13	49	7	44
Vermont		51	58	68	10	17	58	20	22
Hawaii		50	58	70	12	20	50	7	43
Section 5 states		**29**	**25**	**23**	**-2.4**	**-5.9**	**31.6**	**13.0**	**55.4**
Non-Section 5		**43**	**43**	**48**	**4.1**	**4.4**	**39.4**	**11.8**	**48.8**
Difference		**-14****	**-18*****	**-25*****	**-6.5***	**-10.3***	**-7.9***	**1.2**	**6.7***

Chi-square test results are statistically significant: *** P>.001 ** P>.010 *P>.050

Sources: National Exit Poll vote among White respondents 2000, 2004, 2008; and CCES 2010 for party identification among White voters

APPENDIX F

Sources for Appendices B and C
Source: U.S. Census Bureau, 2010 Census. Summary File 2, Tables PCT3, PCT4, PCT7, PCT9, PCT10, PCT15, PCT18, PCT22, PCT24, PCT28, PCT31, PCT32, PCT36, PCT37, PCT39, HCT2, HCT4, HCT5, and HCT7. Accessed 1/10-1/15/2013
Source: U.S. Census Bureau, 2006-2010 American Community Survey. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, Census 2000 Summary File 2, Matrices PCT3, PCT4, PCT8, PCT9, PCT10, PCT11, PCT14, PCT18, PCT19, PCT23, PCT26, HCT2, and HCT5. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT35, PCT36, PCT38, PCT43, PCT45, PCT47, PCT49, PCT61, PCT64, PCT67, and PCT70. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT55, PCT57, PCT58, PCT79, PCT81, PCT85, PCT86, PCT87, PCT88, PCT89, PCT94, PCT98, PCT99, PCT100, PCT101, PCT103, PCT107, PCT108, PCT109, PCT110, PCT112, PCT113, PCT130, PCT139, PCT142, PCT150, PCT151, and PCT157. Accessed 1/10-1/15/2013.
Sources for State specific breakdowns:
Source: U.S. Census Bureau, "Profile of General Demographic Characteristics: 2000 Census 2000 Summary File 2 (SF 2) 100-Percent Data." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF2_DP1&prodType=table. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "Profile of Selected Social Characteristics: 2000 Census 2000 Summary File 4 (SF 4) - Sample Data." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF4_DP2&prodType=table. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "Profile of Selected Economic Characteristics: 2000 Census 2000 Summary File 4 (SF 4) - Sample Data." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF4_DP3&prodType=table. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "State and County QuickFacts." http://quickfacts.census.gov/qfd/index.html. Accessed 1/10, 1/11, 1/12, 1/13, 1/14, and 1/15 2013.
Source: U.S. Census Bureau, "Profile of General Demographic Characteristics: 2000 Census 2000 Summary File 1 (SF 1) 100-Percent Data." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "Profile of General Population and Housing Characteristics: 2010 2010 Demographic Profile Data." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "Profile of General Population and Housing Characteristics: 2010 2010 Census Summary File 2." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF2_SF2DP1&prodType=table. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES 2006-2010 American Community Survey Selected Population Tables." http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_SF4_DP02&prodType=table. Accessed 1/10-1/15/2013.
Source: U.S. Census Bureau, "SELECTED ECONOMIC CHARACTERISTICS 2006-2010 American Community Survey Selected Population Tables."

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_SF4_DP03&prodType=table. Accessed 1/10-1/15/2013.

Citation Notes:	General Notes:
All data from ACS (aggregated estimates), except for race.	*Median household income=all households (HH)
Race data from full Census dataset population.	*Median family income=only related/familial households
Tables resulted from 'search' function on American FactFinder database search engine on Census.gov.	*Median non-family incomes=non-related HH (total HH-family HH=non-family HH)
On US. Census Bureau's American Fact Finder Data Search, I utilized the following criteria to pull this information together for both 2000 and 2010 Census results:	*Median individual income='Median earnings for workers' from Census categories.
Search criteria: Geographies'=State-->'State name'; Race and Ethnic Groups='Race and Hispanic Origin (2010 Code based), Hispanic Origin=Not Hispanic', 'Race alone/alone or in any combination'=Alone; Selected categories: White alone, not Hispanic or Latino, Black or African American Alone, not Hispanic or Latino, Asian alone, not Hispanic or Latino. For Hispanics, Filtered by 'Hispanic Origin'=Hispanic; Selected category: Hispanic or Latino (any race) (200-299). For year filter, added filter 'Year'=2000 or 'Year'=2010.	*Race for 2000 percentage exceeds 100 because of overlapping racial categories.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN - 2 2013
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No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PROJECT 21 AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 6

I. Section 5 Exceeds Congressional Authority Even Under Alternatives to the *Boerne* Test. 6

A. The Necessary and Proper Clause Is Not a Blank Check for Claimed Exercises of Congressional Enforcement Authority. 8

B. Section 5 Fails to Carry into Execution Congress's Power to Enforce the Fourteenth or Fifteenth Amendments. 13

II. Highly Suspect Notions of Second-Generation Discrimination Provide Poor and Often Perverse Support for Claims of Unconstitutional Conduct Said to Justify the Extreme Remedy of Preclearance. 15

A. Vote Dilution Objections, Inquiries, and Related Matters Are Not Evidence of Unconstitutional Discrimination. 16

B. Federal Use of Section 5 to Compel Race-Based Redistricting Demonstrates that Section 5 Is Perversely Inappropriate to Enforce Prohibitions Against Racial Discrimination. 23

Conclusion 28

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995) 24, 26

Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009) .... passim

Bartlett v. *Strickland*, 556 U.S. 1 (2009) 1

Brown v. *Board of Education*, 347 U.S. 483 (1964) 27

City of Boerne v. Flores, 521 U.S. 507 (1997) 2, 6

City of Richmond v. *J.A.Croson Co.*, 488 U.S. 469 (1989) 26

General Motors Corp. v. *Tracy*, 519 U.S. 278 (1997) 12

Georgia v. Ashcroft, 539 U.S. 461 (2003) 22, 24

Hirabayashi v. *United States*, 320 U.S. 81 (1943) 26

Hirabayashi v. *United States*, 828 F.2d 591 (CA9 1987) 27

Korematsu v. *United States*, 323 U.S. 214 (1944) 27

Korematsu v. *United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) 27

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 2, 9, 10

Miller v. *Johnson*, 515 U.S. 900 (1995) 20, 24

National Fed. Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) 15

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) ("*Bossier II*") 25

Rice v. *Cayetano*, 528 U.S. 495 (2000) 26

Shaw v. *Reno*, 509 U.S. 630 (1993) 18, 24, 26

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 23

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 6, 13

Tennessee v. Lane, 541 U.S. 509 (2004) .... passim

United States v. *DeWitt*, 76 U.S. 41 (1869) 11

Watkins v. *United States Army*, 875 F.2d 699 (CA9 1989), *cert. denied*, 498 U.S. 957 (1990) 27

Statutes

42 U.S.C. §§ 1973c 25

Pub. L. No. 109-246, § 2(b)(4), 120 Stat. 577 (2006) 16, 21

Other Authorities

A Friend to the Union, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78 (Gerald Gunther ed., 1969) 11

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) 10

H.R. REP. NO. 109-478 (2006) 16, 21

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. The National Center for Public Policy Research is a communications and research foundation supportive of the view that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. It is a Delaware 501(c)(3) corporation.

Project 21 participated as *amicus curiae* in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), and this Term's *Fisher* v. *University of Texas at Austin*, No. 11-345. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

1. Regardless of the standard of review applied in this case, Section 5 is an improper exercise of Congress's enforcement power under either of the relevant Reconstruction Amendments. Petitioner and all judges below evaluated Section 5 using the "congruence and proportionality" standard from *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). While it seems likely this Court will apply that test in this case as well, some have suggested that a different test – based on *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and the Necessary and Proper Clause – should be applied.

Even under such an alternative standard, however, Congress does not have *carte blanche*, and must fashion its legislation in a manner that actually enforces, or carries into execution, the Reconstruction Amendments' underlying prohibitions against government denial or abridgment on account of race of the right to vote or government denial of equal protection of the laws. The test, first set out in *McCulloch* v. *Maryland* and applied in early Voting Rights Act cases, requires enforcing legislation to be directed towards a legitimate end, use "appropriate" means "plainly adapted to that end," and to be consistent with the letter and spirit of the Constitution. *McCulloch*, 17 U.S. (4 Wheat.) at 421. That test is not as lenient as some have suggested, particularly where, as here, the legislation at issue is conceded to be in significant conflict with other important constitutional provisions and principles. *See Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 557 U.S. 193, 202-03 (2009).

Even under an alternative test flowing from the Necessary and Proper Clause, therefore, the current extension and expansion of Section 5 fails for the same reasons it fails the *Boerne* test. The lack of meaningful evidence of current constitutional violations to be enforced against or remedied shows that Section 5 is no longer directed at the legitimate end of enforcing the relevant prohibitions against unconstitutional discrimination. Rather, it now serves primarily to foster alternative notions of racial proportionality in voting and electoral success not based on, and indeed in conflict with, the Constitution.

Similarly, the disconnect between the coverage formula for preclearance and the claimed evidence of discrimination that shows a lack of congruence under *Boerne* likewise shows that Section 5 is not "plainly adapted" to enforcing the Reconstruction Amendments. And finally, given that the urgency and severity of the problems that once justified the extraordinary remedy of preclearance no longer exist in our vastly improved current circumstances, the extraordinary constitutional burdens imposed by that Section can no longer be reconciled with the letter and the spirit of the Constitution.

2. In addition to failing either the *Boerne* or the *McCulloch* tests for enforcement legislation, the reauthorized Section 5 is invalid for the further reason that much of the so-called "second generation" examples of discrimination relied upon by defenders of the law are not examples of unconstitutional discrimination by the States at all – rather, they are reflections of federal racial stereotyping and institutionalized racial discrimination underlying distorted concepts of

vote dilution at the Department of Justice (DOJ) and in Congress itself. Because preclearance procedures have in fact moved beyond simply blocking intentional efforts to undermine minority voting and often demand affirmative efforts to maximize minority voting strength through concentration and segregation of minority voters, they have turned the very concept of racial discrimination on its head. That approach taints much of the claimed "evidence" of ongoing discrimination and taints the appropriateness of Section 5 as a means of enforcing prohibitions on the very type of discrimination that it now promotes.

a. Lacking sufficient examples of direct interference with the right to vote used to support earlier iterations of the Voting Rights Act, Congress, respondents, and the courts below instead rely on so-called second-generation discrimination that, while not blocking minority access to the ballot, is said to reduce the *weight* of minority votes. The evidence cited for such purported racial discrimination includes Section 2 suits and settlements, DOJ objections to preclearance applications and requests for further information regarding such applications, racial block voting, and the improved, but still less than proportional, numbers of minority office-holders, particularly at the state-wide level.

What such types of evidence have in common is *not* that they reflect greater racial discrimination by covered jurisdictions – the correlation with coverage is, in fact, poor – but rather that they reflect racially offensive stereotypes and policies applied by the DOJ itself. DOJ preclearance objections and information requests, for example, are largely related to redistricting, and reflect efforts to *increase* minority segregation into majority-minority districts. That a covered jurisdiction *failed* to use race to segregate voters is not evidence of unconstitutional racial discrimination – it is its precise opposite. That covered jurisdictions may succumb to DOJ arm-twisting and accommodate DOJ's racial gerrymandering demands simply shows that Section 5 can be successfully abused, not that the initial application was unconstitutional. Other evidence claimed to show current discrimination likewise is tainted by the distorted policies and notions surrounding vote dilution, and the racially stereotyped assumptions underlying those policies. Notions of minority-preferred candidates and racial block voting – an apparent virtue for minority groups, but a vice for non-minorities – reflect racial stereotypes about both minority and non-minority voters that have no proper place in government policy, much less in legislation that is supposed to combat racially discriminatory conduct.

b. In addition to undermining (and in fact inverting) the rationality of much of the current evidence of "discrimination" used to support Section 5, the fact that Section 5 itself is the vehicle by which DOJ implements its racially discriminatory policies demonstrates that it is no longer "appropriate" legislation for enforcing prohibitions on government racial discrimination. That the federal government is now using its preclearance authority to compel, rather than combat, racial discrimination illustrates that the remedy exacts too high a cost, is inconsistent with both the letter and the spirit of the Constitution and thus is not "appropriate" legislation to enforce or carry into execution the Reconstruction Amendments.

ARGUMENT

I. Section 5 Exceeds Congressional Authority Even Under Alternatives to the *Boerne* Test.

Both the majority and the dissent below applied the Fourteenth Amendment "congruence and proportionality" test from *Boerne*, 521 U.S. at 520, in evaluating whether Section 5 was a valid exercise of Congress's enforcement power under the Reconstruction Amendments. *See* Pet. App. 16a (majority below); Pet. App. 70a-71a (Williams, J., dissenting).[2] While this Court's opinion in *Northwest Austin*, 557 U.S. at 202 (2009), strongly suggests that is the standard this Court would apply here, some have suggested that a different, and supposedly more lenient, standard should apply.

The government, for example, has suggested a test allowing Congress to employ "any rational means of enforcement," citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), and assuming an overly permissive reading of the Necessary and Proper Clause. *See* Pet. App. 16a (opinion below describing government's contention).

Justice Scalia also has suggested dissatisfaction with the *Boerne* test. *Tennessee v. Lane*, 541 U.S.

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[2] *Amicus* will assume, *arguendo*, that both the Fourteenth and Fifteenth Amendments are potentially available to support Section 5, without taking any position on the dispute over whether Section 5 must be justified by the Fifteenth Amendment alone.

509, 557-65 (2004) (Scalia, J., dissenting). Concluding that this Court has given too expansive a meaning to the term "enforce" in the Fourteenth Amendment, he would generally apply a much narrower scope to that word and hence to Congress's enforcement authority. *Id.* at 558-59. But within that narrowed scope, he would apply the Necessary and Proper Clause standard from *McCulloch* rather than the more malleable congruence and proportionality test from *Boerne*. *Id.* at 565. For enforcement against unconstitutional *racial* discrimination, however, Justice Scalia would accept existing precedent allowing Congress somewhat greater leeway in enforcing the central purposes of the Reconstruction Amendments, with some qualifications:

> Thus, principally for reasons of *stare decisis,* I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. [Citations and footnote omitted.] I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. [Citation omitted.] And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I

> shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.

Id. at 564.

In *amicus*'s view, even assuming application of a test derived from *McCulloch*, Section 5 still fails to constitute a valid exercise of Congress's enforcement power under either of the relevant Reconstruction Amendments. *Cf. Northwest Austin*, 557 U.S. at 204 ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.")

A. The Necessary and Proper Clause Is Not a Blank Check for Claimed Exercises of Congressional Enforcement Authority.

Although the government and Justice Scalia suggest that the *McCulloch* standard under the Necessary and Proper Clause may be more lenient than the *Boerne* standard in some respects, *McCulloch* and its progeny in fact impose genuine restraints on Congress's power. The test in *McCulloch*, though flexible, requires at least that Congress's ends be legitimate, its means be "appropriate" and "plainly adapted" to those ends, and its actions comport with the letter and the spirit of the Constitution.

The Necessary and Proper Clause gives Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art I, sec. 8, cl. 18. To qualify under this grant of authority, a law must not merely be needful or desirable; it must also have as its function "carrying into Execution" the enumerated power being applied. *See McCulloch*, 17 U.S. (4 Wheat.) at 412.

Here, Congress's enumerated power is the "power to enforce" the Fourteenth and Fifteenth Amendments "by appropriate legislation." U.S. CONST., AMEND. XIV, sec. 5 and AMEND. XV, sec. 2. As a practical matter, "enforc[ing]" the prohibitions of the Fourteenth and Fifteenth Amendments is the same as "carrying into Execution" those prohibitions, and hence the two related powers collapse into the same essential inquiry under *McCulloch*. *Cf. Tennessee* v. *Lane*, 541 U.S. at 559 ("The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined 'enforce' as: 'To put in execution; to cause to take effect; as, to *enforce* the laws.' *Id.*, at 396. *See also* J. Worcester, DICTIONARY OF THE ENGLISH LANGUAGE 484 (1860) ('To put in force; to cause to be applied or executed; as, "To *enforce* a law" ').").

The most essential limitation under the *McCulloch* test, therefore, is that Congress's legislation must be directed at implementing or giving effect to the Fifteenth Amendment's prohibition against "deni[al] or abridge[ment] by the United States or by any State on account of race" of the "right of citizens of the United States to vote," and the Fourteenth Amendment's prohibition against any State "deny[ing] to any person within its jurisdiction the equal protection of the laws."

> To carry a law or power into execution in its most basic sense means to provide enforce-

> ment machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.”

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1993) (emphasis in original; footnote omitted).

In *McCulloch*, Chief Justice Marshall set out the language that has become the accepted test under the Necessary and Proper Clause:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

17 U.S. (4 Wheat.) at 421 (footnote omitted).[3]

Chief Justice Marshall himself later explained how actions designed merely to make an exercise of power more effective, or to accomplish a goal without undue burden, would not constitute a means of executing a given power. Concerning whether Congress could preempt state taxes in order to increase its ability to collect its own taxes without unduly burdening the populace, Marshall explained:

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[3] The "end" to which Chief Justice Marshall was referring in the above passage was, of course, the *exercise* of an enumerated power, not the policy goal of Congress.

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or conducive to[,]" the end.

A Friend to the Union, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added); *see also United States* v. *DeWitt*, 76 U.S. 41, 44 (1869) (rejecting a ban on intrastate sales of certain products unsuccessfully justified as a means to increase demand for other products subject to federal taxation and thereby "aid and support" and make more "effective" the "power of laying and collecting taxes").

Distilling the essence of *McCulloch* as illustrated by the above, legislation will be necessary and proper for enforcing the Fourteenth and Fifteenth Amendments if it is:

- Directed at the "legitimate" end of implementing the prohibitions contained in those Amendments;
- Involves "appropriate" means "plainly adapted to that end";
- Those means "are not prohibited, but consistent with the letter and spirit of the constitution."

And, for these purposes, implementing the relevant prohibitions requires something more direct and immediate than merely "aiding and supporting" them or making them more "effective" through some indirect means unrelated to remedying past constitutional violations or precluding future constitutional violations. *Tennessee* v. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) (prophylactic § 5 legislation can be imposed "only upon those particular States in which there has been an identified history of relevant constitutional violations").

Furthermore, in terms of defining the power being carried into execution for purposes of the *McCulloch* test – *i.e.*, the legitimate "end" – it would be well to keep in mind Justice Scalia's recognition that the enforcement power has already exceeded credible textual boundaries and thus should not be *expanded* beyond the bounds of previous precedent. *Tennessee* v. *Lane*, 541 U.S. at 558-59 (Scalia, J., dissenting). While *stare decisis* may be grounds for declining to retract past holdings, it is no justification for extending them to changed circumstances or more intrusive legislation, such as the 2006 revision of Section 5. *Cf. General Motors Corp.* v. *Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (" 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain"; will apply *stare decisis* only "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is *indistinguishable* from a type of law previously held unconstitutional by this Court") (emphasis added).

In addition to declining to extend past precedent beyond the unique and extreme circumstances from which they arose, Justice Scalia's accepted limits on "prophylactic" enforcement legislation, even in the racial context, are important tools for keeping Congressional authority within their otherwise strained constitutional bounds. Thus, prophylactic measures such as Section 5 must be limited to "particular States in which there has been an identified history of relevant constitutional violations" and must be directed at States themselves, not at the public at large. *Tennessee* v. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting).

B. Section 5 Fails to Carry into Execution Congress's Power to Enforce the Fifteenth Amendment.

Given the above description and limitations on Congress's enforcement power even under the *McCulloch* test, the same evidence and arguments raised by Petitioner to show that Section 5 is not a congruent and proportional remedy to any claimed constitutional violations likewise demonstrate that it is neither appropriate nor plainly adapted to enforcing the prohibitions of the Fourteenth and Fifteenth Amendments, and is not consistent with the letter and spirit of the Constitution.

For example, Petitioner cites ample evidence that the "unique circumstances" and extreme need for prophylactic legislation that existed in 1965, *Katzenbach*, 383 U.S. at 335, have long since passed. Pet. Br. at 9-10, 19-20, 23-33. This Court itself has recognized the dramatic change in circumstances from 1965 to today: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, 557 U.S. at 202. Each of these new circumstances now place even covered jurisdictions well ahead of where non-covered jurisdictions were in 1965, and provide an ongoing political check against backsliding. The urgent necessity for extreme measures such as preclearance is thus well in the past, and such legislation is no longer appropriate even under the *McCulloch* standard. While "exceptional conditions can justify legislative measures not otherwise appropriate," *Katzenbach*, 383 U.S. at 334, when conditions cease to be exceptional, those same legislative measures cease to be appropriate.

Similarly, the coverage formula, while once plainly adapted to identifying affirmative barriers to voting, now is not even remotely adapted to that purpose. It is undisputed that first-generation barriers to voting are effectively eliminated, and the bulk of the claimed discrimination involves the alleged dilution of votes that are being cast. Pet. App. 22a-24a, 26a-27a. But such claimed dilution is not even remotely reflected in metrics such as voter registration and turnout, and consequently a remedy premised on low turnout – as measured by decades-old data – cannot be described as plainly adapted to implementing a prohibition on alleged discrimination having no relationship whatsoever to the metric. Indeed, to the extent there is a "correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout * * * [it] appears to be negative." Pet. App. 83a (Williams, J., dissenting); *see also id.* at 93a ("the covered jurisdictions appear indistinguishable from their covered peers.").

That covered jurisdictions now largely indistinguishable from uncovered peers are nonetheless the target for intrusive federal supervision is simply irrational and, given the absence of "relevant constitutional violations," such prophylactic legislation is not plainly adapted to enforcing the Reconstruction Amendments and cannot be held to satisfy even a standard based on *McCulloch*. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting); *cf. National Fed. Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2647 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (concluding that insurance coverage mandate was not "necessary" to effectuate insurance-market reforms).

Regardless of the test applied, therefore, the evidence and arguments raised by Petitioner and the dissent below are more than sufficient to demonstrate that Section 5 is no longer a valid exercise of Congress's enforcement power.

II. Highly Suspect Notions of Second-Generation Discrimination Provide Poor and Often Perverse Support for Claims of Unconstitutional Conduct Said to Justify the Extreme Remedy of Preclearance.

In addition to the many other failings of the record claimed to support the extension of Section 5, Congress's critical reliance on so-called second-generation barriers to voting is particularly troublesome in that the evidence of such supposed discrimination is largely composed of claims of vote dilution asserted by the Department of Justice in the context of redistricting. Pet. App. 99a (Williams, J., dissenting) (majority of Section 5 objections concern redistricting); Pet. App. 26a-28a (majority opinion below considering evidence of vote dilution claims and objections); Pet. Br. at 32 ("most of this scattered evidence relates to vote dilution"); Given the criteria applied by DOJ in order to find vote-dilution, and the overtly race-based remedies required by DOJ, such claims in fact offer little to no evidence of unconstitutional racial discrimination by the covered jurisdictions. Rather, they illustrate how Section 5 itself is now a central tool for institutionalized racial discrimination at the command of the DOJ itself.[4]

A. Vote Dilution Objections, Inquiries, and Related Matters Are Not Evidence of Unconstitutional Discrimination.

As the courts below recognized, Congress based its reauthorization on evidence of so-called "second-generation barriers" quite different from the direct voting discrimination that supported the original enactment of Section 5. *See* Pub. L. No. 109-246, § 2(b)(4), 120 Stat. 577, 577-78 (2006). Much of this evidence concerns "racially polarized voting" (*i.e.*, "block voting"), *see* H.R. REP. NO. 109-478 (2006), at 34-35, and the remainder consists of Section 2 vote dilution litigation. Pet. App. 26a-29a, 36a-38a.

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[4] Contrary to the court of appeals' suggestion that these issues are not properly in this case, Pet. App. 66a-67a, they go squarely to whether Congress has produced evidence of unconstitutional discrimination needing extraordinary remedy. The DOJ's demands, in the preclearance process, that covered jurisdictions actually engage in affirmative racial discrimination to create segregated voting districts likewise goes to the "appropriateness" of the means chosen to remedy or prevent any alleged constitutional violations by the covered jurisdictions. Pet. App. 77a (Williams, J., dissenting)

In particular, the evidence considered by the courts below included, *inter alia*, "Attorney General objections issued to block proposed voting changes," "more information requests" issued by the Attorney General in response to preclearance applications, and lawsuits brought under Section 2 of the Act. Pet. App. 24a (court of appeals opinion). The district court also considered evidence regarding, inter alia, voter turnout, electoral success, and racially polarized voting Pet. App. 11a-12a (court of appeals describing district court evidence).

As Petitioner has noted, preclearance objections, denials, and information requests are poor proxies for actual evidence of unconstitutional discrimination needing a remedy. Pet. Br. at 30. And, as Justice Thomas has noted, "second generation" evidence "bears no resemblance to the record initially supporting §5, and is plainly insufficient to sustain such an extraordinary remedy." *Northwest Austin*, 557 U.S. at 228 (Thomas, J.).

Aside from the inadequacy of such evidence, however, the fact that much of it involves a distorted notion of vote dilution also means that it is conceptually flawed. If DOJ's notion of vote dilution does not reasonably reflect unconstitutional racial discrimination, then no number of objections, information requests, suits or settlements will establish a sufficient record of constitutional violations to support Section 5. Indeed, the very foundation of modern vote dilution claims is no longer that some change is retrogressive – taking away voting power that already exists – but rather that voting changes are insufficiently progressive and fail to give minority groups *greater* voting strength through concentration in majority-minority districts. The racial stereotypes and assumptions underlying such theories regarding what voting strength different racial groups ought to have, what candidates racial groups prefer, and what constitutes race-based electoral success on the one hand or improper block voting on the other are all deeply offensive and undermine claims of discrimination by covered jurisdictions based on their failure to toe the line of DOJ's stereotypes, assumptions, and resulting preclearance policies.

The problems with vote dilution claims and remedies imposed under Section 5 have been noted often. Judge Williams below, for example, cited the "racial gerrymandering" that results from such efforts, which " 'bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes.' " Pet App. 109a (Williams, J., dissenting) (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993)).

That much of the evidence of supposed constitutional violations relies on the DOJ's application of precisely such stereotypes and racial assumptions when choosing to object to a voting procedure, seek more information, or support a Section 2 suit casts considerable doubt on the validity of such "evidence" as being probative of any actual constitutional violations by covered jurisdictions. Unlike the direct denials of the right to vote that originally motivated Section 5, claiming a denial of the right to vote based on supposedly insufficient voting strength and a lack of supposedly proper voting outcomes is freighted with assumptions regarding the "proper" or non-discriminatory *outcome* of elections, the proper distribution of votes, and stereotypes as to which candidates minority voters prefer. Such discrimination claims also lump minority voters into a group rather than treating them as individuals, fail to recognize differences among minority groups, and apply equally offensive stereotypes to the voters of the majority race. In short, it is hard to imagine how one would claim to find racial discrimination in this context without engaging in precisely the same discrimination in the process and in the remedy.

Given that the premises of modern vote dilution claims virtually require the types of racial stereotyping and discrimination that it is claiming to combat, DOJ's application of such stereotypes and premises is intrinsically flawed as evidence of discrimination by others. Section 2 suits and settlements designed to force an increase in majority-minority districts – without any showing of retrogression – cannot seriously be considered probative of *existing* discrimination. Forcing a covered jurisdiction to create additional racially concentrated voting districts may be a "success" to the DOJ, but it is more correctly characterized as a failure from the perspective of combating racial discrimination.

DOJ objections and information requests are likewise tainted by the DOJ's flawed notion that the failure to segregate and concentrate minority voters constitutes discrimination. Past objections in pursuit of DOJ's own discriminatory "'black-maximization' policy," *Miller* v. *Johnson*, 515 U.S. 900, 921 (1995), are evidence only of discrimination by the DOJ itself, not of discrimination by the covered jurisdiction seeking preclearance. The notion that preclearance could be denied because a jurisdiction only created two, rather than three, segregated districts to increase minority voting strength shows that such objections are better characterized as demands for unconstitutional discrimination rather than objections to discrimination. *Id.* at 924 ("The key to the Government's position, which is plain from its objection letters if not from its briefs to this court * * * , is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create [an additional] majority-minority district.").

That this Court has previously relied on DOJ objections and other such matters in assessing the need for Section 5 is no justification for continuing to do so now, given the changed nature of such objections. In the early years of Section 5, objections more often involved direct, first-generation, examples of discrimination and vote denial, and even intentionally discriminatory affirmative dilution of existing voting strength, not the dubious failure to turn the tables to the DOJ's liking. That an objection raised to a restrictive test for voting is probative of discrimination is one thing – that a complaint that covered jurisdictions failed to discriminate in the manner DOJ demands is quite another matter and is no longer meaningfully probative of any constitutional violations by the covered jurisdictions.

Finally, the implementation of DOJ's vote dilution agenda also undermines, or at least casts in a different light, more traditional evidence thought to show racial discrimination. Racially polarized voting, for example, was cited by Congress as the "clearest and strongest evidence" of the need to reauthorize Section 5, H.R. REPORT NO. 109-478, at 34; VRARAA, §2(b)(3), 120 STAT. at 577. Aside from the fact that such voting is not government action, and hence not a constitutional violation, *see* Pet. Br. at 31, DOJ's vote-dilution views and conduct actually treat block voting somewhat schizophrenically. Block voting by minority groups, for example, is effectively favored and encouraged, and if successful would be taken as evidence that discrimination has been *defeated*. After all, that would seem to be the entire purpose of majority-minority districts: allowing minority voters to racially block vote in order to obtain a "successful" and, in DOJ's view, non-discriminatory outcome of electing a minority office-holder. That the identical conduct by non-minority voters is deemed evidence of unconstitutional discrimination requiring Congressional remedy shows the contradictions in very premises of the evidence cited.[5]

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[5] Furthermore, the fact that DOJ's objections and compulsion of more majority-minority districts in fact creates the conditions for and encourages racially polarized voting means that the supposed remedy simply manufactures the very evidence used to justify its extension. Section 5 as it now stands is effectively self-perpetuating if such evidence is sufficient to sustain it.

The prevalence of minority office-holders likewise takes on a different relevance when viewed in light of the stereotypes underlying current vote dilution arguments. To deem insufficient minority office-holders as evidence of discrimination requires racially stereotyped assumptions about what minority voters as a group "prefer," how many office-holders is the correct amount, and whether there needs to be proportional representation in order to demonstrate non-discrimination. Such assumptions and arguments are reminiscent of the debate over quotas in the context of affirmative action, and are offensive for much the same reasons. Looking at electoral *outcomes* rather than electoral opportunity is simply the wrong metric and one that promotes the very discrimination the Constitution seeks to eliminate.

Furthermore, there is reason to believe that the DOJ's own policies may well account for the difficulty faced by minority office-holders seeking state-wide office. If

> one thinks there has been a shortfall in the covered states, it might be caused in part by the Justice Department's policy of maximizing majority-minority districts, with the concomitant risks of "isolating minority voters from the rest of the State" and "narrowing [their] political influence to only a fraction of political districts." *Georgia v. Ashcroft*, 539 U.S. 461, 481, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003). If African-American candidates primarily face solidly African-American constituencies, and thus develop political personas pitched overwhelmingly to the Democratic side of the aisle,

> it would hardly be surprising that they might face special obstacles seeking statewide office (assuming, of course, racially-polarized voting, as § 5 does).

Pet. App. 86a (Williams, J., dissenting).

The flaws in identifying supposed unconstitutional discrimination through the lens of the DOJ's vote-dilution policies are pervasive and infect much of the evidence cited by Congress and the Courts below. Those flaws, however are conceptual, not merely matters of weight or credibility. DOJ is looking at the wrong thing and inverting the very notion of discrimination such that many of its objections very nearly mean the opposite of what the courts below have taken them to mean. Such Orwellian "proof" of discrimination cannot be sufficient to support the constitutionally extreme Section 5 remedy.

B. Federal Use of Section 5 to Compel Race-Based Redistricting Demonstrates that Section 5 Is Perversely Inappropriate to Enforce Prohibitions Against Racial Discrimination.

In addition to undermining the evidence relied upon below, DOJ's use of Section 5 to compel racial discrimination and voting segregation also shows that the supposed remedy is a severely inappropriate means of enforcing a prohibition against such discrimination, and is in conflict with the letter and spirit of the Constitution.

As this Court has often noted, the right to Equal Protection vests solely in the individual, not in a group. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). And government use of race is always "suspect" and should be viewed with "hostility." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995).

Section 5 preclearance now focuses predominately on imposing racial classifications rather than eliminating them, as this Court has recognized. Preclearance in the redistricting context now effectively requires such jurisdictions to segregate voters by race in order to concentrate minority votes and supposedly increase the weight of such votes. *See Northwest Austin*, 557 U.S. at 203 (noting preclearance requirements of using race in redistricting in a manner that would be unconstitutional in other jurisdictions); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (application of Section 5 has rendered race "the predominant factor in redistricting"; "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (Section 5 preclearance required, in effect, that minority voters be lumped together with other persons with whom they "may have little in common * * * but the color of their skin"; such redistricting perpetuates and enforces "impermissible stereotypes" and "bears an uncomfortable resemblance to political apartheid.").

While this Court has delicately suggested that Section 5 is thus in "tension with the Fourteenth Amendment" to the extent that it was used as a "command that States engage in presumptively unconstitutional race-based districting," *Miller*, 515 U.S. at 927, the reality is that it is more than "in tension" with the prohibitions against racial discrimination, it is in flagrant violation of those prohibitions.

Congress's 2006 amendments to Section 5 have ensured that this conflict continues. Under the amended Section 5, covered jurisdictions must prove that any change will not "diminish[ ] the ability" of minorities "to elect their preferred candidates of choice," 42 U.S.C. §§ 1973c(b),(d), and is not premised on a "discriminatory purpose" of declining to adopt other changes that would have strengthened minority voting power, § 1973c(c). As Judge Williams recognized in dissent below, that revised language means that "[p]reclearance now has an exclusive focus – whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their preferred candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration – and thus less of the political isolation that concentration spawns." Pet. App. 75a (Williams, J., dissenting); *see also id.* at 76a ("Congress appears to have * * * restored 'the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting.' " (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier II*")).

That Section 5 has become a tool for requiring racial classifications and race-based redistricting illustrates how far this remedy has fallen from the more noble purposes that animated it in 1965. This Court has just considered the inappropriate classifications of persons based on their race in the context of college admissions, and should keep in the forefront of its considerations here the extreme offensiveness of such classifications.

"Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw* v. *Reno,* 509 U.S. at 643 (quoting *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943)). As this Court repeatedly has warned in various contexts, such classifications "carry a danger of stigmatic harm," may "promote notions of racial inferiority," and threaten "to incite racial hostility." *City of Richmond* v. *J.A.Croson Co.,* 488 U.S. 469, 493 (1989); *Shaw,* 509 U.S. at 643. Political gerrymandering of the electorate based on race also highlights the improper treatment of minority voters as fungible members of their racial group, rather than as individuals: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice* v. *Cayetano,* 528 U.S. 495, 517 (2000).

Any claim that such racial segregation helps minority voters by increasing the weight or strength of their votes as a group carries no constitutional weight – at least no favorable weight. Rather, it highlights the group-stereotyping that is much of what is offensive about racial discrimination. Furthermore, there is no equal protection exception for the "good motives" of a government actor and there are no "benign" racial classifications. *Adarand,* 515 U.S. at 226. Throughout history proponents of racial classifications routinely justified their restrictions with appeals to the public good and claims of the great benefits from or necessity for racial classifications.

In *Brown* v. *Board of Education,* 347 U.S. 483 (1964), this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia, and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate.

Similar claims of public interest and necessity were used by the military to justify Japanese internment during World War II, and racial segregation of the armed forces. *Korematsu* v. *United States,* 323 U.S. 214 (1944); *see Watkins* v. *United States Army,* 875 F.2d 699, 729 (CA9 1989) (Norris, J., concurring in the judgment) ("As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."), *cert. denied,* 498 U.S. 957 (1990). Those claims, too, proved overblown, unsupported, and inadequate to justify the racial policies of their day. *Hirabayashi* v. *United States,* 828 F.2d 591 (CA9 1987); *See Korematsu* v. *United States,* 584 F. Supp. 1406, 1416, 1420 (N.D. Cal. 1984).

This Court should recoil at the very notion of approving government authority perversely used to manufacture racially segregated majority-minority voting districts under the false flag of enforcing prohibitions on such discrimination. Substitute "schools" or "neighborhoods" for "voting districts," and there would be no question that government-manufactured segregation of minorities constituted racial discrimination of the worst sort. But in the Orwellian universe of the DOJ and Section 5, the *failure* to engage in such racial segregation is now evidence of "discrimination," and coerced racial segregation for voting purposes is now the supposed remedy. Whatever the supposed benefits, virtues, or aesthetics of segregated voting districts, they no more validate such overt and express racial discrimination than did past defenses of government mandated racial segregation in schools or elsewhere. Separate-but-politically-desirable is no more compelling an argument than was separate-but-equal.

In the end, Section 5 is now less a means of preventing unconstitutional racial discrimination and more a mechanism for causing it. As such, it is now the precise antithesis of legislation "appropriate" to enforce the Reconstruction Amendments, it is not a "proper" means of executing Congress's enforcement power, and it is not consistent with the letter and spirit of the Constitution. The current reauthorization of Section 5 thus is not a valid exercise of Congress's enforcement power and should be invalidated.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

- I. UNDER THE RECONSTRUCTION AMENDMENTS, CONGRESS'S EXERCISE OF ITS ENFORCEMENT AUTHORITY MUST BE JUSTIFIED BY THE EVIDENCE BEFORE CONGRESS AT THE TIME OF LEGISLATIVE ACTION. 6
- II. THE COURT OF APPEALS ERRED BY RELYING ON POST-ENACTMENT EVIDENCE TO UPHOLD THE RENEWAL OF SECTION 5. 18

CONCLUSION 26

TABLE OF AUTHORITIES

CASES **Page(s)**

Bd. of Trustees of the Univ. of Ala. v. *Garrett*,
531 U.S. 356 (2000)................................3, 4, 13, 14

Bruesewitz v. *Wyeth LLC*,
131 S. Ct. 1068 (2011)..7

City of Boerne v. *Flores*,
521 U.S. 507 (1997)................................2, 4, 18, 25

City of Rome v. *United States*,
446 U.S. 156 (1980)..8

Coleman v. *Court of Appeals of Md.*,
132 S. Ct. 1327 (2012)..................................15, 16

Doe v. *Reed*, 130 S. Ct. 2811 (2010)..........................23

Employment Div. v. *Smith*,
494 U.S. 872 (1990)..18

Fla. Prepaid Postsecondary Educ. Expense Bd. v. *College Savings Bank*,
527 U.S. 627 (1999)....................................2, 16, 18

Katzenbach v. *Morgan*,
384 U.S. 641 (1966)....................................2, 10, 11

Kelo v. *City of New London*,
545 U.S. 469 (2005)..1

Kimel v. *Fla. Bd. of Regents*,
528 U.S. 62 (2000)...17, 18

Nev. Dep't of Human Resources v. *Hibbs*,
538 U.S. 721 (2003)..................3, 14, 15, 22, 23, 25

Nw. Austin Mun. Util. Dist. No. 1 v. *Holder*,
129 S. Ct. 2504 (2009)...............................3, 8, 9, 24

Nw. Austin Mun. Util. Dist. No. 1 v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) 9, 10

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 2, 13

Shelby Cnty. v. *Holder*, 270 F.R.D. 16 (D.D.C. 2010) 10

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 6, 7, 10

Tennessee v. *Lane*, 541 U.S. 509 (2004) 13, 14, 21, 22, 23, 25

U.S. Dep't of Health & Human Services v. *Florida*, No. 11-398 1

United States v. *Bd. of Comm'rs of Sheffield*, 435 U.S. 110 (1978) 6

United States v. *Louisiana*, 363 U.S. 1 (1960) 3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIII, § 2 2

U.S. Const. amend. XIV, § 5 .... *passim*

U.S. Const. amend. XV, § 2 .... *passim*

STATUTES

29 U.S.C. § 2612(a)(1)(C) 14

29 U.S.C. § 2612(a)(1)(D) 15

29 U.S.C. § 2617(a)(2) 15

42 U.S.C. § 12111 13

42 U.S.C. § 12131 13

42 U.S.C. § 1973b(a)(1) 20

OTHER AUTHORITIES

Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Fed. Courts in Sch. Desegregation Litig., 6 Op. O.L.C. 1 (1982) 12

Paul Taylor, Pew Research Center, *The Growing Electoral Clout of Blacks Is Driven by Turnout, Not Demographics* (Dec. 26, 2012)..24

BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Reason Foundation ("the Foundation") is a national, nonpartisan, and nonprofit public policy think tank. The Foundation's mission is to advance a free society by promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. The Foundation supports market-based public policies that allow individuals and voluntary institutions to flourish.

The Foundation advances its mission by publishing *Reason* magazine, commentary on its websites, and policy research reports. It has also participated as *amicus curiae* in significant cases involving issues of individual rights and the rule of law, including *United States Department of Health & Human Services* v. *Florida*, No. 11-398, and *Kelo* v. *City of New London*, 545 U.S. 469 (2005).

This case raises just such an issue. The Court of Appeals' holding—that the 2006 reauthorization of Section 5 of the Voting Rights Act was a valid exercise of Congress's authority to enforce the Fifteenth Amendment—relied heavily on evidence created *after* Congress reauthorized Section 5. Such post-hoc rationalizing is forbidden by this Court's precedents. A judicial system that tolerates this form of post-hoc analysis would undermine the predictability necessary to the rule of law, which fosters the only conditions in which individual liberty can flourish.

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[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of this Court. Pursuant to this Court's Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT

To ensure that the promises enshrined in the Reconstruction Amendments did not become empty words, the drafters of those Amendments granted Congress "power to enforce" their provisions "by appropriate legislation."[2] Those new founts of congressional authority "'expand[ed] federal power at the expense of state autonomy,'" thereby "'fundamentally alter[ing] the balance of state and federal power struck by the Constitution.'" *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627, 637 (1999) (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 59 (1996)). But the Reconstruction Amendments did not fundamentally alter the distinct separation of powers between Congress and the judiciary. For example, the Amendments gave Congress "the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*

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[2] These words appear in Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment. Although the three provisions contain other minor textual differences, they are essentially identical, and give Congress "similar power." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). As discussed in Section I below, this Court has used the same framework to analyze the constitutionality of laws passed under the Fourteenth and Fifteenth Amendments' grants of congressional enforcement authority.

v. *Flores*, 521 U.S. 507, 519 (1997). The latter responsibility remains vested in Article III courts alone. *See Bd. of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2000) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").

This Court thus must ensure that legislation Congress passes under its authority "to enforce" the Reconstruction Amendments accords with "the fundamental principle of equal sovereignty" inherent in our federal system. *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2512 (2009). This is particularly true for legislation that constitutes "federal intrusion into sensitive areas of state and local policymaking," which "imposes substantial federalism costs," *id.* at 2511 (internal quotation marks omitted), or that "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty,'" *id.* at 2512 (quoting *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960)).

This Court determines the validity of an exercise of Congress's enforcement authority by applying a three-part test. "The first step . . . is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, a court must "examine whether Congress identified a history and pattern of unconstitutional [action] by the States." *Id.* at 368. This step requires careful review of the legislative record supporting the challenged act because "[t]he charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture." *Nev. Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 748 (2003) (Kennedy, J., dis.). Third, upon confirming that Congress amassed evidence in the legislative record showing a "pattern of unconstitutional discrimination," *Garrett*, 531 U.S. at 370, a court assesses whether the legislation "exhibit[s] 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" *id.* at 365 (quoting *City of Boerne*, 521 U.S. at 520).

SUMMARY OF ARGUMENT

This Court bears the responsibility of ensuring that legislation enacted under Congress's authority "to enforce" the Reconstruction Amendments does not change constitutional rights or unduly interfere with State sovereignty. The Court historically has executed that duty by assessing challenged laws under a three-part test. This brief focuses on the second part of that test, which requires analyzing the legislative record at the time the challenged law was passed to determine whether Congress had identified a history and pattern of unconstitutional discrimination by the States. Under the Court's precedents, only a record containing such a showing can justify an exercise of Congress's enforcement authority.

The Court has applied that test to assess the constitutionality of, among other statutes, the Voting Rights Act of 1965 (and certain amendments to it), the Religious Freedom Restoration Act, and abrogations of State sovereign immunity in the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and the Age Discrimination in Employment Act. Each case scrutinized the pre-enactment legislative record to determine whether Congress had amassed evidence of a pattern of constitutional violations by the States warranting the corresponding exercise of enforcement authority. The Court's requirements on this issue are clear, and the federal district courts and the Executive Branch have repeatedly followed them with no apparent difficulty.

But in this case, the Court of Appeals relied in significant part on two sets of evidence created *after* 2006 to support its judgment, that the 2006 reauthorization of Section 5 of the Voting Rights Act was a constitutionally valid exercise of Congress's authority to enforce the Fifteenth Amendment. That approach cannot be reconciled with this Court's precedents requiring analysis of the evidentiary record *at the time* of legislative activity. Left unchecked, that approach may require the States—coordinate sovereigns—to endure years-long lawsuits to learn the post-hoc rationales allegedly justifying federal intrusion into their sovereign spheres. That approach also would allow repeated challenges to statutes enacted under Congress's enforcement authority any time "new" evidence emerged that could be construed to undermine Congress's reasoning.

Section I below reviews in detail this Court's precedents requiring a court to examine the evidence of discrimination that Congress compiled *before* legislating to enforce the Reconstruction Amendments. Section II examines the Court of Appeals' improper—yet crucial—reliance on post-enactment evidence to confirm the validity of Section 5's 2006 reauthorization.

This Court should reject the Court of Appeals' approach. It should assess the constitutionality of Section 5's 2006 reauthorization solely based on the record of unconstitutional State discrimination that Congress had compiled in 2006.

ARGUMENT

I. UNDER THE RECONSTRUCTION AMENDMENTS, CONGRESS'S EXERCISE OF ITS ENFORCEMENT AUTHORITY MUST BE JUSTIFIED BY THE EVIDENCE BEFORE CONGRESS AT THE TIME OF LEGISLATIVE ACTION.

A. 1. Congress passed the Voting Rights Act of 1965 under its Fifteenth Amendment enforcement authority in order "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century" before its passage. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). "The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *Id.* at 315. Section 5 is one of the Act's remedies: it requires certain jurisdictions to pre-clear changes to their voting regulations through federal authorities, who are charged with ensuring that such changes do not "perpetuate voting discrimination." *Id.* at 316. Section 5 is thus "a substantial departure from . . . ordinary concepts of our federal system" that "significant[ly]" and "undeniabl[y]" encroaches "on state sovereignty." *United States* v. *Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dis.) (internal quotation marks omitted).

This Court has repeatedly assessed whether Section 5 is a facially valid exercise of Congress's authority "to enforce" the Fifteenth Amendment by examining the evidence of intentional State discrimination in voting that Congress had amassed *before* passing (or reenacting) that provision.[3]

In *Katzenbach*, this Court acknowledged that Section 5 was an "uncommon exercise of congressional power." *Id.* at 334. The Court nevertheless sustained Section 5 because its preclearance requirements "responded" to evidence in the legislative record of "exceptional conditions," *id.*, by which "Congress *knew* that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," *id.* at 335 (emphasis added). Congress thus "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.* "Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner" by enacting Section 5, *id.*—a "legislative measure[] otherwise not appropriate," *id.* at 334.

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[3] Indeed, reliance on post-enactment developments—as the Court of Appeals relied here—is inconsistent with even the most expansive approach to legislative history. *See, e.g.*, *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081–82 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition could have had no effect on the congressional vote." (internal quotation marks and citations omitted)).

Similarly, when the City of Rome, Georgia brought a facial challenge to Congress's 1975 decision to extend Section 5 for seven years, the Court relied on evidence before Congress in 1975—at the time of legislative action—to reject the challenge. *City of Rome* v. *United States*, 446 U.S. 156 (1980). The Court cited Congress's conclusion that "extension of the Act was warranted" because of record evidence documenting persistent disparities in voter registration among racial groups and small increases in the number of minority elected officials. *Id.* at 180–81. The Court also expressly observed that Congress had "careful[ly] consider[ed]" whether to "readopt[] § 5's preclearance requirement." *Id.* at 181. The legislative history contained Congress's finding that Section 5 had "become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." *Id.* at 181 (internal quotation marks omitted). "After examining" the evidence before it in 1975, "Congress not only determined that § 5 should be extended for another seven years," but also concluded that the legislative record "clearly [established] the continuing need for this preclearance mechanism." *Id.* (internal quotation marks omitted).

This Court's most recent opinion addressing a facial challenge to Section 5 invoked the doctrine of constitutional avoidance and resolved the case on statutory grounds. *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2508 (2009). Nevertheless, *Northwest Austin*'s analysis comports entirely with *Katzenbach* and *City of Rome*. The Court noted "unquestionabl[e] improve[ment]" in "[s]ome of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome*." 129 S. Ct. at 2511. "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.* But the Court also left no doubt that "[p]ast success alone" could not constitute "adequate justification to retain the preclearance requirements." *Id.* Rather, because "the Act imposes current burdens," it "must be justified by current needs." *Id.* at 2512. The Court specifically highlighted "[t]he statute's coverage formula"—which "is based on data that is now more than 35 years old"—as one example where "considerable evidence" suggests that the 2006 reauthorization of the Voting Rights Act "fails to account for current political conditions." *Id.* at 2512. *Northwest Austin* thus endorses this Court's requirement that Section 5's validity be assessed in light of the "current needs" documented in the pre-enactment legislative record.

Following the Court's approach in *Katzenbach* and *City of Rome*, the three-judge district court panel in *Northwest Austin* framed the "precise questions" before it in these terms: "[H]ow do the nature and magnitude of the racial discrimination in voting *revealed in the 2006 legislative record* compare to the conditions documented by Congress in 1975, and is *the 2006 record* sufficiently comparable to the 1975 record for us to conclude that Congress again acted rationally when it extended section 5 for another twenty-five years?" *Nw. Austin Mun. Util. Dist. No. 1* v. *Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008) (emphasis added). Because the district court expressly recognized that its "review is limited to *the actual evidence Congress considered*," it refused to consider post-enactment evidence proffered by the

Attorney General when it assessed Section 5's constitutionality. *See id.* (emphasis added).[4]

2. This Court has also resolved facial challenges to the Voting Rights Act's other provisions by examining pre-enactment evidence. *Katzenbach* upheld Section 4(b)'s coverage formula because "Congress began work *with reliable evidence* of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act," 383 U.S. at 329 (emphasis added), including "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average," *id.* at 330. Section 4(b)'s coverage formula was thus "rational[]" because it covered all States and political subdivisions "in which *the record reveals* recent racial discrimination involving tests and devices." *Id.* at 331 (emphasis added). *See also id.* at 333–34 (upholding Section 4(a), which suspended voting-qualification tests, because "*[t]he record shows*" that "various tests and devices" had been used for discriminatory purposes) (emphasis added).

Katzenbach v. *Morgan*, 384 U.S. 641 (1966), upheld Section 4(e), which provided that any person "educated in American-flag schools in which the predominant classroom language was other than English" could vote without completing an English-language literacy test. § 4(e)(1). Noting that this provision was primarily intended to protect the franchise for Puerto Rican immigrants in New York, the Court held that the legislative record "plainly" supported Congress's conclusion that Section 4(e)'s ban on literacy tests was an appropriate method of enforcing the Equal Protection Clause. *Id.* at 653.

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[4] That reasoning formed the basis for the District Court's order in this case denying the Attorney General's request for discovery into Shelby County's claim that Section 5 is facially unconstitutional. Such discovery was not warranted because the "court's analysis [was] limited to the actual evidence Congress considered." *Shelby Cnty.* v. *Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) (internal quotation marks omitted).

B. The Executive Branch also has acknowledged that Voting Rights Act cases require Congress to exercise its enforcement authority based on pre-enactment evidence showing a pattern of constitutional violations. In *Northwest Austin*, the Attorney General expressly asked the three-judge district court panel to "assess the continuing validity of Section 5's preclearance mechanism *in light of the record of voting rights violations Congress amassed in support of the 2006 reauthorization*." Mem. in Supp. of Def.'s Mot. for Summ. J. at 12, *Nw. Austin Mun. Util. Dist. No. 1* v. *Mukasey*, No. 06-cv-1384 (D.D.C. May 15, 2007) (emphasis added). He also explained that "[i]n keeping with the Supreme Court's approach in *City of Rome*, this Court must determine whether the ongoing *record of voting discrimination Congress amassed in 2006* was sufficient to justify Congress's decision to extend the life of Section 5." Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. at 14, *Nw. Austin Mun. Util. Dist. No. 1* v. *Mukasey*, No. 06-cv-1384 (D.D.C. June 15, 2007) (emphasis added).

To be sure, a different person now serves as Attorney General; and the Department of Justice now advocates a different view. *See* Opp. to Pet. for Cert. at 21 n.4, 26 n.7. But the Executive Branch's position in *Northwest Austin* accords with published Executive Branch guidance dating back at least 30 years. In 1982, for example, the Attorney General issued an opinion on the constitutionality of proposed legislation that would have stripped federal district courts of jurisdiction to order out-of-area busing in order to remediate racial segregation in schools. *See* Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Fed. Courts in Sch. Desegregation Litig., 6 Op. O.L.C. 1 (1982). In analyzing whether that bill would have been a permissible exercise of Congress's Fourteenth Amendment enforcement authority, the Attorney General cited *Katzenbach* and *City of Rome* to conclude that "Congress may enact statutes to prevent or to remedy situations which, *on the basis of legislative facts*, Congress determines to be violative of the Constitution." *Id.* at 7 (emphasis added). He further observed that "federal and state courts would probably pay considerable deference to the *congressional factfinding upon which the bill is ultimately based* in determining the scope of constitutional requirements in this area." *Id.* at 7–8 (emphasis added).

C. Congress also has invoked its Reconstruction Amendment enforcement authority to pass other statutes. This Court has resolved constitutional challenges to those statutes by applying the same three-step framework discussed above. In many instances, the Court's assessment of the challenged law's validity turned on whether Congress had amassed a sufficient pre-enactment record of unconstitutional State discrimination.

Two cases regarding different provisions in the Americans with Disabilities Act of 1990 (ADA) illustrate the point. Broadly speaking, the ADA is designed to eliminate discrimination against persons with disabilities. Title I prohibits discrimination in employment by certain employers, including the

States. *See generally* 42 U.S.C. §§ 12111–12117. Title II "prohibits any public entity from discriminating against 'qualified' persons with disabilities in the provision or operation of public services, programs, or activities." *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004) (citing 42 U.S.C. §§ 12131–12134). Both of those Titles contain provisions purporting to waive the States' immunity under the Eleventh Amendment, manifesting Congress's intent that the States should be liable for money damages if they discriminate against persons with disabilities in violation of those Titles. But because Congress cannot waive the States' Eleventh Amendment immunity using its Article I powers, *see Seminole Tribe*, 517 U.S. at 72–73, the ADA's waivers were constitutional only if they were legitimate exercises of Congress' authority to enforce Section 5 of the Fourteenth Amendment.

This Court applied *Katzenbach*'s test to hold that Title I's sovereign immunity waiver was not a valid exercise of Congress's Section 5 authority. *Bd. of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2000). *Garrett* observed that Congress had "simply fail[ed]" to "in fact identify" in "the legislative record of the ADA" a "pattern of irrational state discrimination in employment against the disabled." *Id.* at 368. Even the fact that Congress cited a "half dozen" record examples of State discrimination in employment against persons with disabilities failed to justify Title I's sovereign immunity waiver, *id.* at 369; those "incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Id.* at 370. Particularly noteworthy was this Court's refusal to credit evidence cited by the dissent because it "consist[ed] not of legislative findings, but of unexamined, anecdotal accounts of adverse, disparate treatment by state officials." *Id.* (internal quotation marks omitted).

In contrast, *Lane* concluded that the legislative history of Title II—more particularly, the legislative history regarding "the right of access to the courts at issue in this case," which was "protected by the Due Process Clause," 541 U.S. at 523—justified Title II's distinct waiver of sovereign immunity. "With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities." *Id.* at 527. The specific record evidence included a "report *before Congress* show[ing] that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities," and testimony presented to "Congress itself" by "persons with disabilities who described the physical inaccessibility of local courthouses." *Id.* (emphasis added). Such evidence allowed the Court to "conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533–34.

The Court employed identical reasoning in two opinions concerning the Family and Medical Leave Act of 1993 (FMLA). The FMLA "entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons." *Nev. Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 724 (2003). They include "the onset of a 'serious health condition' in an employee's spouse, child or parent," *id.* (quoting 29 U.S.C. § 2612(a)(1)(C)), or the onset of "the employee's own serious health condition when the condition interferes with the employee's ability to perform at work," *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1332 (2012) (citing 29 U.S.C. § 2612(a)(1)(D)). The FMLA purports to abrogate the States' Eleventh Amendment immunity for State violations of § 2612(a)(1)(C)'s "family-care" provision and § 2612(a)(1)(D)'s "self-care" provision. *See* 29 U.S.C. § 2617(a)(2).

This Court held in *Hibbs* that the sovereign-immunity waiver for a State's violation of the "family-care" provision was a valid exercise of Congress's authority to enforce the Fourteenth Amendment's Equal Protection Clause. In so doing, *Hibbs* relied on "evidence that was *before Congress when it enacted the FMLA*" to show that Congress had learned that "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." 538 U.S. at 730 (emphasis added). Such evidence included a 1990 Bureau of Labor Statistics survey and congressional testimony showing maternity leave to be more broadly available than paternity leave, thereby reinforcing "stereotype-based beliefs about the allocation of family duties." *Id.* at 730–34.

Employing a similar analysis, the Court in *Coleman* held that Congress had not validly waived State sovereign immunity for State violations of the FMLA's self-care provision. The Court observed that the legislative record lacked "evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." *Coleman*, 132 S. Ct. at 1334. For example, nothing in the record before Congress suggested that "States had facially discriminatory self-care leave policies or that they administered neutral self-care leave policies in a discriminatory way." *Id.* Neither was the immunity waiver for the self-care provision justified as a "necessary adjunct to the family-care provisions," *id.* at 1335; indeed, "Congress made no findings and did not cite specific or detailed evidence to show how the self-care provision is necessary to the family-care provisions or how it reduces an employer's incentives to discriminate against women." *Id.* at 1336. The legislative record at the time of the FMLA's enactment thus revealed "no sufficient nexus, or indeed any demonstrated nexus, between self-care leave and gender discrimination by state employers." *Id.* at 1337.

In two other cases, this Court relied on the lack of evidence of unconstitutional discrimination in the pre-enactment legislative record to reject Congress's attempts to abrogate the States' sovereign immunity using its Reconstruction Amendment enforcement power. The Court held that the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act)—which purported to make States liable for patent infringement—was not a valid exercise of Congress's enforcement authority. *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999). "In enacting the Patent Remedy Act, . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 640. "The legislative record thus suggests that the Patent Remedy Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic § 5 legislation." *Id.* at 645 (internal quotation marks omitted).

Similarly, the Court held that Congress exceeded its enforcement authority by purporting to abrogate the States' sovereign immunity for violations of the Age Discrimination in Employment Act (ADEA). *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000). "Our examination of the ADEA's legislative record confirms" that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. The evidence that petitioners had cited to try to make that showing—which "consist[ed] almost entirely of isolated sentences clipped from floor debates and legislative reports"—fell "well short of the mark." *Id.* The Court also rejected petitioners' "reliance on a 1966 report by the State of California on age discrimination in its public agencies" because it did "not indicate that the State had engaged in any *unconstitutional* age discrimination." *Id.* at 90. Even if that report had established a pattern of unconstitutional discrimination by *California's* agencies, that "would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union" because it did "not constitute evidence that [unconstitutional age discrimination] had become a problem of national import." *Id.* at 90 (internal quotation marks omitted). "A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id.* at 91. "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.*

The Court also held that Congress had not validly exercised its enforcement authority when it enacted the Religious Freedom Restoration Act (RFRA). *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). RFRA constituted Congress's attempt to overrule this Court's holding in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne*, 521 U.S. at 514. In striking down RFRA, the Court highlighted the "instructive" comparison "between RFRA and the Voting Rights Act." *Id.* at 530. "[T]he record which confronted Congress and the Judiciary in the voting rights cases" "contrast[ed]" markedly with "RFRA's legislative record," which "lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530. *See also Fla. Prepaid*, 527 U.S. at 639 ("RFRA failed to meet this test because there was little support in the record for the concerns that supposedly animated the law.").

II. THE COURT OF APPEALS ERRED BY RELYING ON POST-ENACTMENT EVIDENCE TO UPHOLD THE RENEWAL OF SECTION 5.

A. The Court of Appeals based its holding that Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets," App. to Pet. for Cert. 48a (internal quotation marks omitted), in part on two pieces of post-enactment evidence. This error was critical. The Court of Appeals itself characterized the question "whether the record contains sufficient evidence to demonstrate that the [coverage] formula continues to target jurisdictions with the most serious problems" as "a close question," *id.* at 58a—even *with* the post-enactment evidence buttressing its analysis. That acknowledgment underscores that post-enactment evidence infected the Court of Appeals' analysis on an essential part of the legal test.

First, the Court of Appeals relied on a supplemental declaration from Justice Department historian Dr. Peyton McCrary. This declaration is located in Appendix G of the Joint Appendix. *See* JA 144a–155a. The declaration purports to provide a nationwide tally—from both jurisdictions covered by Section 5 and jurisdictions not subject to its constraints—of published and unpublished "successful" cases under Section 2 of the Voting Rights Act. App. to Pet. for Cert. 51a. (Section 2 "enables individuals to bring suit against any state or jurisdiction to challenge voting practices that have a discriminatory purpose or result." *Id.* at 5a.) According to the Court of Appeals, these data show a "striking" "concentration of successful section 2 cases in the covered jurisdictions," which Dr. McCrary argued evinces a continuing need for Section 5's preclearance requirements in covered jurisdictions. *Id.* at 51a. This analysis was performed during this litigation, based in part on extra-record data gathered by different persons using unknown collection methods. *See id.* at 54a. This declaration clearly was not before Congress in 2006.

Second, the Court of Appeals reasoned that the propriety of Section 5's "disparate geographic coverage" should be assessed in light of "the statute as a whole, including its provisions for bail-in and bail-out." *Id.* at 61a. (The Voting Rights Act's "bail-out" provisions permit "jurisdictions originally covered" to "escape section 5 preclearance by demonstrating a clean record on voting rights for ten years in a row." *Id.* at 63a (citing 42 U.S.C. § 1973b(a)(1) (listing bail-out criteria)). According to the Court of Appeals, the bail-out mechanism plays an "important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting" because it "reduce[s] the possibility of overbreadth and helps to ensure Congress' means are proportionate to [its] ends." *Id.* at 62a (internal quotation marks omitted). The Court of Appeals thus relied on data showing that "[a]s of May 9, 2012, having demonstrated that they no longer discriminate in voting, 136 jurisdictions and sub-jurisdictions had bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts." *Id.* at 62a. Critically, the Court noted that "the pace of bailout increased after *Northwest Austin*" made bail-out available to any type of covered jurisdiction: "of the successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court issued its decision in 2009." *Id.* at 63a. These post-*Northwest Austin* bail-out data also were not before Congress in 2006.

Those two data sets should have played no role in the Court of Appeals' analysis of Congress's decision to reauthorize Section 5. Under *Katzenbach* and its progeny, courts assess the constitutional validity of such exercises of Congress's authority "to enforce" the Reconstruction Amendments based on whether the legislative record on the date of enactment showed a history and pattern of unconstitutional State discrimination. As the Court of Appeals necessarily recognized, both the McCrary analysis of unpublished Section 2 litigation in uncovered jurisdictions—and the evidence of bail-out since *Northwest Austin*—were created well after 2006. Accordingly, that information was not evidence showing a pattern of unconstitutional discrimination in 2006; thus it could not have justified Congress's 2006 reauthorization of Section 5. This evidence is legally irrelevant to the question presented, and the Court of Appeals erred. This Court should not rely on post-enactment data in resolving Shelby County's facial challenge to Section 5.[5]

B. Neither should the Court countenance the Court of Appeals' explanation for considering the McCrary data even though it was not part of the legislative record. The Court of Appeals knew that *Katzenbach* and its progeny turned on the record before Congress at the time of legislation, but sought to excuse its departure from precedent by a tortured reading of *Lane*. It reasoned that "the Supreme Court has considered post-enactment evidence to find at least one law congruent and proportional, *see Lane*, 541 U.S. at 524–25 nn. 6–9 & 13, and here a majority of the unpublished cases from non-covered jurisdictions (as well as all from covered jurisdictions) appears in the legislative record." *Id.*

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[5] Because, as shown above, the post-enactment data should be rejected on purely legal grounds, this Court need not consider the methodological or statistical anomalies that led the Court of Appeals, for example, "to approach this [McCrary] data with caution." *Id.* at 54a; *see also id.* at 93a (Williams, J., dis.). If this Court were to consider those post-enactment materials, their anomalies provide a fact-specific basis for rejecting them. And—for the reasons discussed in Shelby County's brief—those post-enactment materials fail in any event to sustain the 2006 reauthorization of Section 5. *See* Petr.'s Br. 52–54.

at 54a (parenthetical omitted). The Court also stated that "Shelby County has identified no errors or inconsistencies in the data analyzed by McCrary." *Id.*

First, the evidence in *Lane* cited by the Court of Appeals did not concern the "particular services at issue" in *Lane*, 541 U.S. at 527—"the right of access to the courts," *id.* at 523. Rather, that evidence (and the discussion it supported) sketched a general overview of "harm that Title II [of the ADA] is designed to address."[6] *Id.* at 524. Accordingly, those portions of *Lane* are dicta that provide no basis for the Court of Appeals' departure from the uniform rule explained in Section I.[7]

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[6] The evidence that this Court actually cited "[w]ith respect to the particular services at issue in" *Lane* consisted principally of "a report *before Congress*" and pre-enactment testimony to Congress "from persons with disabilities," both of which "described the physical inaccessibility of local courthouses." *Id.* at 527 (emphasis added). *Lane* also cited "examples of the exclusion of persons with disabilities from state judicial services and programs" that a congressional task force had compiled, and a post-enactment report that the task force prepared. *See id.* But because pre-enactment evidence supports *Lane*'s as-applied holding, its additional citations to task force materials (which may not have been necessary to its holding) are best read as secondary support for its outcome, so as to avoid making *Lane* an outlier in this Court's otherwise uniform precedent.

[7] The Attorney General's additional reliance on *Hibbs* to support the Court of Appeals' error is particularly puzzling. *See* Br. for Resps. in Opp'n 21–22 n.4 (citing *Hibbs*, 538 U.S. at 733–34 & nn.6–9). *Hibbs* made clear that its holding relied on pre-enactment evidence: "As we stated above, our holding rests on congressional findings that, *at the time the FMLA was enacted*, States 'rel[ied] on invalid gender stereotypes in the

[Footnote continued on next page]

Additionally, *Lane* limited its holding as "applie[d] to the class of cases implicating the fundamental right of access to the courts"; only in that specific application was the sovereign immunity waiver in Title II of the ADA "a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533–34. Because *Lane* adopted only an as-applied holding, it is not binding in this facial challenge to Section 5's constitutionality. *See, e.g.*, *Doe* v. *Reed*, 130 S. Ct. 2811, 2817 (2010) (explaining the more limited scope of as-applied challenges in comparison to facial challenges).

Finally, with respect to the Court of Appeals' claim that Shelby County did not identify errors or inconsistencies in the McCrary data, nothing in *Lane* (or any other precedent) requires a party challenging legislation passed under Congress's Reconstruction Amendment enforcement authority to rebut legally irrelevant data. The Court of Appeals certainly cited no authority supporting such a requirement.

C. If allowed to stand, the Court of Appeals' deviation from this Court's uniform precedents would create several serious legal and practical problems. First, it would raise the possibility that a State would not learn until years after legislation enforcing the Reconstruction Amendments was passed—and after suing the federal government—all the reasons supporting Congress's exercise of its enforcement authority. In such cases, Congress or the Attorney General presumably could seek to

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[Footnote continued from previous page]

employment context, *specifically in the administration of leave benefits*.'" 538 U.S. at 735 n.11 (first emphasis added).

buttress a weak legislative record with post-hoc declarations, as happened here. The resulting litigation uncertainty and gamesmanship would amount to a stark "departure from the fundamental principle of dual sovereignty" that hardly befits our federal system. *Nw. Austin*, 129 S. Ct. at 2512.

Second, it would create a new tactic in litigation challenging legislation passed under Congress's enforcement authority that must be available to all parties. If *supporters* of an exercise of Congress's enforcement authority could invoke post-enactment evidence to *justify* such legislation, there is no principled legal reason why States *challenging* such legislation should not also be able to invoke contrary post-enactment evidence to *attack* the legislation.

Under such a regime, even if Respondents were to prevail in this case, Shelby County—or other jurisdictions covered by Section 5 of the Voting Rights Act—could repeatedly challenge that law's 2006 reenactment for the next 25 years so long as they could cite new post-enactment evidence to argue that preclearance was no longer justified by this evolving view of "current needs."[8] States could again challenge the FMLA's waiver of their Eleventh Amendment immunity if new evidence showed that

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[8] This is not a hypothetical possibility. For example, the Pew Research Center recently published a report analyzing voter turnout in the 2012 presidential election. It concluded, among other things, that "Blacks voted at a higher rate this year than other minority groups and for the first time in history may also have voted at a higher rate than whites." Paul Taylor, Pew Research Center, *The Growing Electoral Clout of Blacks Is Driven by Turnout, Not Demographics* 1 (Dec. 26, 2012), *available at* http://www.pewsocialtrends.org/files/2012/12/2012_Black_Voter_Project_v2.pdf (last visited Jan. 2, 2013).

States were no longer enforcing the FMLA's "family-care" provision in a discriminatory manner. *See Hibbs*, 538 U.S. at 730. States could also re-challenge the sovereign immunity waiver in Title II of the ADA if new evidence showed that States had eliminated the accessibility barriers to their courthouses that discriminated against individuals with disabilities. *See Lane*, 541 U.S. at 527. And religious organizations could again invoke their rights under RFRA against the States if they compiled "examples of modern instances of generally applicable laws passed because of religious bigotry." *City of Boerne*, 521 U.S. at 530.

Nothing in this Court's precedents supports such repeated post-hoc attacks on enforcement legislation that would follow from the Court of Appeals' approach. It is difficult to conclude that Congress envisioned a coordinate branch of government reviewing its legislative judgments based on facts occurring years after it acted—much less that Congress would be willing to abandon the fate of its laws to whatever social or political evidence litigants could conjure during a lawsuit. Such a system would be antithetical to the principled, reasoned decisionmaking that has long been the hallmark of this Court's jurisprudence of judicial review.

This Court should thus reject the Court of Appeals' erroneous reliance on post-enactment evidence to uphold Section 5. The Court should adhere to *Katzenbach* and assess Section 5's constitutionality solely in light of the pattern of unconstitutional State discrimination that Congress had compiled before it reauthorized Section 5 in 2006.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS
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RECORD
AND
BRIEFS

No. 12-96

In the
Supreme Court of the United States

Shelby County, Alabama,

Petitioner,

v.

Eric H. Holder, Jr., Attorney General, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR SENATE MAJORITY LEADER HARRY M. REID AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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February 1, 2013

QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.................................. 1

ARGUMENT 4

I. The Language of the Constitution and Longstanding Precedent Require Application of Rational Basis Review 4

II. The 2006 Reauthorization of Section 5 Was Approved Unanimously by the Senate Based on Extensive Evidence and Survives Any Standard of Review 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of Trustees of the University of Alabama v. Garrett,
531 U.S. 356 (2001) 8

City of Boerne v. Flores,
521 U.S. 507 (1997) 10

City of Rome v. United States,
446 U.S. 156 (1980) 6, 7, 13

Eldred v. Ashcroft,
537 U.S. 186 (2003) 7

Ex parte Virginia,
100 U.S. 339 (1879) 2, 3, 5, 6

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,
527 U.S. 627 (1999) 8

Katzenbach v. Morgan,
384 U.S. 641 (1966) 6

National Federation of Independent Businesses v. Sebelius,
132 S. Ct. 2566 (2012) 3

Nevada Department of Human Resources v. Hibbs,
538 U.S. 721 (2003) 8, 9

TABLE OF AUTHORITIES (continued)

Page

Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) 1

Oregon v. Mitchell, 400 U.S. 112 (1970) 6

Salazar v. Buono, 130 S. Ct. 1803 (2010) 9

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .... passim

Tennessee v. Lane, 541 U.S. 509 (2004) 8, 9

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV .... passim

U.S. Const. amend. XV .... passim

OTHER AUTHORITIES

The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 3-4 (2006) (statement of Anita S. Earls) 11

H.R. REP. NO. 109-478 (2006) 11

TABLE OF AUTHORITIES
(continued)

Page

THE FEDERALIST NO. 62 (James Madison)............... 12

INTEREST OF *AMICUS CURIAE*[*]

Amicus is currently serving as the Senate Majority Leader and has two primary interests here. First, *Amicus* seeks to ensure that the Court does not reduce Congress's longstanding authority to combat racial discrimination in voting by adopting a constricted view of the authority granted to Congress by the Fourteenth and Fifteenth Amendments. Second, *Amicus* seeks to remind the Court that Section 5 passed the Senate unanimously, with no members from covered states voting against, and that unanimous ratification deserves great respect in light of Congress's relative institutional competence—as an elected branch, unlike the Court—to judge what is necessary to prevent racial discrimination in election practices.

SUMMARY OF ARGUMENT

It may well be that "[t]hings have changed in the South," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009), but that is not the central issue in this case. The words of the Fourteenth and Fifteenth Amendments have not changed, and those amendments grant *Congress* the power to enact legislation to combat racial discrimination in electoral practices. The central question in this case is whether this Court will, contrary to longstanding precedent, reduce Congress's power to enforce these amendments and instead place itself in charge of deciding what measures are needed to prevent discrimination in voting.

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[*] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. All parties have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs. Counsel of record for all parties received notice of *amicus*'s intention to file this brief more than 10 days before it was due.

Since the enactment of the Civil War amendments, this Court has consistently held that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). The Court has applied rational basis review to such enactments based on both the plain language and original intent of the amendments: "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude," and "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV. By this language, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created." *Katzenbach*, 383 U.S. at 326. "'It is the power of *Congress* which has been enlarged. *Congress* is authorized to enforce the prohibitions by appropriate legislation.'" *Id.* (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)) (emphasis added).

Despite this explicit grant of authority to Congress, Petitioner claims that Congress has overstepped its bounds and infringed on state sovereignty. Such claims are nothing new, and this Court has consistently rejected them for nearly 150 years. "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce . . . . Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ex parte Virginia*, 100 U.S. at 346.

Put simply, for well over a century this Court has held—based on clear constitutional language—that Congress's power is at its apex when it seeks to "effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. The Court has therefore consistently applied rational basis review to such enactments. If the Court follows its longstanding precedent and does the same here, it must uphold Section 5.

The Court also should uphold Section 5 based on its stated desire to show "respect for a coordinate branch of the government" and the judicial role. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). Section 5, at its heart, aims to protect the political process from discriminatory practices. If there is one thing about which the elected branches know more than this Court, it is the political process. *See id.* ("[W]e possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders . . . ."). And when Congress reauthorized Section 5 in 2006, the Senate passed it unanimously, with not a single member from a covered state voting against. If this Court strikes down Section 5, it will in effect be declaring that it knows better than the elected Senators from these states whether the protections of Section 5 remain necessary. There is no basis in the Constitution or in any proper conception of the judicial role for such a ruling.

ARGUMENT

I. The Language of the Constitution and Longstanding Precedent Require Application of Rational Basis Review

Before this Court turns to the question of whether Congress compiled a record sufficient to support the reauthorization of Section 5, it must first determine what level of scrutiny it will apply: the rational basis test or a less deferential standard? The question is critical because it impacts not only the Court's approach to this case, but also the fundamental balance of power between the judiciary and Congress. Out of respect for the Constitution's plain language, the intent of the Framers, the Court's own precedent, and a coordinate branch of government, the Court should apply rational basis review.

The Fourteenth and Fifteenth Amendments could not be clearer in two respects crucial to this case. First, they expressly limit the power of states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV. *See also Ex parte Virginia*, 100 U.S. at 346 ("The prohibitions of the Fourteenth Amendment are directed to the States . . . .").

Second, the amendments make clear that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV. "'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation.'" *Katzenbach*, 383 U.S. at 326 (quoting *Ex parte Virginia*, 100 U.S. at 345).

There can thus be no question that these amendments give Congress power to prevent discrimination by states; the only question is how to judge what qualifies as "appropriate legislation" to advance this purpose. For nearly 150 years, this Court has held that "legislation is appropriate" if it is "adapted to carry out the objects the amendments have in view," i.e., if it "tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion." *Ex parte Virginia*, 100 U.S. at 345-46. The Court has applied this same rational basis test countless times to laws enacted by

Congress to prevent racial discrimination in voting, repeatedly emphasizing that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. *See also City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 118, 217, 231 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

Under this standard, this Court does not sit as a super-legislature to decide whether Congress has appropriately respected states. The Framers of the Fourteenth and Fifteenth Amendments have already made that decision by giving Congress power to enforce them: "Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ex parte Virginia*, 100 U.S. at 346.

Instead, the Court simply asks whether "Congress could rationally have concluded" that extending Section 5 would help prevent racial discrimination in election practices. *City of Rome*, 446 U.S. at 177. As detailed in the next section, the only plausible answer to that question is yes.

Petitioner contends, however, that the Court should apply the congruence and proportionality standard from its recent Fourteenth Amendment cases rather than the rational basis test it has always applied to judge Section 5 and other laws aimed at eliminating discrimination in voting. Pet.

Br. 23 n.4. Alternatively, Petitioner contends that the Court may simply avoid this question because "Section 5 and Section 4(b) are no longer 'appropriate' enforcement legislation under any applicable standard of review." *Id.* Neither argument bears scrutiny.

There is no justification in this case to apply the congruence and proportionality standard. To begin with, the Fifteenth Amendment—on its own—provided sufficient authority for Congress to enact and extend Section 5, which aims exclusively at preventing discrimination in voting. But this Court has never applied the congruence and proportionality standard to a law enacted under Congress's Fifteenth Amendment power. *See Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("[P]etitioners ask us to apply the 'congruence and proportionality' standard described in cases evaluating exercises of Congress' power under § 5 of the Fourteenth Amendment. But we have never applied that standard outside the § 5 context.") (citation omitted).

Moreover, in evaluating prior extensions of Section 5—that is, in the precedent directly on point—this Court has applied rational basis review rather than the congruence and proportionality standard. *City of Rome*, 446 U.S. at 175 (holding that Congress's authority under section 2 of the Fifteenth Amendment is "no less broad than its authority under the Necessary and Proper Clause"); *Katzenbach*, 383 U.S. at 324 ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."). By contrast, the Court has applied the congruence and proportionality standard in cases addressing statutes far removed from the central purpose of the Fourteenth and Fifteenth Amendments: the elimination of discrimination based on race. *See, e.g.*, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (applying congruence and proportionality test in upholding provision of Family and Medical Leave Act allowing recovery of money damages from states); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (applying test in invalidating provisions of the Americans with Disabilities Act subjecting state employers to money damages); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (applying test in invalidating provisions of the Patent and Plant Variety Protection Remedy Clarification Act that made states liable in federal court for patent infringement). *See also Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (noting that "racial discrimination . . . was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored").

Thus, even if the Court were to conclude that Congress had to rely on its Fourteenth Amendment power to extend Section 5, it should still apply rational basis review given that Section 5's purpose of preventing racial discrimination in voting is at the very heart of the purpose of the Fourteenth and Fifteenth Amendments. *See, e.g.*, *Lane*, 541 U.S. at 561 (Scalia, J., dissenting) ("Giving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions."); *id.* ("I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.").

"Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality." *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010). The Court cannot, consistent with this rule, change its longstanding approach to evaluating congressional enactments designed "to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. This is doubly so because congressional power is at its apex when Congress legislates to protect rights subject to heightened scrutiny, including the right that is the singular focus of Section 5—the right to vote free from racial discrimination. *Hibbs*, 538 U.S. at 736.

In sum, the language of the Fourteenth and Fifteenth Amendments, as well as decades of precedent applying them, compel the conclusion that the Court should apply rational basis review here. The 2006 extension of Section 5 plainly survives review under that (or any) standard.

II. The 2006 Reauthorization of Section 5 Was Approved Unanimously by the Senate Based on Extensive Evidence and Survives Any Standard of Review

Congress's conclusion that reauthorization of Section 5 was necessary was based on extensive testimony and substantial documentary evidence, as reflected by the legislative history compiled by both houses, which runs to over 15,000 pages. The decision to reauthorize was not a close question. The vote in support was bipartisan and overwhelming in both chambers. In the Senate, it was unanimous. The conclusion of the legislative branch that, on the record before it, reauthorization was justified was plainly reasonable and is entitled to substantial deference from this Court.

Not only is the legislative record in support of Congress's 2006 reauthorization of Section 5 sufficient to defeat Petitioner's attack, it is much more substantial and extensive than this Court's precedent requires. Congress's decision to reauthorize Section 5 was based on a voluminous record replete with evidence of its effectiveness and continued necessity, including evidence specific to the jurisdictions presently covered by Section 4(b)'s formula. That record easily satisfies the rational basis review that should apply, and also more than satisfies the congruence and proportionality test outlined in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Amicus* leaves a more extensive discussion of the record to Respondents, except to reiterate that the days of testimony and thousands of pages of documentary submissions provide extensive evidence that reauthorization of Section 5 is justified by current needs, including specific and substantial evidence of continued discriminatory practices in covered jurisdictions.[1] The Court may not second guess and substitute its judgment for Congress's reasonable conclusion, made on this extensive record, that reauthorization was necessary to remedy current discrimination and prevent backsliding on the progress that the Voting Rights Act has made possible. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress," which "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") (internal quotation marks omitted).

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[1] *See, e.g.*, *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3-4 (2006) (statement of Anita S. Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights) (summarizing "five main sources of evidence documenting continued intentional discrimination in voting in the covered jurisdictions" including "numerous objection letters from every covered jurisdiction [since 1982]" that "document an extensive record of local officials seeking to change dates of election, change election district boundaries, change city boundaries, and make other changes in election procedures out of a desire to suppress, diminish, or negate the effect of minority voters"; 25 declaratory judgment actions where jurisdictions were denied pre-clearance; numerous judicial findings of intentional discrimination in litigation brought under Section 2 in published and unpublished opinions; and 501 instances in which proposed changes affecting voting were withdrawn after the Department of Justice requested more information about the proposed changes); H.R. REP. NO. 109-478, at 36 (2006) (finding that "voting changes devised by covered jurisdictions [in recent years] resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements" and "[t]he Committee received testimony indicating that these changes were intentionally developed to keep minority voters and candidates from succeeding in the political process").

Finally, the bicameral legislative system envisioned by the Framers and enshrined in our Constitution ensures that "[n]o law or resolution can . . . be passed without the concurrence, first, of a majority of the people [as represented by the House of Representatives], and then, of a majority of the States [as represented by the Senate]." THE FEDERALIST NO. 62 (James Madison). The 2006 reauthorization of Section 5 was approved overwhelmingly by both chambers, with not a single Senator voting against it. In other words, the 2006 reauthorization was approved unanimously by the States through their elected representatives, including those most directly affected by Section 5. That provides further reason for the Court to reject Petitioner's argument that the reauthorization violates constitutional principles of federalism.

CONCLUSION

The question before the Court is not the wisdom of extending Section 5, although the Court is certainly free to disagree with Congress on that question. The question is whether "Congress could rationally have concluded" that extending Section 5 would advance the cause of eradicating racial discrimination in election practices. *City of Rome*, 446 U.S. at 177. On that question, there can be no meaningful dispute, especially given the unanimous conclusion of the elected members of the United States Senate that Section 5 remains necessary.

Respectfully submitted,

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February 1, 2013

AMICUS CURIAE BRIEF

No. 12-96

RECORD
AND
BRIEFS

In the
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *et. al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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TABLE OF CONTENTS

Page

INTERESTS OF THE AMICI 1

SUMMARY OF ARGUMENT........ 2

ARGUMENT 5

I. RECENT PRECLEARANCE LITIGATION SHOWS THAT SECTION 5 IS "JUSTIFIED BY CURRENT NEEDS" 5

  A. This Court May Consider Post-Enactment Evidence In Deciding Whether Congress Correctly Determined That Section 5 Remains Necessary........ 5

  B. The Two Cases Involving Texas Show That Section 5 Remains Necessary 6

    1. The Texas Redistricting Case 6

    2. The Texas Photo ID Case 11

  C. Section 5 Ameliorated The Potentially Discriminatory Effects Of Laws In South Carolina And Florida 15

    1. The South Carolina Voter ID Case 15

    2. The Florida Early Voting Case 17

II. THE 2012 CASES SHOW THAT POTENTIAL BURDENS OF SECTION 5 LITIGATION CAN BE SIGNIFICANTLY MINIMIZED 19

  A. The 2012 Cases Were Highly Expedited 20

  B. Section 5 Litigation Is Faster Than Litigation Under Section 2 While Preventing Discriminatory Laws From Taking Effect.... 23

C. The Scope Of Discovery In Section 5 Cases Can Be Limited So As To Prevent Intrusion Into Privileged Legislative Matters 25

D. Intervenors Carefully Managed By The Courts Played An Important Role In The 2012 Cases 26

E. Covered Jurisdictions Do Not Face An "Impossible Burden" Under Section 5 29

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Page(s)

Bartlett v. Strickland,
556 U.S. 1 (2009)..2

Beer v. United States,
425 U.S. 130 (1976)..30

Bush v. Vera,
517 U.S. 952 (1996)..7

City of Mobile v. Bolden,
446 U.S. 55 (1980)..25

Crawford v. Marion County Election Board,
553 U.S. 181 (2008)..12

Florida v. United States,
820 F. Supp. 2d 85 (D.D.C. 2011)........................22

Florida v. United States,
___ F. Supp. 2d ___, No. 11-1428, 2012 WL
3538298 (D.D.C. Aug. 16, 2012) ....*passim*

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990)................................26

Johnson v. DeSoto County Board of Commissioners,
868 F. Supp. 1376 (M.D. Fla. 1994), *vacated*, 72 F.3d 1556 (11th Cir. 1996), *remanded to* 995 F. Supp. 1440 (M.D. Fla. 1998), *aff'd*, 204 F.3d 1335 (11th Cir. 2000)..23

Layton v. Elder,
143 F.3d 469 (8th Cir. 1998) 5

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548 U.S. 399 (2006) 7, 9, 10

Levy v. Lexington County, South Carolina,
No. 03-3093, 2009 WL 440338 (D.S.C. Feb. 19, 2009), *vacated*, 589 F.3d 708 (4th Cir. 2009), *remanded to* 2012 WL 1229511 (D.S.C. April 12, 2012) 23

Matthews v. Jefferson,
29 F. Supp. 2d 525 (W.D. Ark. 1998) 6

Mazurek v. Armstrong,
520 U.S. 968 (1997) 24

Nevada Department of Human Resources v. Hibbs,
538 U.S. 721 (2003) 5

Northwest Austin Municipal Utility District Number One v. Holder,
557 U.S. 193 (2009) 2, 3, 7, 25

Shelby County, Alabama v. Holder,
811 F. Supp. 2d 424 (D.D.C. 2011) 3

Shelby County, Alabama v. Holder,
679 F.3d 848 (D.C. Cir. 2012) 3, 17, 23, 24

South Carolina v. United States,
___ F. Supp. 2d ___, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) ....*passim*

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541 U.S. 509 (2004)..5

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___ F. Supp. 2d ___, No. 12-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), *notice of appeal filed* (D.D.C. Dec. 19, 2012) ....*passim*

Texas v. United States,
___ F. Supp. 2d ___, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), *appeal docketed*, No. 12-496 (U.S. Oct. 19, 2012).. *passim*

Thompson v. Glades County Board of County Commissioners,
493 F.3d 1253, *vacated*, 508 F.3d 975 (11th Cir. 2007)..23

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512 U.S. 622 (1994)..6

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997)..6

Terrazas v. Slagle,
789 F. Supp. 828 (W.D. Tex. 1992), *aff'd sub nom., Richards v. Terrazas*, 505 U.S. 1214 (1992)..7

United States v. Charleston County,
316 F. Supp. 2d 268 (D.S.C. 2003) 24, 25

Upham v. Seamon,
456 U.S. 37 (1982)..7

Vander Linden v. Hodges,
193 F.3d 268 (4th Cir. 1999)................................23

Village of Arlington Heights v. Metro Housing Development Corp.,
429 U.S. 252 (1977)..8

Washington State Grange v. Washingston State Republican Party,
552 U.S. 442 (2008)..31

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982)..24

White v. Regester,
412 U.S. 755 (1973)..7

White v. Weiser,
412 U.S. 783 (1973)..7

Williams v. City of Dallas,
734 F. Supp. 1317 (N.D. Tex. 1990)....................25

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008)..24

Federal Statutes and Congressional Material

28 U.S.C. § 1253..23

42 U.S.C. § 1973c(a)..23

Voting Rights Act of 1965, Pub. L. No. 89-110,
79 Stat. 937 ....*passim*

H.R. Rep. No. 109-478 (2006) 2, 3, 17

Fed. R. Civ. P. 24..29

Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 80 (2005) 25

State Statutes

Ga. Code Ann. § 21-2-417 ....12, 14

Ind. Code Ann. § 3-5-2-40.5(a)................................12

Tex. Elec. Code § 63.0101 12

Docketed Cases, Court Filings, and Docket Entries

Attorney General's Proposed Findings of Fact and Conclusions of Law, *Texas v. Holder*, No. 12-128 (D.D.C. June 25, 2012), ECF No. 223 15

Brief of Arizona et al. as *Amici Curiae* in Support of Petitioner 6, 20, 23

Brief of Cato Institute as *Amicus Curiae* in Support of Petitioner 29

Brief of Former Government Officials as *Amici Curiae* in Support of Petitioner...................*passim*

Brief of National Black Chamber of Commerce as *Amici Curiae* in Support of Petitioner 23, 24

Brief for Reason Foundation as *Amicus Curiae* in Support of Petitioner 5

Brief of State of Texas as *Amicus Curiae* in Support of Petitioner .... *passim*

Defendant-Intervenors' Proposed Supplemental Non-Duplicative Findings of Fact and Conclusions of Law, *Texas v. Holder*, No. 12-128 (D.D.C. June 27, 2012), ECF No. 241 15

Florida v. United States, No. 11-1428 (D.D.C. Oct. 19, 2011), ECF No. 42 ....27, 28

Plaintiff's Motion to Expedite, *Texas v. United States*, No. 11-1303 (D.D.C. Aug. 8, 2011), ECF No. 10 22

South Carolina v. United States, No. 12-203 (D.D.C. Mar. 20, 2012), ECF No. 10 ....27, 28

South Carolina v. United States, No. 12-203 (D.D.C. Apr. 26, 2012), ECF No. 64 ....16, 21, 29

South Carolina v. United States, No. 12-203 (D.D.C. May 11, 2012), ECF No. 67 21

South Carolina v. United States, No. 12-203 (D.D.C. Aug. 7, 2012), ECF No. 155 28

Texas v. Holder,
No. 12-128 (D.D.C. Mar. 27, 2012), ECF No. 43 20

Texas v. Holder,
No. 12-128 (D.D.C. May 7, 2012), ECF No. 107 21

Texas v. Holder,
No. 12-128 (D.D.C. May 22, 2012), ECF No. 137 21

Texas v. Holder,
No. 12-128 (D.D.C. June 13, 2012), ECF No. 183 28

Texas v. United States,
No. 11-1303 (D.D.C. Aug. 16, 2011), ECF No. 11 27

Texas v. United States,
No. 11-1303 (D.D.C. Sept. 22, 2011), ECF No. 51 .... 22, 28

Texas v. United States,
No. 11-1303 (D.D.C. Sept. 30, 2011) (paperless minute order) 28

United States' Notice to the Court, *Florida v. United States*,
No. 11-142 (D.D.C. Sept. 19, 2012), ECF No. 161 19

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Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* (2011)....................22

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7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1913 (3d ed. 2012)....................29

INTERESTS OF THE AMICI

Amici curiae[1] were intervenors in the four cases decided in the last year under Section 5 of the Voting Rights Act of 1965 ("VRA"). These cases demonstrate that Section 5 is still necessary to achieve the constitutional goal of an election system free of the taint of racial and ethnic discrimination.

The Texas State Conference of NAACP Branches ("Texas NAACP"), the Mexican American Legislative Caucus, the Texas League of Young Voters Education Fund, and the Reverend Peter Johnson intervened as defendants in a lawsuit brought by the State of Texas under Section 5, concerning Texas's voter photo identification ("ID") law. *Amici* successfully helped to prevent preclearance for that retrogressive law.

The League of United Latin American Citizens as well as the Texas NAACP intervened in Section 5 litigation decided in 2012 concerning the redistricting plans drawn by Texas based on the 2010 Census. That case determined that Texas's plans were discriminatory in purpose and effect, further demonstrating the continued need for Section 5.

The South Carolina State Conference of the NAACP, The Family Unit, Inc., Dr. Brenda Williams, and Kenyda Bailey were all intervenors in Section 5 litigation concerning South Carolina's photo ID law, which was found to have a potentially retrogressive effect, but was saved by a mitigating construction of the law taken by South Carolina officials as a direct result of the Section 5 case.

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[1] This *amicus curiae* brief is submitted pursuant to the parties' consents on file with the Court. No counsel for a party authored this brief in whole or in part, and no party or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Florida State Conference of the NAACP, Sharon Carter, Howard Harris, and Dianne Hart intervened in the preclearance litigation regarding Florida's early voting procedures. This litigation enabled Florida to implement changes to its voting procedures in a nondiscriminatory manner.

As individuals and organizations representing minority voting groups that are expressly protected by the VRA, *Amici* have a substantial interest in this matter. Should Section 5 of the VRA be held unconstitutional, they would stand to lose a crucial safeguard against measures that disproportionately burden racial and language minorities' right to vote.

SUMMARY OF ARGUMENT

The enactment of the VRA represented a monumental turning point in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). As Congress recognized in overwhelmingly reauthorizing the VRA in 2006, the law is largely responsible for the effective transformation of America into a broadly inclusive democracy. *See generally* H.R. Rep. No. 109-478, at 12-18 (2006). To be sure, "[t]hings have changed in the South." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). "[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [VRA] have been eliminated." H.R. Rep. No. 109-478, at 12.

But not all things have changed. Rather, "voting discrimination in covered jurisdictions" remains a "21st century problem." *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012) (quoting *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011)).

Petitioner and various *amici* assert that jurisdictions covered under Section 5 no longer engage in "pervasive voting discrimination and electoral gamesmanship." Pet'r Br. 28. While it is true that progress has been made and that the specific methods of voting discrimination in place in 1965—such as poll taxes, literacy tests, and grandfather clauses—are no more, that is not the whole story. Indeed, Congress determined in 2006, that while "[d]iscrimination [in voting] today is more subtle than the visible methods used in 1965 . . . the effects and results are the same." H.R. Rep. No. 109-478, at 6.

Petitioner's claims to the contrary are utterly belied by the four cases decided under Section 5 in 2012 (the "2012 cases"). These cases confirm that, while the particular methods of discrimination have taken new and more subtle forms, they persist; and therefore Section 5 remains "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

Two of the 2012 cases involved the State of Texas, a covered jurisdiction with a long and sad history of discrimination in voting. In 2012, a unanimous three-judge panel found that Texas's three redistricting plans were either discriminatory in purpose or effect *or both*. Just two days later, another three-judge court unanimously determined that Texas's photo ID law would have a retrogressive effect on Black and Latino voters. In these two cases, Section 5 prevented Texas from turning back the clock on minority voting rights.

The other two 2012 cases concerned South Carolina's photo ID law and Florida's change in early voting hours. In those cases, Section 5 litigation resulted in covered jurisdictions being allowed to implement otherwise retrogressive laws in non-retrogressive ways. In the South Carolina case, the litigation process pushed the State to interpret the law in such a way that would allow individuals unable to obtain photo ID to vote. In the Florida case, the court found that contemplated changes to Florida's early voting hours could potentially have a discriminatory impact on minority voters. Rather than just striking down these provisions entirely, the court offered guidance on how the Florida law could be implemented in a non-retrogressive manner. These two cases demonstrate the flexibility of Section 5 and show that Section 5 litigation can play a vital role in ameliorating the impacts of otherwise retrogressive laws, while allowing states and localities to pursue legitimate policy objectives.

The 2012 cases also demonstrate that the "current burdens" imposed by Section 5 litigation, as discussed by Petitioner and various *amici*, can be significantly minimized by diligent federal judges tightly managing the process. Indeed, these courts were able to achieve highly expedited results—despite repeated instances where the covered jurisdictions' recalcitrance in meeting court orders could have led to significant delays.

The VRA is more than adequately justified by current needs, and Congress acted properly in reauthorizing it in order to enforce constitutional guarantees that remain all too threatened. Accordingly, this Court should affirm the decision of the Court of Appeals.

ARGUMENT

I. RECENT PRECLEARANCE LITIGATION SHOWS THAT SECTION 5 IS "JUSTIFIED BY CURRENT NEEDS"

A. This Court May Consider Post-Enactment Evidence In Deciding Whether Congress Correctly Determined That Section 5 Remains Necessary

The 2012 cases are relevant in assessing the validity of Section 5 and may be considered even though they occurred after the reauthorization of the VRA in 2006. This approach is consistent with precedent. In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court considered cases decided after the enactment of the Americans with Disabilities Act of 1990 ("ADA") to determine whether Title II of the ADA was valid. *Id.* at 524-25 nn.7, 11, 13 & 14. Likewise, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court reviewed legislation in effect after the enactment of the Family and Medical Leave Act of 1993 to assess whether the family-care provision of that statute was congruent and proportional under Section 5 of the Fourteenth Amendment. *Id.* at 733-34 & nn.6-9.

One *amicus* argues that *Lane* did not examine post-enactment cases with regard to the specific constitutional right that was at issue there—access to the courts. *See* Br. for Reason Foundation as *Amicus Curiae* in Supp. of Pet'r 22 ("Reason Foundation Br."). That is flatly incorrect. *See Lane*, 541 U.S. at 525 & n.14 (citing *Layton v. Elder*, 143 F.3d 469, 470-72 (8th Cir. 1998) (mobility-impaired individual excluded from a quorum court session held on an inaccessible floor of a courthouse), and *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 528, 533-34 (W.D. Ark. 1998) (mobility-impaired individual called to court for full-day hearings but unable to use the restroom or leave the floor to obtain a meal during noon recess)).

Moreover, "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion)). In applying such deference to the review of Congress's prediction in 2006 that Section 5 would still be necessary in the years to come, it would be absurd to require the Court to ignore that Congress's prediction turned out to be right.[2]

B. The Two Cases Involving Texas Show That Section 5 Remains Necessary

1. The Texas Redistricting Case

Two of the 2012 cases involved the State of Texas, and Texas lost in both. *See Texas v. United States*, ___ F. Supp. 2d ___, No. 11-1303, 2012 WL

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[2] Petitioner itself pointed to the Texas and South Carolina photo ID cases and the Florida early voting case in its Petition for a Writ of Certiorari. *See* Pet. for a Writ of Cert. 19-20. Many *amici* supporting Petitioner likewise point to these cases in their analysis of the constitutionality of Section 5. *See, e.g.*, Br. of Arizona et al. as *Amici Curiae* in Supp. of Pet'r ("Arizona Br.") 22-23 (South Carolina photo ID case); Br. of Former Government Officials as *Amici Curiae* in Supp. of Pet'r ("Former Officials Br.") 19-22 (South Carolina and Texas photo ID cases; Florida early voting case); Br. of State of Texas as *Amicus Curiae* in Supp. of Pet'r ("Texas Br.") 3-25 (Texas photo ID case).

3671924, at *37 (D.D.C. Aug. 28, 2012) ("*Texas Redistricting*"), *appeal docketed*, No. 12-496 (U.S. Oct. 19, 2012); *see also Texas v. Holder*, ___ F. Supp. 2d ___, No. 12-128, 2012 WL 3743676, at *1 (D.D.C. Aug. 30, 2012) ("*Texas ID*"), *notice of appeal filed* (D.D.C. Dec. 19, 2012). In its *amicus* brief, Texas focuses almost entirely on the 2012 photo ID case, *see* Texas Br. 3-25, but never even mentions that, just two days before that case was decided, another three-judge panel rejected Texas's redistricting plans, finding that the State's Congressional and State Senate plans were intentionally discriminatory and that the State's Congressional and State House plans would have a retrogressive effect. *See Texas Redistricting*, 2012 WL 3671924, at *37. The court also expressed grave doubts about Texas's commitment to protecting the rights of non-Anglo voters. *See id.* Indeed, as that court noted, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Id.* at *20.[3] Thus, the most recent Texas redistricting case demonstrates why Section 5 remains amply "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

In August 2012, following a 10-day trial, a three-judge panel declined to preclear Texas's redistricting plans. *Texas Redistricting*, 2012 WL 3671924, at *2. The court unanimously found that Texas's Congressional redistricting plan was enacted with a discriminatory intent. *Id.* at *21. The court noted that the Texas legislature had engaged in

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[3] *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Bush v. Vera*, 517 U.S. 952 (1996); *Upham v. Seamon*, 456 U.S. 37 (1982); *White v. Weiser*, 412 U.S. 783 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex.1992), *aff'd sub nom.*, *Richards v. Terrazas*, 505 U.S. 1214 (1992).

"substantial surgery" in order to remove key economic generators, such as hospitals, universities, sports centers, and even Congressional district offices, from the districts of Black and Latino members of Congress. *Id.* at *19. In contrast, "[n]o such surgery was performed on the districts of Anglo incumbents." *Id.* at *20.

Texas offered two explanations for this pattern, neither of which the court found remotely plausible. *Id.* First, the State argued that the removal of economic engines and district offices from the districts of Black and Latino lawmakers was a mere "coincidence." *Id.* But as the court found, "[i]t is difficult to believe that pure chance would lead to such results." *Id.* Texas also asked the court to believe that "the mapdrawers did not know where [Congressional] district offices were located." *Id.* But the court saw this explanation as the mere smoke screen that it was. *See id.* ("We are confident that the mapdrawers can not only draw maps but read them, and the locations of these district offices were not secret.").

The court found that these actions "alone" could support a finding of discriminatory intent as they were "unexplainable on grounds other than race." *Id.* (quoting *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). In determining the legislature's intent, however, the court also looked to Texas's record of defying the VRA in redistricting, and the fact that Black and Latino members of Congress "were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored." *Id.* at *20, 21. "[T]he totality of th[is] evidence" demonstrated that the Congressional plan had been "enacted with discriminatory intent." *Id.* at *21.

In addition to finding discriminatory purpose, the court determined that Texas's Congressional redistricting plan would have a retrogressive effect. *Id.* at *17-18. The court noted that under the status quo, there already existed a "representation gap" between the number of minority Congressional districts in Texas and the number of minority districts that would exist if districts were allocated proportionally to the population. *Id.* at *18. In turn, the court determined that the enacted plan would increase this "representation gap" by one Congressional district. *Id.* at *17-18. The court emphasized that a state may not "undo[] or defeat[] the rights recently won by minorities by increasing the degree of discrimination." *Id.* at *18 (internal citation and quotation marks omitted). Texas's enacted plan would have done just that. *Id.*

One of the most egregious aspects of Texas's Congressional plan involved Congressional District 23. *See id.* at *15-16. In *LULAC v. Perry*, 548 U.S. 399 (2006), a case decided shortly before Congress reauthorized the VRA, this Court specifically rejected Texas's attempt to dilute the Latino vote in that district. *Id.* at 442. In a strongly worded decision, this Court observed that "District 23's Latino voters were poised to elect their candidate of choice," and that Texas was trying to "t[ake] away [that] opportunity because Latinos were about to exercise it." *Id.* at 438, 440. In view of "the long history of discrimination against Latinos and Blacks in Texas," this Court found that Texas's actions "b[ore] the mark of intentional discrimination" and could not be sustained. *Id.* at 439, 440 (citation and internal quotation marks omitted).

Sadly, following this Court's decision, Texas tried once again to undermine the political participation of Latino voters in Congressional District 23. The district court in the 2012 Section 5 case found that Texas "consciously replaced many of the district's active Hispanic voters with low-turnout Hispanic voters." *Texas Redistricting*, 2012 WL at 3671924, at *16. In other words, the State tried to "maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness." *Id.* Just as this Court did in 2006, the district court rejected Texas's attempt "to create the facade of a Latino district," *LULAC*, 548 U.S. at 441, finding that it was a thinly veiled attempt "to reduce Hispanic voters' ability to elect." *See Texas Redistricting*, 2012 WL 3671924, at *16.

With respect to the State Senate plan, specifically Senate District 10, the court also found credible evidence showing that the Texas legislature intentionally sought to weaken the Black and Latino vote. *Id.* at *26. Among other things, the court found that "the legislature deviated from typical procedures and excluded minority voices from the process even as minority senators protested that section 5 was being run roughshod." *Id.* Texas "made no real attempt" to refute defendants' claims of intentional discrimination. *Id.* As a result, the court was compelled to "conclude that the Senate Plan was enacted with discriminatory purpose as to [Senate District] 10." *Id.*

Finally, the court denied preclearance to the State House plan because of its retrogressive effect, finding that Texas's enacted plan would have the effect of abridging minority voting rights in four "ability districts," without creating any new ability districts to offset this loss. *Id.* In contrast to its findings with respect to Texas's Congressional and State Senate plans, the court stopped just short of formally finding that Texas's State House plan was motivated by discriminatory intent. *Id.* at *36. Nevertheless, the court observed that, "at minimum, the full record strongly suggests that the retrogressive effect [of the State House plan] may not have been accidental." *Id.* at *37. The court noted that the legislature had adopted "a deliberate, race-conscious method to manipulate . . . the Hispanic vote," and found evidence "suggest[ing] that Texas had something to hide in the way it used racial data to draw district lines." *Id.* (emphasis omitted).

2. The Texas Photo ID Case

Repeatedly, Petitioner and its supporting *amici* also point to Texas's attempt to implement the most restrictive voter ID law in the country as an example of Section 5 fostering an improper intrusion on federalism. *See* Pet. for Writ of Cert. 19-20; Former Officials Br. 19-21; Texas Br. 3-25. To the contrary, the Texas photo ID case demonstrates precisely why the protections of Section 5 are still needed.

Because of Section 5, Texas was stopped from implementing a statute that "will likely have a retrogressive effect" on minorities' right to vote. *Texas ID*, 2012 WL 3743676, at *1. This finding of retrogression was based on the uniquely restrictive nature of Texas's law, "the most stringent [voter ID law] in the country," *id.* at *33, and the undisputed record evidence specific to Texas's circumstances. *See id.* at *14.

In this context, although Petitioner and supporting *amici* repeatedly claim that Section 5 stopped Texas from implementing a law that non-covered states may implement, *see, e.g.*, Former Officials Br. 19-21, that is simply not the case. Texas's proposed photo ID law, SB 14, is significantly more restrictive than that of any other State, including the Indiana statute adjudicated in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a case decided without a well-developed record as to how many voters (or which ones) would be affected by the ID law, *see id.* at 200, and the Georgia statute precleared by the Attorney General.[4] *See Texas ID*, 2012 WL 3743676, at *26, 33. Other covered states, including Arizona, Louisiana, Michigan, New Hampshire, and Virginia, have also successfully adopted voter ID requirements less restrictive than Texas's without any objection by the Attorney General. Federal Resp't Br. 44.

As the court indicated, had Texas simply adopted some of the very provisions found in the laws of other states, its request for preclearance might have been granted.[5] *See Texas ID*, 2012 WL

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[4] While Indiana's law permits the use of *any* federal or Indiana ID with an individual's name, photograph, and an expiration date after the most recent general election, *see* Ind. Code Ann. § 3-5-2-40.5(a), Texas's law would have permitted the use of only the following photo IDs: a driver's license, election ID certificate, personal ID card, license to carry a concealed handgun issued by the Texas Department of Public Safety, a United States passport, or United States military ID card, all of which must be current or not expired earlier than 60 days before the election, or a United States citizenship certificate. Tex. Elec. Code § 63.0101. Similarly, Texas's law would have permitted fewer forms of ID than Georgia's, which allows the use of photo ID issued by *any* state or federal entity authorized to issue ID, as well as a tribal ID. Ga. Code Ann. § 21-2-417(a). Also unlike Texas's law, Georgia's permits the use of expired drivers' licenses. *Id.*

3743676, at *32-33. Instead, Texas pushed the envelope by proposing a retrogressive law that the court condemned as "almost certain" to disproportionately affect racial minorities by "impos[ing] strict, unforgiving burdens on the poor." *Id.* at *33.

The purported discrepancy between the result in *Crawford* and that in *Texas* does not raise the specter of federalism concerns suggested by Petitioner and its supporting *amici*. First, there is a fundamental difference between Texas and Indiana. Texas has a well-documented history of flagrant voting discrimination; Indiana does not. Second, there is no inconsistency in the result between *Crawford* and *Texas* because the ultimate issue determined in *Texas* was not decided in *Crawford*, which involved a facial challenge to the constitutionality of a voter ID law without reference to its potentially discriminatory effect. *See id.* at *12-13. Finally, to the extent that *Crawford* instructed on two issues involved in *Texas*, the district court in *Texas* followed *Crawford*'s guidance. *Id.* at *12. The court adhered to *Crawford*'s ruling that the purpose of curtailing in-person voter fraud was a legitimate state interest even without any evidence of in-person voter fraud. *Id.* The district court also followed *Crawford*'s ruling that the inconvenience of making a trip to a motor vehicle facility, in and of itself, does not qualify as a substantial burden on the right to vote. *Id.* at *13.

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[5] Specifically, the Texas legislature tabled or defeated amendments that would have waived all fees for indigent persons who needed the underlying documents to obtain an election ID certificate (as does Georgia), expanded the range of acceptable ID by allowing voters to present Medicare ID cards at the polls (as do Georgia and Indiana), and allowed indigent persons to cast provisional ballots without photo ID (as does Georgia). *See Texas ID*, 2012 WL 3743676, at *33.

But Petitioner and its supporting *amici* would have *Crawford* stand for the much broader proposition that *any* type of voter ID law is immune from challenge, no matter what its terms, no matter if it has an *illegitimate* purpose as well as a *legitimate* purpose, and no matter what the actual proof is of its potential discriminatory impact. *See, e.g.*, Former Officials Br. 19-21. Nothing in *Crawford* suggests that result, and, as explained by the court in the Texas ID case, *Crawford*'s discussion as to the insubstantiality of the burden of the Indiana law on "most" voters cannot be expanded into a finding as to "all" voters, and *Crawford* specifically did not address whether the burdens fell disproportionately on minorities. *Texas ID*, 2012 WL 3743676, at *13.

In *Texas ID*, the court found that the burdens of obtaining the required ID would weigh most heavily on poor Texans, who are disproportionately racial minorities. *Id.* at *26.[6] These burdens were sufficiently significant to convince three federal judges to find that, in 2011, a covered jurisdiction had enacted a law, which, if implemented, would have discriminated against minorities in the exercise of their voting rights. *Id.* In this regard, the court did not merely rely on Texas's failure to shoulder its burden of proof under Section 5 to show a lack of discriminatory effect. *See id.* ("[T]his case does not hinge merely on Texas's failure to prove a negative." (citation and internal quotation marks omitted)). Rather the court expressly found that "in fact, record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect" on Latino and Black voters. *Id.* at *1.[7]

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[6] Specifically, the court found that these burdens include traveling to motor vehicle facilities over 200 miles away roundtrip (one-third of Texas counties do not have such facilities, and many facilities have limited hours); and paying significant sums to obtain documents such as a birth certificate necessary to get a driver's license or the election ID certificate supposedly provided for "free" under the proposed law. *Texas ID*, 2012 WL 3743676, at *15-16. In Georgia, by contrast, the required ID can be obtained in every county. Ga. Code Ann. § 21-2-417.1(a). Moreover, the documents necessary to obtain the free Georgia voter ID include those that are costless. *See id.* § 21-2-417.1(e).

C. Section 5 Ameliorated The Potentially Discriminatory Effects Of Laws In South Carolina And Florida

While the two Texas 2012 cases demonstrate the necessity of the preclearance process to address laws that are discriminatory in purpose or effect, the other two 2012 cases show that Section 5 is flexible and may enable otherwise retrogressive laws to be ameliorated such that they can be implemented in a non-retrogressive manner.

1. The South Carolina Voter ID Case

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[7] Because it found discriminatory effect, the court did not reach the issue of discriminatory purpose, *Texas ID*, 2012 WL 3743676, at *32, of which there was substantial evidence, including (1) the implementation of extraordinary legislative procedures to pass the law, such as the abandonment of the established two-thirds rule in the Texas Senate, (2) the increasingly restrictive evolution of the law, despite express knowledge of its potential discriminatory impact; (3) the summary rejection of dozens of amendments which would have ameliorated that impact; (4) the anti-immigrant rhetoric associated with the bill; and (5) the use of pretextual arguments, most notably that the law would have prevented prior instances of alleged voter fraud. *See* Attorney General's Proposed Findings of Fact and Conclusions of Law at 24-48, 63-71, *Texas v. Holder*, No. 12-128 (D.D.C. June 25, 2012), ECF No. 223; Defendant-Intervenors' Proposed Supplemental Non-Duplicative Findings of Fact and Conclusions of Law at 23-40, *Texas v. Holder*, No. 12-128 (D.D.C. June 27, 2012), ECF No. 241.

The South Carolina case concerned Act R54, that State's newly enacted photo ID law. *South Carolina v. United States*, ___ F. Supp. 2d ___, No. 12-203, 2012 WL 4814094, at *1 (D.D.C. Oct. 10, 2012). With regard to the 178,000 voters in South Carolina that would be affected by R54,[8] the three-judge panel determined that the law could have a retrogressive effect because far fewer Blacks in South Carolina possessed acceptable forms of ID than whites. *Id.* at *8. The court determined "[t]hat racial disparity, combined with the burdens of time and cost of transportation inherent in obtaining a new photo ID card, might have posed a problem for South Carolina's law under the strict effects test of Section 5 . . . ." *Id.*

The law was saved, however, when, at trial, State officials offered a broad reinterpretation of R54's "reasonable impediment" provision. *Id.* at *4-5. Under this interpretation, "all citizens may still vote with [a] non-photo voter registration card, so long as they state the reason for not having obtained a photo ID." *Id.* at *9; *see also id.* at *11 ("So long as the reasonable impediment affidavit is properly completed and actually lists a reason for not obtaining a photo ID, the affidavit generally 'will be deemed to speak for itself' and the ballot must be counted." (quoting Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at *4)). Any alteration of this interpretation by the state would again require preclearance. *Id.* at *19-20.

Thus, as Judge Bates wrote in his concurrence (joined by Judge Kollar-Kotelly), R54 (as precleared by the court) was not the same law passed by the South Carolina legislature. *Id.* at *21 (Bates, J., concurring). The Section 5 process enabled South Carolina to implement a photo ID law that otherwise would have disproportionately disenfranchised minority voters in a way that ensured that it would not have such an effect. *See id.* As Judge Bates put it:

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[8] *See South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 26, 2012) (Bates, J., concurring), ECF No. 64.

> [O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive.

Id.

In addition, *South Carolina* demonstrates the powerful deterrent effect of Section 5. At trial, certain South Carolina legislators testified that the "reasonable impediment" provision and the overall structure of the law were meant to help ensure preclearance. *See id.* at *4 (opinion of the court). Accordingly, "the history of Act R54 demonstrates the continuing utility of Section 5 . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* at *22 (Bates, J., concurring). Indeed, Congress took this deterrent effect into account in reauthorizing the VRA, finding that "the deterrent effect of Section 5 is substantial." *See* H.R. Rep. No. 109-478, at 24; *see also Shelby Cnty.*, 679 F.3d at 870-72 (summarizing Congressional findings as to Section 5's deterrent effect).

2. The Florida Early Voting Case

The fourth 2012 case concerned Florida's early voting statute, which a three-judge panel determined could not be precleared because of its potentially discriminatory impact on Black voters. *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298, at *2 (D.D.C. Aug. 16, 2012).

The new law reduced the total number of days available for early voting and gave county election officials broad discretion to determine the number of early voting hours for each day, within a statutory range. *Id.* at *16. As a result, the new statute allowed the number of early voting hours to be cut by as much as half from that which was available under the prior law. *Id.*

The court found that offering the minimum number of early voting hours under the new law would have a retrogressive effect. *Id.* at *17. Indeed, because the rate at which Blacks used early voting could be as high as twice that of whites—54% of Black Floridians voted early in 2008—the new statute undoubtedly had significant *potential* for a discriminatory effect. *Id.* at *17–18. The court was also concerned that a reduction in early voting days could lead to "substantially increased lines, overcrowding, and confusion at the polls," which would further disproportionately discourage Blacks from voting. *Id.* at *24. Florida failed to submit any evidence to show that "given a menu of possible hours, its covered counties will choose nonretrogressive ones." *Id.* at *22. As a result, the court found that the statute could have a discriminatory effect and denied preclearance. *Id.* at *17.

As in *South Carolina*, however, the Section 5 process led to a result in which an otherwise retrogressive law ultimately could be implemented in a nondiscriminatory manner. Specifically, the court offered guidance to Florida, holding that "if Florida and the covered counties were to submit a preclearance plan that offered early voting for 12 hours per day, from 7 a.m. to 7 p.m. over an 8-day early voting period, including one previously-unavailable Sunday, they would likely satisfy the burden of proving that the overall effect of the early voting changes would be nonretrogressive . . . ." *Id.* at *30.

In response, Florida submitted a revised early voting plan that took into account the court's guidance, and the Attorney General promptly precleared the State's plan. *See* United States' Notice to the Court, *Florida v. United States*, No. 11-142 (D.D.C. Sept. 19, 2012), ECF No. 161.

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Whether in cases involving blatant discrimination (such as the Texas cases) or cases concerning potentially retrogressive laws that required judicial intervention in order to achieve a balanced, mitigated result (such as the Florida and South Carolina cases), the 2012 cases rebut Petitioner's claim that Section 5 is no longer justified by current needs. Rather, as determined by four unanimous three-judge panels in 2012, minority voters in Texas, South Carolina, and Florida recently faced the very real possibility of moving backwards in their hard-won progress as a result of decisions made by state legislators. Section 5 prevented that result.

II. THE 2012 CASES SHOW THAT POTENTIAL BURDENS OF SECTION 5 LITIGATION CAN BE SIGNIFICANTLY MINIMIZED

Various *amici* supporting Petitioner, especially the State of Texas, discuss the "heavy burdens" they claim are associated with litigation under Section 5; Texas argues that such litigation is unduly time-consuming, subjects legislators to inappropriate discovery, allows too much leeway to intervenor parties, and imposes on covered jurisdictions an "impossible burden." *See* Texas Br. 18; *see also* Arizona Br. 24-31; Former Officials Br. 24-27. But the 2012 cases refute those claims and demonstrate that courts manage Section 5 litigation in a manner consistent with the federalism concerns described in *Northwest Austin*.

A. The 2012 Cases Were Highly Expedited

Texas argues that the delay it faced in seeking adjudication of its photo ID law demonstrates that "the burdens that section 5 imposes on covered jurisdictions are severe and extraordinary." Texas Br. 24.

The record paints a different picture. Ever mindful of both efficiency and federalism concerns, the three-judge panel adjudicated the photo ID law with dispatch, and with great deference to the sovereign rights of Texas. Throughout the litigation, the court acted with "obvious urgency," so as to permit "Texas's only chance of implementing SB 14 before the November 2012 elections." *Texas ID*, 2012 WL 3743676, at *5. Even before the United States had filed an answer to Texas's amended complaint, the court granted Texas's request for an expedited schedule. *Texas v. Holder*, No. 12-128 (D.D.C. Mar. 27, 2012) (scheduling order), ECF No. 43. The court rejected the defendants' position that a summer trial was infeasible, and set an accelerated case schedule, with 90 days of discovery, a five-day trial beginning July 9, and the promise of a decision by Texas's requested date of August 31. *Id.* Each of these dates was met—despite ample reasons to modify the schedule occasioned by Texas's own delays. As the court said:

> It should be no surprise to Texas that this Court has been troubled by Texas'[s] dilatory conduct. The specific instances of delay detailed in Defendants' briefs—much of which is not specifically rebutted or contested by Texas—and revealed or confirmed at the May 3, 2012 hearing, has troubled this Court even more. . . . Based upon the record to date, this Court would be well within its discretion to continue the July 9 trial date, to impose monetary sanctions against Texas, or to keep the July 9 trial date and impose evidentiary sanctions such as an adverse inference upon Texas.

Texas v. Holder, No. 12-128 (D.D.C. May 7, 2012) (order clarifying trial schedule), ECF No. 107.

Nevertheless, the court stuck to its schedule. As it explained, "[t]he questions under the Voting Rights Act presented here are too important to let even Texas'[s] missed discovery . . . force a change to the July 9 trial date." *Texas v. Holder*, No. 12-128 (D.D.C. May 22, 2012) (order denying motion to clarify trial date), ECF No. 137 at ¶ 2.

The expedited schedule adopted by the court was no anomaly: each of the courts that oversaw the 2012 cases took steps to expedite the litigation.[9] It is noteworthy that, as a result, all of these cases reached final adjudication within 8 to 13 months of the filing of the complaint, well short of the median time for civil cases generally, despite the complexity of voting rights cases. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 156 (2011) (median time interval in fiscal 2011 from filing to post-trial judgment in civil cases was 23.4 months).

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[9] The *South Carolina* court "set an extremely aggressive trial schedule," *South Carolina*, 2012 WL 4814094, at *19; *South Carolina v. United States*, No. 12-203 (D.D.C. May 11, 2012) (revised scheduling order), ECF No. 67, despite the fact that the state engaged in "inexplicably dilatory conduct" prior to and during the litigation. *South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 26, 2012) (Bates, J., concurring), ECF No. 64. The court ultimately issued its final decision in October

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2012, only eight months after the commencement of the litigation. *See South Carolina*, 2012 WL 4814094, at *1. The court in the Texas redistricting case also sought to accommodate Texas's desire to implement its redistricting plans for the November 2012 elections. Texas sought a final decision before November 12, 2011, the first date on which the candidates could register to run for election. Plaintiff's Motion to Expedite, *Texas v. United States*, No. 11-1303 (D.D.C. Aug. 8, 2011), ECF No. 10. Hewing to that request, the court issued a scheduling order that contemplated the possibility of a resolution of the case by that date. *See Texas v. United States*, No. 11-1303 (D.D.C. Sept. 22, 2011) (scheduling order), ECF No. 51. After denying Texas's summary judgment motion on November 8, 2011, the court set trial for January 2012 and ultimately rendered its final decision in August 2012, about thirteen months after the case began. *Texas Redistricting*, 2012 WL 3671924, at *1-2. Florida asked the court that oversaw the early voting litigation to expedite the matter—specifically, to decide the case by early January 2012, in advance of the State's preferential presidential primary. *See Florida v. United States*, 820 F. Supp. 2d 85, 88-89 (D.D.C. 2011). The court noted, however, that the languid pace with which Florida handled the litigation "belie[d] Florida's contention that expedition of this action is essential"—for example, Florida did not file a motion to expedite until two-and-a-half months after commencing the action. *Id.* at 91. Nonetheless, the court did adopt an expedited schedule for both discovery and briefing. *Florida*, 2012 WL 3538298, at *50. The court ultimately issued its preclearance decision about twelve months after the commencement of the litigation. *See id.* at *1, 49.

B. Section 5 Litigation Is Faster Than Litigation Under Section 2 While Preventing Discriminatory Laws From Taking Effect

While addressing the burdens associated with Section 5 litigation, Petitioner and various *amici* urge that Section 2 is the "appropriate" remedy to redress discriminatory voting laws. *See* Pet'r Br. 20; Arizona Br. 27; Br. of National Black Chamber of Commerce as *Amici Curiae* in Supp. of Pet'r ("National Black Chamber Br.") 13-23. But litigation under Section 2 is more time consuming than litigation under Section 5 and at the same time fails to ensure that discriminatory voting laws are not implemented prior to adjudication.

Congress had an adequate basis for finding that Section 2 litigation was an insufficient remedy, because Section 2 cases are more costly, complex, and time consuming—often taking more than several years to resolve[10]—than those brought under Section 5. *See Shelby Cnty.*, 679 F.3d at 872-73. In part, this is because, unlike Section 2, Section 5 provides for an expedited appeal directly to this Court. 42 U.S.C. § 1973c(a); *see also* 28 U.S.C. § 1253.

This delay under Section 2 is compounded by the fact that a discriminatory law may take effect during the pendency of Section 2 litigation—one of the most critical drawbacks of Section 2 litigation that Congress considered in reauthorizing the VRA. *See Shelby Cnty.*, 679 F.3d at 872 (noting that, "during the time it takes to litigate a section 2 action . . . proponents of a discriminatory law may enjoy its benefits").

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[10] *See, e.g.*, *Levy v. Lexington Cnty., S.C.*, No. 03-3093, 2009 WL 440338, at *1 (D.S.C. Feb. 19, 2009), *vacated*, 589 F.3d 708 (4th Cir. 2009), *remanded to* 2012 WL 1229511 (D.S.C. April 12, 2012) (9 years); *Thompson v. Glades Cnty. Bd. of Cnty. Comm'rs*, 493 F.3d 1253, 1267, *vacated*, 508 F.3d 975 (11th Cir. 2007) (en banc) (7 years); *Vander Linden v. Hodges*, 193 F.3d 268, 272 (4th Cir. 1999) (8 years); *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 868 F. Supp. 1376, 1378 (M.D. Fla. 1994), *vacated*, 72 F.3d 1556 (11th Cir. 1996), *remanded to* 995 F. Supp. 1440 (M.D. Fla. 1998), *aff'd*, 204 F.3d 1335 (11th Cir. 2000) (10 years).

The suggestion that preliminary injunctions may remedy this problem, *see* National Black Chamber Br. 13-23, is not persuasive. It overlooks the fact that, by its nature, "a preliminary injunction is an *extraordinary and drastic* remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis added) (citation and internal quotation marks omitted). A plaintiff must demonstrate entitlement to relief by a "*clear showing*" even before discovery has begun. *Id.* And this Court has long made it clear that a preliminary injunction is "never awarded as of right," *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008), "even though irreparable injury may otherwise result to the plaintiff," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation and internal quotation marks omitted).

United States v. Charleston County, 316 F. Supp. 2d 268 (D.S.C. 2003), illustrates this reality. There, the United States alleged in January 2001 that the at-large method of electing the members of the Charleston County Council violated Section 2 of the VRA. *Id.* at 270. In March 2002, the United States moved for a preliminary injunction to prevent the method from being used for the November 2002 elections, and the request was denied. *Id.* at 272-73. Following a trial on the merits, however, the court in 2003 found that "the at-large system of election for the Charleston County Council unlawfully denies African Americans equal access to the electoral process" and enjoined its use in future elections.[11] *Id.* at 304. Unfortunately, by that time, the November 2002 elections had already occurred. *See id.* at 268; *see also Williams v. City of Dallas,* 734 F. Supp. 1317, 1317, 1367-68, 1415 (N.D. Tex. 1990) (finding after denial of preliminary injunction and trial that the electoral system for the Dallas City Council violated Section 2, and noting that an election had occurred since the time the injunction was denied).

C. The Scope Of Discovery In Section 5 Cases Can Be Limited So As To Prevent Intrusion Into Privileged Legislative Matters

Texas argues that its state legislators were subjected to inappropriate questioning about their motives in passing the photo ID legislation. Texas Br. 14-15. Texas's account ignores the great deference shown to such concerns by the court in that case even though Section 5 expressly requires an inquiry into legislative purpose.[12] Mindful of "federal intrusion into sensitive areas of state and local policy making," *Nw. Austin*, 557 U.S. at 202, the *Texas* court prohibited all discovery relating to legislative acts or a legislator's motivations, other than what was in the public record; prohibited the discovery of certain communications between legislators and executive agencies; and shielded most evidence in possession of the Lieutenant Governor, even though the Lieutenant Governor operates as both a legislator and an executive. *Texas ID*, 2012 WL 3743676, at *5-6.

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[11] As a part of the Section 2 analysis, the court also described attempts by the South Carolina legislature to alter the method of electing the Charleston County School Board after the 2000 elections resulted in Blacks becoming a majority on the school board for the first time. *Charleston Cnty.*, 316 F. Supp. 2d at 290 n.23. If not for the Attorney General's objection under Section 5, South Carolina would have adopted "the exact same method" for the school board elections as the discriminatory one struck down for the County Council. *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 80, 84-85 (2005). Whereas the Section 2 suit had lasted four years, Section 5 swiftly prevented South Carolina from engaging in discriminatory electoral gamesmanship. *Id.* at 80.

[12] Notably, both Fourteenth Amendment and Section 2 litigation also contemplate inquiries into legislative intent that can cause similar discovery disputes. *See City of Mobile v. Bolden,*

Similarly, "[d]uring the discovery phase of [the Florida] case, the intervenors moved to compel deposition testimony from four Florida legislators and two legislative staff members," but the motion was denied on the grounds of legislative privilege. *Florida*, 2012 WL 3538298, at *50; *see also id.* at *44 & n.65 (rejecting the United States' request that the court draw an adverse inference from Florida's refusal to allow its legislators to be deposed).

Clearly, courts can manage discovery in Section 5 cases while preventing intrusion into the "sensitive areas" outlined in *Northwest Austin*.

D. Intervenors Carefully Managed By The Courts Played An Important Role In The 2012 Cases

The 2012 cases also refute the suggestion that "rampant intervention by private parties in judicial preclearance cases has significantly increased" the costs of Section 5 litigation. Former Officials Br. 24; *see also* Texas Br. 13-14. Indeed, intervenors in the 2012 cases—many of whom became parties to the

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446 U.S. 55, 66 (1980); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir.1990).

cases without opposition from the covered jurisdictions[13]—played an important role in representing the interests of minority voters, even while operating under significant constraints imposed by the district courts.

For instance, in the Texas redistricting case, the United States did not object to the State Senate redistricting plan, but several intervenors did, arguing that the plan was enacted with discriminatory intent. *Texas Redistricting*, 2012 WL 3671924, at *21. Following trial, the court agreed with the intervenors and denied preclearance. *Id.* Similarly, the United States declined to take the position that one particular Congressional district was protected under the VRA, but several intervenors did, urging that, as a result, the redistricting plan would have an impermissibly retrogressive impact. *Id.* at *44 (majority opinion). The court also agreed with the intervenors in that respect. *Id.*

In the Texas photo ID case, intervenors contributed significantly to the district court's resolution of the preclearance issues. The court's rejection of Texas's expert on discriminatory effect was based substantially on the testimony of the intervenors' statistical expert. *Texas ID*, 2012 WL 3743676, at *23-25. In addition, the court expressly relied on the testimony of several other witnesses presented by intervenors on the issue of the disproportionate burden that the law would have on minorities. *Id.* at *27-29. Similarly, in ***Florida***, the court relied primarily on the testimony of the intervenors' expert witness to find that the proposed changes would disproportionately affect minorities. *See, e.g.*, *Florida*, 2012 WL 3538298, at *17, 25, 26.

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[13] *See, e.g.*, *South Carolina v. United States*, No. 12-203 (D.D.C. Mar. 20, 2012) (noting that South Carolina did not file a response to the motion to intervene and granting the motion), ECF No. 10; *Florida v. United States*, No. 11-1428 (D.D.C. Oct. 19, 2011) (noting that Florida did not oppose permissive intervention and granting motions to intervene), ECF No. 42; *Texas v. United States*, No. 11-1303 (D.D.C. Aug. 16, 2011) (noting that Texas did not oppose permissive intervention and granting motion to intervene), ECF No. 11.

Moreover, in each of these cases, the intervenors operated under significant constraints imposed by the court. For instance, the courts ordered the United States and intevenors to confer with each other throughout the litigation to determine whether their position on any given issue could be set forth in a consolidated fashion,[14] required intervenors to work collectively and to act through a single representative,[15] and carefully managed the intervenors' involvement.[16]

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[14] *See, e.g.*, *South Carolina v. United States*, No. 12-203 (D.D.C. Mar. 30, 2012) (order granting motion to intervene and requiring intervenors to confer with the United States prior to any filings to determine whether their positions can be set forth in a consolidated fashion), ECF No. 10; *Florida v. United States*, No. 11-1428 (D.D.C. Oct. 19, 2011) (same), ECF No. 42; *see also Texas v. United States*, No. 11-1303 (D.D.C. Sept. 30, 2011) (paperless minute order precluding those intervenors who agreed with the United States on Texas's compliance from filing a separate brief).

[15] *See, e.g.*, *Texas v. United States*, No. 11-1303, ECF No. 51, at ¶7 (order requiring the intervenors to designate one representative to address scheduling and non-merits issues, including all discovery disputes).

[16] *See, e.g.*, *South Carolina v. United States*, No. 12-203 (D.D.C. Aug. 7, 2012) (order limiting intervenors as a group to five hours of live testimony at trial, in comparison to fourteen for the state and nine for the United States), ECF No. 155; *Texas v. Holder*, No. 12-128 (D.D.C. June 13, 2012) (order limit-

Indeed, it is telling that although Petitioner and its supporting *amici* reference the relatively large number of intervenors in these cases, they ignore that in each case, all intervenors operated as a single unit.[17]

E. Covered Jurisdictions Do Not Face An "Impossible Burden" Under Section 5

Texas also argues that covered jurisdictions face an "impossible burden" under Section 5 because a court hearing a Section 5 case can demand "that the State produce evidence that is impossible to obtain" or else invoke "new theories of 'retrogression' and requir[e] the State to rebut them." Texas Br. 15, 18. Other *amici* complain that Section 5 is burdensome because it requires the covered jurisdiction to "prove a negative" by establishing the absence of discriminatory purpose. *See* Former Officials Br. 14; Br. of Cato Institute as *Amicus Curiae* in Supp. of Pet'r 5. However, the 2012 cases rebut these claims.

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ing intervenors as a group to five hours of live testimony, in comparison to ten each for Texas and for the United States), ECF No. 183; *South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 26, 2012) (order limiting intervenors as a group to fewer depositions, interrogatories, and requests for admission than those allowed for the original parties), ECF No. 64.

[17] Moreover, if the restrictions imposed by the courts on intervenors in the 2012 cases were somehow deemed insufficient, any burden created by the involvement of such intervenors does not provide a justification for striking down Section 5 as unconstitutional. Under the Federal Rules of Civil Procedure, courts have ample authority to control the conduct of intervenors, such as by limiting their number and the extent of their involvement. *See* Fed. R. Civ. P. 24(b); *see also* Fed. R. Civ. P. 24 advisory committee's note; 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1913 (3d ed. 2012).

Contrary to the claims of various *amici*, these courts did not invent the governing retrogression standard from whole cloth. Rather, they applied the decades-old retrogression standard first established by this Court in *Beer v. United States*: "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. 130, 141 (1976); *see also Texas ID*, 2012 WL 3743676, at *32 ("For decades, courts have applied the Supreme Court's longstanding interpretation of section 5's effect element . . . ."). South Carolina and Florida could meet that standard. Texas could not.[18]

In *South Carolina*, the court concluded that given its "expansive reasonable impediment provision" the State's photo ID law would "not have a discriminatory retrogressive effect on racial minorities . . . ." 2012 WL 4814094, at *12. In fact, the court specifically noted that South Carolina's showing with respect to the mitigating impact of that provision distinguished the case from the Texas ID case. *See id.* at *16. Likewise, in *Florida*, the court determined that adoption of an ameliorative early voting plan within the "menu" of options devised by the State would not be retrogressive. 2012 WL 3538298, at *30. These cases demonstrate that it is not impossible for a covered jurisdiction to establish a lack of retrogression.

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[18] Indeed, following the 2010 census, Texas was the *only* state whose statewide redistricting plans were denied preclearance by the Attorney General. U.S. Comm'n on Civil Rights, *Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act* 28 (2012).

While Texas argues that there exists no precise measure of retrogression and that Section 5 is thus subject to the interpretive whims of the Attorney General and federal judges, that argument is unpersuasive. With regard to the photo ID litigation, the State asks "how exactly is Texas (or any other State) supposed to 'prove' the absence of a disparity in photo-identification possession?" Texas Br. 18. But this argument ignores what actually happened in that case, which did "not hinge merely on Texas's failure to prove a negative." *Texas ID*, 2012 WL 3743676, at *26 (citation and internal quotation marks omitted). Indeed, the *Texas ID* court pointed to substantial record evidence affirmatively demonstrating that the photo ID law would have a disproportionate and retrogressive effect on Latino and Black voters. *Id.* at *1, 26-30.

To be sure, close cases—unlike those decided in 2012—could raise questions about the degree of harm required to establish retrogression. But Petitioner has brought a *facial* challenge and thus "can only succeed . . . by establishing that *no* set of circumstances exists under which the [VRA] would be valid, i.e., that the law is unconstitutional in all of its applications" or that the statute lacks any "plainly legitimate sweep." *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008) (citations and internal quotation marks omitted). Given the success of covered jurisdictions in showing nonretrogression, Texas's theoretical concerns about its ability to meet the retrogression standard do not justify striking down Section 5.

Additionally, both the South Carolina and Florida cases demonstrate that a jurisdiction can show the absence of discriminatory purpose under the *Arlington Heights* factors. *See South Carolina*, 2012 WL 4814094, at *12 (citing *Arlington Heights*); *Florida*, 2012 WL 3538298, at *39 (same). In *South Carolina*, the court found that the State acted without a discriminatory purpose insofar as R54 was facially neutral; the statute was designed to achieve the legitimate State interests of preventing fraud and increasing voters' confidence in the legitimacy of elections; and the legislature made ultimately fruitful attempts to ameliorate the law's discriminatory effect. *See* 2012 WL 4814094, at *12-15. Similarly, in *Florida*, the court found that a change relating to the casting of ballots by inter-county movers was enacted without a discriminatory purpose, noting that the State had a legitimate interest in preventing fraud even in the absence of evidence demonstrating that such fraud existed. *See* 2012 WL 3538298, at *42-46.

CONCLUSION

For the reasons set forth above, *Amici* urge the Court to affirm the judgment of the Court of Appeals.

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February 1, 2013

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC HOLDER, Attorney General of the United States, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF REPS. F. JAMES SENSENBRENNER, JR., JOHN CONYERS, JR., STEVE CHABOT, JERROLD NADLER, MELVIN L. WATT, AND ROBERT C. SCOTT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The VRA Responds To A Century Of Ineffective Protection For Minority Suffrage 3

II. The Legislative History Of The 2006 Reauthorization Shows That Congress Considered And Responded To Extensive Evidence In Deciding To Reauthorize Section 5 9

  A. Congress Paid Careful Attention To This Court's Decisions Throughout The Reauthorization Process 11

  B. The 2006 Reauthorization Rests On An Extensive Record Showing Both The Continuing Need For Section 5 And Its Effectiveness 12

  C. Congress Has Carefully Tailored The VRA To Respect States' Interests During Each Reauthorization 21

  D. The 2006 Reauthorization Reflected A Bipartisan Consensus And Received Significant Support From Covered Jurisdictions 27

III. The VRA Regulates The Political Process, Voting, and Race – Areas Where Congress Acts At The Height Of Its Powers And Merits Special Deference From This Court.................... 30

  A. The Constitution Grants Congress Broad Powers To Pass Legislation Protecting Racial Minorities 30

  B. The Constitution Grants Congress Special Authority To Safeguard Fundamental Rights...................................... 32

  C. The Elections Clause Recognizes An Especially Robust Role For Congress In Regulating Federal Elections And Undercuts Any Tenth Amendment-Based Facial Challenge To The Voting Rights Act 33

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999) 23

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 14

Bartlett v. Strickland,
556 U.S. 1 (2009) 9

City of Boerne v. Flores,
521 U.S. 507 (1997) 11, 13, 31

City of Rome v. United States,
446 U.S. 156 (1980) 8, 12, 38

Civil Rights Cases,
109 U.S. 3 (1883) 5

Colegrove v. Green,
328 U.S. 549 (1946) 7, 37

Cook v. Gralike,
531 U.S. 510 (2001) 33, 35

Crawford v. Marion Cnty. Bd. of Elections,
553 U.S. 181 (2008) 12, 36

Ex parte Clarke,
100 U.S. 399 (1879) 34

Ex parte Siebold,
100 U.S. 371 (1879) 34

Foster v. Love,
522 U.S. 67 (1997) 35

Fullilove v. Klutznick,
448 U.S. 448 (1980) 10

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 29

Georgia v. Ashcroft,
539 U.S. 461 (2003) 29

Giles v. Harris,
189 U.S. 475 (1903) 7

Gregory v. Ashcroft,
501 U.S. 452 (1991) 35

Grutter v. Bollinger,
539 U.S. 306 (2003) 25

Guinn v. United States,
238 U.S. 347 (1915) 6

Harper v. Va. State Bd. of Elections,
383 U.S. 663 (1966) 32

In re Coy,
127 U.S. 731 (1888) 35

Johnson v. California,
543 U.S. 499 (2005) 31

Kramer v. Union Free Sch. Dist.,
395 U.S. 621 (1969) 32

Lane v. Wilson,
307 U.S. 268 (1939) 6

Luther v. Borden,
48 U.S. 1 (1849) 37

Morris v. Gressette,
432 U.S. 491 (1977) 21

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 35

Nev. Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 12

Nixon v. Herndon,
273 U.S. 536 (1927)..6

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000)..37

Nw. Austin Mun. Util. Dist. No. 1 v. Holder,
557 U.S. 193 (2009)..9, 23, 28

Roudebush v. Hartke,
405 U.S. 15 (1972)..33

Smiley v. Holm,
285 U.S. 355 (1932)..33, 34

Smith v. Allwright,
321 U.S. 649 (1944)..6

South Carolina v. Katzenbach,
383 U.S. 301 (1966)..passim

Tennessee v. Lane,
541 U.S. 509 (2003)..12, 32

Terry v. Adams,
345 U.S. 461 (1953)..6

Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994)..10

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995)..35

United States v. Avery,
80 U.S. 251 (1871)..5

United States v. Cruikshank,
92 U.S. 542 (1875)..5

United States v. Georgia,
546 U.S. 151 (2006)..32

United States v. Gradwell,
243 U.S. 476 (1917)..33

United States v. Reese,
92 U.S. 214 (1875) 5

United States v. Salerno,
481 U.S. 739 (1987) 36

Vieth v. Jubelirer,
541 U.S. 267 (2004) 34, 37

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 10

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 36

Woods v. Cloyd W. Miller Co.,
333 U.S. 138 (1948) 35

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 7, 32

Constitutional Provisions

U.S. CONST. art. I, § 4 .... passim

U.S. CONST. art. IV, § 4 37

U.S. CONST. amend XIV .... passim

U.S. CONST. amend. XV .... passim

Statutes

42 U.S.C. § 1973b(a) 23

42 U.S.C. § 1973b(a)(7) 25

42 U.S.C. § 1973b(a)(8) 24

42 U.S.C. § 1973c .... passim

Apportionment Act of 1842, 5 Stat. 491 34

Pub. L. No. 91-285, 84 Stat. 314 (1970) 27

Pub. L. No. 94-73, 89 Stat. 402 (1975) 27

Pub. L. No. 97-205, 96 Stat. 131 (1982) 27

Pub. L. No. 109-246, 120 Stat. 577 (2006) ... 24

Regulations

28 C.F.R. § 51 ... 22
28 C.F.R. pt. 51, app. ... 36

Legislative Materials

51 Cong. Rec. 6555 (1890) ... 5
152 Cong. Rec. H5131 (daily ed. July 13, 2006) ... passim
152 Cong. Rec. S7949 (daily ed. July 20, 2006) ... 16
Cong. Globe, 42d Cong., 2d Sess. 525 (1872) ... 30
H. Amdt. 1183 ... 25
H. Amdt. 1184 ... 24
H. Amdt. 1186 ... 26
H.R. Rep. No. 109-478 (2006) ... passim
H.R. Rep. No. 89-439 (1965) ... 13
H.R. Rep. No. 91-397 (1969) ... 14
H.R. Rep. No. 94-196 (1975) ... 14
H.R. Rep. No. 97-227 (1981) ... 8, 15, 21
S. Rep. No. 97-417 (1982) ... 8, 15
Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 97th Cong. 17 (1981) ... 15
Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 89th Cong. (1965) ... 13

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LANDSBERG, BRIAN K., FREE AT LAST TO VOTE (2007) 8

LANE, CHARLES, THE DAY FREEDOM DIED (2008) 5

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WOODWARD, C. VANN, THE STRANGE CAREER OF JIM CROW (3d ed. 1974) 7

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Members of the House Committee on the Judiciary and were the bipartisan leadership of the Committee and its Subcommittee having jurisdiction over constitutional and federal civil rights matters at the time of the 2006 reauthorization of the Voting Rights Act. They include: Rep. F. James Sensenbrenner, Jr. (R-WI), then Chairman of the Committee; Rep. John Conyers, Jr. (D-MI), then Ranking Member of the Committee; Rep. Steve Chabot (R-OH), then Chairman of the Subcommittee on the Constitution; Rep. Jerrold Nadler (D-NY), then Ranking Member of the Subcommittee; Rep. Melvin Watt (D-NC), then Member of the Subcommittee and Chairman of the Congressional Black Caucus; and Rep. Robert C. Scott (D-VA), then Member of the Subcommittee and Chairman of the Civil Rights Taskforce of the Congressional Asian Pacific American Caucus.

Amici played a major role in the passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, and are deeply interested in its continued vitality.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Nor did anyone other than counsel fund the preparation or submission of this brief. Letters reflecting the consent of the parties have been filed with the Clerk.

Amici represent a combined experience of over 150 years in Congress. All *amici* were directly and substantively involved in the hearings and the Committee processes that led to the 2006 reauthorization. *Amici* sought to "ensure that all aspects of the right to vote are protected, including the right to cast a meaningful ballot." H.R. REP. NO. 109-478, at 6 (2006) (Committee Statement on the Right to Vote and the Voting Rights Act of 1965).

Amici have an institutional interest in defending Congress's powers under Section 5 of the Fourteenth Amendment, Section 2 of the Fifteenth Amendment, and the Elections Clause of Article I, Section 4, to enact appropriate legislation protecting the right to vote. After conducting extensive hearings, and based on a voluminous record, *amici* concluded that a reauthorization of Section 5 was necessary to fulfill their constitutional responsibilities and to ensure that minority citizens have the "ability to fully participate in the electoral process." H.R. REP. NO. 109-478, *supra*, at 6.

SUMMARY OF ARGUMENT

The Voting Rights Act of 1965 (VRA) represents the first successful response to nearly a century of minority disenfranchisement. Congress enacted the VRA in direct response to evidence of pervasive efforts by southern states to deny blacks the right to vote. It has been the single most effective tool in combating discrimination in voting.

The 2006 reauthorization of Section 5 of the VRA continues the work of guaranteeing minority citizens the right to participate fully in the electoral process. That reauthorization is a model exercise of

Congress's unique ability to legislate in complex areas. The overwhelming, bipartisan decision to reauthorize the VRA, which drew support from covered and non-covered jurisdictions alike, should be upheld by this Court under any standard.

The extensive record before Congress demonstrates the VRA's success in rolling back a century of disenfranchisement. But it also demonstrates the continued need for Section 5 to block covered jurisdictions' implementation of new discriminatory voting rules. Congress responded by tailoring the Act to respect states' independence and to ensure that the VRA imposes no unnecessary burdens.

The sufficiency of the record is reinforced by the subject matter. This Court has recognized that Congress acts at the height of its powers when it legislates to regulate the concerns at which the VRA is aimed: racial discrimination, infringement of fundamental rights, and elections. When Congress exercises its powers at the intersection of these three concerns – as it did here – this Court should defer to Congress's considered judgment.

ARGUMENT

I. The VRA Responds To A Century Of Ineffective Protection For Minority Suffrage.

The Fourteenth and Fifteenth Amendments confer broad powers on Congress to effectuate the rights they provide. Both during Reconstruction and in passing the VRA, Congress enforced those Amendments through legislation combatting the disenfranchisement and political exclusion of minority citizens.

As history shows, this is not the first occasion on which this Court has faced claims, like those petitioner tries to advance, *see* Petr. Br. 24-33, that times have changed. The success of Reconstruction-era legislation also led to arguments that federal protection was no longer necessary. This Court agreed, setting off a century-long campaign by southern states to disenfranchise minorities and nullify federal efforts to remedy that discrimination. The VRA has provided the only subsequent effective response to voting discrimination. Nonetheless, the work of Section 5 is not yet complete.

1. During Reconstruction, Congress successfully deployed its Fourteenth and Fifteenth Amendment powers to protect minority suffrage. Those Amendments empower Congress to pass legislation to "effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *see also infra* Part III (discussing the scope of congressional enforcement powers). In 1870, Congress passed the Enforcement Act, making "it a crime for public officers and private persons to obstruct exercise of the right to vote." *Katzenbach*, 383 U.S. at 310. A year later, Congress expanded the Act to provide for federal supervision of elections. *Id.*

Congress's aggressive enforcement of voting rights produced widespread black suffrage. During the early years of Reconstruction, "about two-thirds of eligible black males cast ballots in presidential and gubernatorial contests." Chandler Davidson, *The*

Voting Rights Act: A Brief History, *in* CONTROVERSIES IN MINORITY VOTING 7, 10 (Bernard Grofman & Chandler Davidson eds., 1992). Racially motivated violence during elections declined dramatically. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 106 (2000).

2. Believing the same rosy assurances petitioner now offers – that there was no reason to believe that discrimination had been "hibernating for two generations," Petr. Br. 39 – this Court responded overoptimistically. Persuaded that black citizens "ha[d] shaken off the inseparable concomitants" of slavery, *The Civil Rights Cases*, 109 U.S. 3, 25 (1883), this Court construed the Enforcement Act to reach only a small subset of the conduct interfering with minority suffrage, *see, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Avery*, 80 U.S. 251 (1871). *See generally* CHARLES LANE, THE DAY FREEDOM DIED (2008).

In the wake of these decisions, southern states began to "nullif[y]" the First Reconstruction. 51 CONG. REC. 6555 (1890) (statement of Rep. Jonathan Rowell).[2] States reorganized voting precincts and closed polling places to obstruct black voters. KEYSSAR, *supra*, at 105. They imposed residency requirements, poll taxes, and literacy tests, created complex voter registration systems, and strengthened criminal laws, all with the aim of disenfranchising black voters. *Katzenbach*, 383 U.S. at 310-11; KEYSSAR, *supra*, at 111-12. And they redrew congressional district boundaries to minimize minority political power. KOUSSER, *supra*, at 26-31. Contrary to petitioner's view, "so-called 'second generation' tactics like intentional vote dilution are in fact decades-old forms of gamesmanship." Pet. App. 28a.

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[2] *Quoted in* J. MORGAN KOUSSER, COLORBIND INJUSTICE 24 (1999).

Black political participation plummeted. In Mississippi, after 1890, less than 9000 of 147,000 voting-age black citizens remained registered to vote. KEYSSAR, *supra*, at 114. In Louisiana, where blacks had once constituted 44% of the electorate, by 1920 they cast less than 1% of the votes. Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 2 (1965). In Georgia, as late as 1940, less than 5% of eligible black citizens were registered.

3. Although this Court attempted to defend the right to vote, it was unable to combat "the variety and persistence" of laws disenfranchising minority citizens. *Katzenbach*, 383 U.S. at 311. For instance, although this Court first struck down Texas's white primary in 1927 in *Nixon v. Herndon*, 273 U.S. 536, blacks remained excluded until this Court's decisions decades later in *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953). Similarly, in *Guinn v. United States*, 238 U.S. 347 (1915), this Court struck down Oklahoma's grandfather clause, only to see the state perpetuate the clause's effects until *Lane v. Wilson*, 307 U.S. 268 (1939).

Because the right to vote is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), minority citizens suffered discrimination in other arenas as well. In particular, this Court's inability to protect minority suffrage resulted in a "strengthening of the segregation code[s]." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 115 (3d ed. 1974). To give one striking example, Chief Justice Warren later suggested that *Brown v. Board of Education* "would have been unnecessary" if the South had been fairly apportioned before 1954. JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).

4. Recognizing its limited ability to protect minority citizens, this Court directed plaintiffs to seek relief from Congress. In *Giles v. Harris*, 189 U.S. 475 (1903), it instructed a black citizen from Alabama to seek protection not from the courts but from the "legislative and political department of the government of the United States," *id.* at 488. Years later, faced with a malapportionment claim, this Court similarly directed the plaintiffs to "invoke the ample power of Congress." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

5. Congress's initial responses were ineffective. The 1957 and 1960 Civil Rights Acts empowered the Department of Justice (DOJ) to bring suit on behalf of individuals. Christopher, *supra*, at 4, 5. In response, southern states "merely switched to discriminatory devices not covered by the federal decrees." *Katzenbach*, 383 U.S. at 314.

Moreover, "case-by-case adjudication," even with the Government as plaintiff, "proved too ponderous a method to remedy voting discrimination." *City of*

Rome v. United States, 446 U.S. 156, 174 (1980); *see* H.R. REP. NO. 97-227, at 3-4 (1981); S. REP. NO. 97-417, at 5 (1982). Between 1957 and 1963, these suits secured registration for only 6000 black citizens. Christopher, *supra*, at 6.

6. The VRA successfully responded to these problems: Section 5 crafted effective prophylactic administrative and judicial relief. BRIAN K. LANDSBERG, FREE AT LAST TO VOTE 170, 180-82 (2007). Its preclearance requirement ensured that states could not perpetuate disenfranchisement through new techniques. It placed responsibility for identifying changes on jurisdictions and for overseeing the protection of voting rights within the Executive Branch, rather than placing the burden of challenging unfair practices entirely on disenfranchised and disadvantaged citizens.

The VRA's adoption of prophylactic remedies resuscitated effective enforcement of the Reconstruction Amendments. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina and South Carolina as in the entire century before 1965." Davidson, *supra*, at 21.

Moreover, during both the 1982 and 2006 reauthorization processes, Congress concluded that Section 5 continued to play a critical role in preventing minority disenfranchisement. Contrary to petitioner's denial that covered jurisdictions continue to engage in "gamesmanship," Petr. Br. 28, 43, Congress concluded that Section 5 has helped to deter, detect, and prohibit a wide range of voting laws and procedures that would otherwise have deprived minorities of their voting power. *See infra* pp. 11-22 (discussing the evidence supporting these conclusions).

As this Court reaffirmed, however, "Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009). Section 5 continues to play a major role in combating discrimination.

II. The Legislative History Of The 2006 Reauthorization Shows That Congress Considered And Responded To Extensive Evidence In Deciding To Reauthorize Section 5.

Perhaps no statute in American history has been the subject of more sustained consideration by Congress than the VRA. *See* 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (the House Judiciary Committee record was "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member of this body"). Indeed, Congress "amassed a sizable record." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009); *see* Pet. App. 24a, 47a (Congress "heard analysis and opinions by experts on all sides of the issue" and acted only after "assembling and analyzing an extensive record."); *id.* 266a ("Congress approached its task seriously and with great care." (internal quotation marks omitted)).

This Court has recognized that Congress possesses special expertise in gathering and analyzing the large amounts of information essential to well-informed policy determinations. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue."); *see also, e.g.*, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665-66 (1994) (same). This expertise stems from Congress's ability to go beyond the facts in individual lawsuits. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring) (Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider *all* facts and opinions that may be relevant to the resolution of an issue" (emphasis added)).

Moreover, particularly when it comes to questions involving the political process, legislation can be informed in valuable ways by Members' own extensive experiences. Members gain knowledge not only through their direct experiences in running for office, but also through wide-ranging contacts with constituents and Executive Branch officials. Finally, geographic diversity among its Members ensures that Congress is able to consider regional differences and state interests when crafting legislation. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179 (2001).

All these abilities are evident in Congress's consideration of whether to reauthorize Section 5. Contrary to petitioner's suggestions, the voluminous record compiled by Congress during the 2006 reauthorization fully supports Congress's decision. In addition, the reauthorization process reflects a widespread, bipartisan consensus, supported by affected jurisdictions. House Judiciary Committee Members from covered jurisdictions were active participants in shaping and supporting the 2006 reauthorization.

A. Congress Paid Careful Attention To This Court's Decisions Throughout The Reauthorization Process.

Prior to the 2006 reauthorization, House leadership and staff reviewed this Court's recent decisions regarding the appropriate scope of congressional enforcement powers. *See* H.R. REP. NO. 109-478, at 54-56 (2006). Congress was well aware of the standards articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. It understood the need both to develop a complete record before acting and to tailor its response to that record to ensure that its legislation was "congruent and proportional." Testimony from numerous witnesses about this Court's guidance helped inform the House Judiciary Committee in assembling a strong legislative record during the VRA reauthorization.

Congress correctly concluded that the record supporting reauthorization "far exceeds" the records this Court found sufficient in both *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509

(2004).[3] H.R. REP. NO. 109-478, *supra*, at 57. In fact, the 2006 record includes exactly the kind of specific evidence of intentional discrimination that the dissenters found missing in those cases. *Hibbs*, 538 U.S. at 745-49 (Kennedy, J., dissenting); *Lane*, 541 U.S. at 541-44 (Rehnquist, C.J., dissenting). Moreover, the 2006 record is comparable in both its thoroughness and the quality of supporting evidence to the legislative records this Court found adequate to sustain earlier versions of the VRA. *See City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

B. The 2006 Reauthorization Rests On An Extensive Record Showing Both The Continuing Need For Section 5 And Its Effectiveness.

The 2006 reauthorization process occurred against the backdrop of Congress's forty years of experience in crafting and reconsidering the VRA. Each time Congress considered the need for Section 5 – in 1965, 1970, 1975, 1982, and 2006 – it developed and carefully studied a massive record before deciding how best to refine the Act.

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[3] The 2006 record was also far more extensive than the record this Court recently found sufficient to support the State of Indiana's decision to adopt a voter identification requirement in *Crawford v. Marion County Board of Elections*, 553 U.S. 181 (2008). There, this Court found the State's interest in enhancing the integrity of the electoral process adequate to uphold the identification requirement where "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194 (opinion of Stevens, J., joined by Roberts, C.J. & Kennedy, J.).

This Court has repeatedly recognized the quality of that legislative process. In ***Katzenbach***, this Court emphasized the "voluminous legislative history" underlying the VRA as a basis for upholding it. 383 U.S. at 308. Similarly, in *City of Boerne*, this Court recognized that the record of racial discrimination compiled by Congress during the reauthorizations provided detailed evidence of the continued need for the VRA. It pointed to the VRA as a model for Congress's exercise of its enforcement powers. *See City of Boerne*, 521 U.S. at 530. Congress's conclusion in 2006 that the VRA remains necessary rests on an equally careful process.

1. During the initial authorization in 1965, Congress had before it a record of more than ninety-five years of widespread racial discrimination in the electoral process. H.R. REP. NO. 109-478, *supra*, at 6-7; H.R. REP. NO. 89-439, at 7 (1965). Congress conducted nine days of hearings, with a total of sixty-seven witnesses, and held three days of floor debate in the House and twenty-six in the Senate. *Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. (1965); *Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. (1965). Testimony from Members of Congress, the Attorney General, members of the U.S. Commission on Civil Rights, state and local officials, private citizens, and representatives from voting rights organizations led Congress to conclude that "widespread violations of the 15th Amendment" provided "ample justification for congressional action." H.R. REP. NO. 89-439, *supra*, at 19. Ultimately, Congress approved the Act by wide margins in both Houses.

In 1975, in a thorough review of Section 5,[4] Congress again compiled a persuasive record showing the persistence of problems the VRA was intended to combat. During thirteen days of hearings in the House and seven in the Senate, Congress heard from a wide variety of witnesses, again including Members of Congress, the DOJ, state and local officials, private citizens, and voting rights organizations. H.R. REP. NO. 94-196, at 3-4 (1975). On the basis of evidence in the nearly 3000-page record documenting significant ongoing discrimination, Congress concluded that there were still "continuing and significant deficiencies" in minority political participation and thus voted to reauthorize Section 5 for another seven years. *Id.* at 7.

Congress's 1982 reauthorization process was equally comprehensive, again supporting its conclusion that Section 5 remained necessary and appropriate legislation. The House held eighteen days of hearings, including regional hearings in covered jurisdictions, and heard testimony from 156 witnesses, assembling a record of over 2800 pages. H.R. REP. NO. 97-227, at 2 (1981). Similarly, the Senate, during nine days of hearings, heard from fifty-one witnesses and amassed a record of over 2900 pages. S. REP. NO. 97-417, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 180. The evidence of discrimination echoed Congress's findings in 1975 that covered jurisdictions had continued to devise means to suppress effective minority participation. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 17 (1981). Congress responded by extending Section 5 for an additional twenty-five years.

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[4] In 1970, Congress reviewed the progress that had been made under the VRA and extended Section 5's preclearance requirement for an additional five years. H.R. REP. NO. 91-397 (1969). Because covered jurisdictions had not truly begun to comply with Section 5's submission requirement until after *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the 1970 record contained a relatively limited discussion of the need for, and effectiveness of, the preclearance process.

2. The 2006 reauthorization process was similarly rigorous. Congress again engaged in extensive factfinding and analysis before concluding that the VRA remains necessary today. *Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 67 (2005). The House Judiciary Committee alone conducted twelve hearings and heard from forty-six witnesses representing a breadth of interests ranging from federal and state executive officials to civil rights leaders. H.R. REP. NO. 109-478, at 11-12. The Committee's record totaled over 12,000 pages. 152 CONG. REC. H5136 (daily ed. July 13, 2006) (statement of Rep. Chabot). The Senate Judiciary Committee held nine hearings and also heard from forty-six witnesses, creating a combined record of over 15,000 pages. The extensive record provides detailed evidence of Congress's thorough reconsideration of the Act and confirms the clear need for reauthorization. Congress approved the twenty-five-year extension by wide margins of 390-33 in the House and 98-0 in the Senate. 152 CONG. REC.

H5207 (daily ed. July 13, 2006); 152 CONG. REC. S8012 (daily ed. July 20, 2006).

The record confirms that although the VRA is one of the most successful civil rights statutes in American history, its "work is not yet complete." 152 CONG. REC. H5143-44 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee requested, received, and incorporated into its record eleven reports documenting the continuation of discrimination after 1982 in covered jurisdictions. *See Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *H.R. Hearing* 109-103]. Each report describes numerous examples of discrimination that prompted Section 5 objections or litigation. One of the reports, for example, detailed nearly 300 cases of voting discrimination. VOTING RIGHTS PROJECT, AM. CIVIL LIBERTIES UNION, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, (2006), *reprinted in H.R. Hearing* 109-103, *supra*, at 378 [hereinafter ACLU REPORT]. The vast evidence of ongoing discrimination in the record shows that covered jurisdictions continue to deny minority voters full and effective participation in the political process with a variety of techniques, including discriminatory annexations, de-annexations, and consolidations; redistricting plans; and polling relocations. H.R. REP. NO. 109-478, *supra*; *H.R. Hearing* 109-103, *supra*; *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *H.R. Hearing* 109-

79]; *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *H.R. Hearing* 109-70].

Petitioner's account of the reauthorization process blindly ignores the hundreds of accounts of continuing discrimination in covered jurisdictions contained in the congressional record. These numerous examples reveal both that covered jurisdictions continue to adopt discriminatory voting changes and attempt to evade enforcement of Section 5, and confirm that such attempts are more than just "fragmentary." Petr. Br. 39.

The 2006 congressional record is replete with examples of discrimination. Limited space constrains *amici* to highlighting only a few representative examples of the persistent discrimination Congress confronted.

Polling Place Changes. In 1992, Johnson County, Georgia, sought to relocate a voting precinct from the county courthouse to the private American Legion Hall, which had a well-known reputation for racial hostility and exclusion. ACLU REPORT, *supra*, at 337; Robert Kengle, VOTING RIGHTS IN GEORGIA, 1982-2006, A REPORT OF THE RENEWTHEVRA.ORG app. 1, xxviii, *reprinted in H.R. Hearing* 109-103, *supra*, at 1499. In its objection letter, the DOJ concluded that the polling place change had the effect of "discouraging black voters from turning out to vote." ACLU REPORT, *supra*, at 337.

In 1994, at the request of white voters, officials in Sunset, Louisiana, agreed to move a polling place from the community center to a different building that had been a site of historical racial discrimination. Debo P. Adegbile, VOTING RIGHTS IN LOUISIANA 1982-2006, at 31, *reprinted in H.R. Hearing* 109-103, *supra*, at 1592. The officials held no hearings, sought no input from the black community, and did not advertise the change in any way. *Id.* Minority leaders in the town did not learn of the proposed change until notified by the DOJ during the Section 5 preclearance process. *Id.*

In 1995, Jenkins County, Georgia, attempted to relocate a polling site from a location in a predominantly black community easily accessible by foot to one in a predominantly white neighborhood outside the city limits, and not easily accessible. ACLU REPORT, *supra*, at 330-31; Kengle, *supra*, at app. 1, xxviii. The Attorney General objected to the change, noting that the county's proffered reasons for the location change were merely "pretextual" and were designed to "thwart recent black political participation." ACLU REPORT, *supra*, at 331.

Similarly, in 2003 Waller County, Texas, tried to restrict early voting at a polling site near Prairie View A&M, a historically black college, after two black students decided to run for county office. NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 65-66 (2006), *reprinted in H.R. Hearing* 109-103, *supra*, at 104 [hereinafter NAT'L COMM'N REPORT]. Prairie View's students comprised 20% of the county's voting population. Thus, the county's restriction on voting directly reduced the relative voting strength of black citizens.

Discriminatory Annexations. In 1990, the city of Monroe, Louisiana, attempted to annex white suburban wards to its city court jurisdiction. Adegbile, *supra*, at 23. In its Section 5 objection letter, the DOJ noted that the wards in question had been eligible for annexation since 1970, but that there had been no interest in annexing them until the first African-American candidate ran for Monroe city court. *Id.* In 2003, the DOJ interposed an objection to a proposed annexation in the town of North, South Carolina, because the town had been racially selective in its response to both formal and informal annexation requests. John C. Ruoff & Herbert E. Buhl III, VOTING RIGHTS IN SOUTH CAROLINA: 1982-2006, at 26 (2006), *reprinted in H.R. Hearing* 109-103, *supra*, at 1928. In rejecting the proposed annexation, the Attorney General concluded that "race appears to be an overriding factor in how the town responds to annexation requests." *Id.*

Discriminatory Reductions. In 1991, Concordia Parish, Louisiana, attempted to exclude minority voters by reducing the size of its police jury from nine to seven seats in order to eliminate one majority black district. Adegbile, *supra*, at 24. Although the parish claimed that the reduction was a cost-saving measure, the DOJ's objection noted that the parish had been unconcerned about saving money until an influx of African-American residents converted the district from a majority-white district to a majority-black district. *Id.*

3. The 2006 record also reveals that between 1982 and 2004, the rate of DOJ objections remained almost constant when compared to the period between 1965 and the 1982 reauthorization, with

more than 600 objections being interposed. *H.R. Hearing* 109-103, *supra*, at 172. Congress recognized, and this Court found in *City of Rome*, 446 U.S. at 181, that the number and nature of objections interposed by the Attorney General indicate the continued need for preclearance. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, at 12, *reprinted in H.R. Hearing* 109-103, *supra*, at 2664. Congress also found that between 1982 and 2003, covered jurisdictions withdrew more than 200 proposed changes after initially seeking preclearance under Section 5. NAT'L COMM'N REPORT, *supra*, at 58. Jurisdictions routinely abandon proposed discriminatory voting changes when a "Request for More Information" by the Attorney General signals that preclearance is unlikely. These withdrawal letters highlight hundreds of discriminatory voting changes that *would have been* implemented in the absence of Section 5.

Finally, the record reveals that Section 5 deters covered jurisdictions from proposing discriminatory voting changes in the first place. *See H.R. Hearing* 109-79, *supra*, at 4 (statement of Rep. Chabot) (noting the "thousands of proposed plans that never came to fruition because of section 5"); *H.R. Hearing* 109-70, *supra*, at 17; *see also* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 613-14 (2005). The preclearance requirement encourages jurisdictions to make voting choices that benefit *all* voters and helps to ensure that officials more carefully evaluate and modify voting changes that might otherwise be retrogressive before they are submitted for preclearance.

C. Congress Has Carefully Tailored The VRA To Respect States' Interests During Each Reauthorization.

The VRA represents an appropriate congressional response to the problem of pervasive racial discrimination in the electoral process. The record shows that in creating an administrative preclearance process, modifying the "bailout" process, and enacting a clear sunset provision, Congress has taken seriously both its responsibility to enforce the Fourteenth and Fifteenth Amendments and the need to respect local autonomy.

1. Congress initially developed the administrative preclearance regime as a speedy and efficient alternative to requiring that covered jurisdictions seek declaratory judgments before implementing voting-related changes. H.R. REP. NO. 97-227, *supra*; *see also Morris v. Gressette*, 432 U.S. 491, 502-05 (1977); Mark Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 154-55 (2006). By requiring the Attorney General to make administrative preclearance decisions within a sharply limited time frame,[5] Congress recognized

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[5] The Attorney General has sixty days to interpose an objection to a submitted voting change, 28 C.F.R. § 51.1(a)(2), with the possibility of one sixty-day extension, *id.* § 51.37. Absent a timely objection, the change is automatically precleared. *See* 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.42.

covered jurisdictions' strong interest in implementing legitimate new voting provisions quickly. *See* Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 681-82 (2008); Posner, *supra*, at 91-92. Petitioner points to *no* evidence in the record suggesting that it has ever faced any logistical burden in seeking preclearance for a covered change.

In reauthorizing Section 5, Congress also concluded that, contrary to petitioner's assertion, Petr. Br. 33, Section 2 litigation alone provides an "inadequate remedy" for minority voters. H.R. REP. NO. 109-478, *supra*, at 57. Congress found that "case-by-case enforcement alone is not enough to combat efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." *Id.* Recognizing that Section 2 has helped achieve important progress for minority voters in covered jurisdictions, Congress concluded that Section 5 is necessary to prevent "backsliding from the gains previously won" under both Section 2 and Section 5. *Id.* at 53. Moreover, Congress recognized that placing the burden on affected individuals to challenge discriminatory voting changes would leave many of those changes unchallenged, in part because the high costs and time constraints of litigation might discourage individuals from bringing suit. *See H.R. Hearing* 109-70, *supra*, at 42 (noting that the cost of private litigation under Section 2 may "run in the millions of dollars").

In addition, by placing the VRA's enforcement powers in the politically accountable Executive Branch, Congress took appropriate account of covered jurisdictions' interests in avoiding suits by individual litigants. *Cf. Alden v. Maine*, 527 U.S. 706, 759-60 (1999) (explaining that enforcement by the United States does not infringe state sovereignty).

2. In 2006, Congress reassessed several provisions of the VRA to determine whether conditions within covered jurisdictions required modifications. Having already modified the "precisely tailored" bailout provision, 42 U.S.C. § 1973b(a), in 1982, Congress concluded in 2006 that that provision was effectively crafted to create incentives for covered jurisdictions to eliminate discriminatory features of their electoral systems, *see* Laughlin McDonald, *Racial Fairness: Why Shouldn't It Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 851 (1992). Moreover, the provision ensured that Section 5 remains focused on those areas where oversight is necessary to prevent and respond to voting rights abuses. This Court's decision in *Northwest Austin* adopting a liberal reading of the bailout provision, *see* 557 U.S. at 211 (holding that "all political subdivisions – not only those described in § 14(c)(2) [of the Act, defining the term 'political subdivision'] – are eligible to file a bailout suit"), reinforces the flexible nature of the coverage formula.

When Congress concluded that a particular component of the VRA was no longer necessary, it did not hesitate to repeal that provision. As part of the same reauthorization process that extended preclearance, Congress also reevaluated the need for federal examiners in covered jurisdictions. In response to evidence that examiners had been used only sparingly in recent years, Congress concluded that the examiner provisions had outlived their usefulness. *See Voting Rights Act: Sections 6 & 8 – The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Rep. Scott). Accordingly, Congress repealed Sections 6, 7, and 9 of the VRA in their entirety. *See* Pub. L. No. 109-246 § 3(c), 120 Stat. 580 (2006); *see also* H.R. REP. NO. 109-478, *supra*, at 91-92.

Finally, during each reauthorization, Congress has included a sunset provision for Section 5, 42 U.S.C. § 1973b(a)(8) rather than making it permanent. This decision ensures that Congress will periodically reevaluate the need for the VRA. *See* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1817 (2004).

The 2006 legislative record shows that Congress carefully considered what would constitute an appropriate reauthorization period. Representative Louie Gohmert (R-TX) proposed an amendment on the House floor, H. AMDT. 1184 (offered July 13, 2006), that would have limited reauthorization to ten years. The amendment was defeated by a vote of 288-134. 152 CONG. REC. H5205 (daily ed. July 13, 2006). In opposing the amendment, Representative Sensenbrenner emphasized the importance of capturing more than one redistricting cycle to provide Congress with sufficient evidence to reassess Section 5. *Id.* at H5187. Thus, Congress decided to include a twenty-five-year sunset provision in the Act. 42 U.S.C. § 1973b(a)(8). Contrary to petitioner's claim that the provision somehow allows Congress to retain preclearance until "the crack of doom," Petr. Br. 39

(quoting Pet. App. 94a), the very purpose of a sunset provision is to confine Congress's power to a defined and limited time period. Both the record and this Court's guidance support the conclusion that eliminating the vestiges of historical racial discrimination may well take this amount of time. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). Just as significantly, Congress expressly declared that it would reconsider Section 5 in fifteen years to ensure that the provision was still both necessary and effective. 42 U.S.C. § 1973b(a)(7).

3. In addition to carefully fine-tuning Section 5, Congress also considered but rejected proposed amendments to the VRA that would have altered Section 5's coverage formula and bailout procedures. Congress's consideration of each of these proposed amendments shows its thorough and deliberative examination of Section 5 during the 2006 reauthorization.

An amendment offered by Representative Charles Norwood (R-GA), H. AMDT. 1183 (offered July 13, 2006), would have replaced Section 5's "very carefully" crafted coverage formula, *see* 152 CONG. REC. H5185 (daily ed. July 13, 2006) (statement of Rep. Conyers), with a rolling test for Section 5 coverage. Opponents of the amendment explained that the existing coverage formula, combined with the context-sensitive bailout process, struck a more appropriate balance between remedying and deterring discrimination in jurisdictions with a pervasive history of discrimination on the one hand

and releasing jurisdictions from coverage if Section 5 was no longer necessary on the other. The amendment was defeated by a vote of 318-96. *Id.* at H5204-05.

Another amendment proposed by Representative Lynn Westmoreland (R-GA), H. AMDT. 1186 (offered July 13, 2006), would have provided for an expedited, proactive bailout procedure placing a significant new burden on the DOJ. Representative Sensenbrenner explained that the amendment would require DOJ officials to travel to nearly 900 jurisdictions each year to review voluminous voting records and interview thousands of individuals to determine whether all of the jurisdiction's voting changes were submitted for preclearance and that all other bailout criteria had been met. *See* 152 CONG. REC. H5199 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner). Such a regime would make the VRA administratively ineffective and ultimately disadvantage minority voters by frustrating Congress's goal of continuing to target those jurisdictions with a history of entrenched voting discrimination. *See id.* at H5199-200. The amendment was defeated by a vote of 302-118. *Id.* at H5206-07.

Congress's thorough consideration of these amendments underscores the careful attention that Congress has given to Section 5 during each reauthorization to ensure that it remains properly tailored to protect minority voting rights while respecting the interests of covered jurisdictions.

D. The 2006 Reauthorization Reflected A Bipartisan Consensus And Received Significant Support From Covered Jurisdictions.

1. The Voting Rights Act has enjoyed strong bipartisan support throughout its history, including reauthorization under four Republican Presidents and with both Democratic and Republican majorities in Congress.[6] As Representative Mel Watt (D-NC) observed in introducing the 2006 reauthorization bill: "It is not a Republican bill, it is not a Democratic bill . . . . [It] is a bipartisan, bicameral bill that unites us as a country." *Rep. Watt Comments on Introduction of Bicameral/Bipartisan Voting Rights Act Reauthorization Bill*, U.S. FED. NEWS, May 2, 2006, *available at* 2006 WLNR 8232980.

As discussed earlier, in 2006 Congress responded to the overwhelming evidence of continuing discrimination in the record by considering, but ultimately rejecting, several proposed amendments that would have weakened the VRA's protections.

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[6] The 1970 reauthorization occurred under President Nixon (Pub. L. No. 91-285, 84 Stat. 314 (signed June 22, 1970)) (Democratic majorities in both Houses); the 1975 reauthorization occurred under President Ford (Pub. L. No. 94-73, 89 Stat. 402 (signed Aug. 6, 1975)) (Democratic majorities in both Houses); the 1982 reauthorization occurred under President Reagan (Pub. L. No. 97-205, 96 Stat. 131 (signed June 29, 1982)) (Democratic majority in House and Republican majority in Senate); and the 2006 reauthorization occurred under President George W. Bush (Pub. L. No. 109-246, 120 Stat. 577 (signed July 27, 2006)) (Republican majorities in both Houses).

The VRA was ultimately reauthorized with strong support from both parties. Former Speaker of the House Dennis Hastert (R-IL) praised Congress's bipartisan effort to protect minority voters: "Today, Republicans and Democrats have united in a historic vote to preserve and protect one of America's most important fundamental rights – the right to vote." *Speaker Hastert Comments on Reauthorization of Voting Rights Act*, U.S. FED. NEWS, July 13, 2006, *available at* 2006 WLNR 12133683. The 390-33 vote for passage of the VRA in the House is the largest number of votes in favor of passage in the history of VRA reauthorization.

2. Petitioner places great emphasis on this Court's observation in *Northwest Austin* that a "departure from the fundamental principle of equal sovereignty" requires justification. Petr. Br. 40 (quoting 557 U.S. at 203). Tellingly, petitioner does not acknowledge this Court's qualification that the doctrine of equality among the states "does not bar . . . remedies for *local* evils which have subsequently appeared." *Nw. Austin*, 557 U.S. at 203 (internal quotation marks omitted). Nor does it acknowledge that in the 2006 reauthorization – in sharp contrast to the original passage of the Act in 1965 – Members from covered jurisdictions provided broad support for continued coverage. Of the 110 representatives from covered jurisdictions, ninety voted in favor of reauthorization. 152 CONG. REC. H5204-05 (daily ed. July 13, 2006). The 2006 reauthorization thus reflects a particularly strong example of this Court's observation in *Garcia v. San Antonio Metropolitan Transit Authority* that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards

inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. 528, 552 (1985); *cf. Georgia v. Ashcroft*, 539 U.S. 461, 484 (2003) ("And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new [districting] plan."). The Members of Congress most attuned to the particular benefits and burdens of Section 5 struck the balance strongly in favor of reauthorization.

3. Moreover, the record contains numerous letters from covered states and local government organizations both documenting continued discrimination and expressing support for reauthorization. A coalition of organizations including the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors supported reauthorization as part of the "ongoing partnership among all levels of government" needed to fully integrate minority voters into the electoral process. *See* 152 CONG. REC. H5146 (daily ed. July 13, 2006). Given the wide-ranging and diverse support for reauthorization in 2006, this Court should defer to Congress's considered judgment.

III. The VRA Regulates The Political Process, Voting, And Race – Areas Where Congress Acts At The Height Of Its Powers And Merits Special Deference From This Court.

As this Court has repeatedly recognized, Congress is due special deference when it acts to protect suspect classes, defend fundamental rights, or make inherently political determinations about the electoral process. The VRA stands at the intersection of this trio of congressional powers, which are expressed in the Enforcement Clauses of the Fourteenth and Fifteenth Amendments as well as the Elections Clause of Article I, § 4, and the Guaranty Clause of Article IV, § 4.

A. The Constitution Grants Congress Broad Powers To Pass Legislation Protecting Racial Minorities.

1. The Constitution expressly grants Congress a central role in protecting minority groups against racial discrimination. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2. "[T]he remedy for the violation of the Fourteenth and Fifteenth Amendment was expressly not left to the courts. The remedy was legislative . . . ." CONG. GLOBE, 42D CONG., 2D SESS. 525 (1872) (statement of Sen. Oliver Morton); *see also* Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 194-95 (1997) ("The historical record shows that the framers of [the Fourteenth Amendment] expected Congress, not the Court, to be the primary agent of its enforcement. . . . [T]he Court should give respectful attention – and probably the presumption of

constitutionality – to the interpretive judgments of Congress.").

2. Accordingly this Court has recognized that Congress's remedial and prophylactic powers are at their strongest when it legislates to remedy or prevent discrimination against historically disadvantaged groups that receive the protections of heightened judicial scrutiny. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 735-36 (2003). Racial minorities are the prototypical example of a suspect class under the Fourteenth Amendment, and this Court has consistently subjected claims of discrimination on the basis of race or ethnicity to the strictest scrutiny, even when they involve situations (such as prison administration) where this Court normally defers to state officials. *See Johnson v. California*, 543 U.S. 499, 515 (2005). Indeed, in modern times this Court has never struck down a congressional statute protecting the right to vote against racial discrimination.

3. The clear purpose of the VRA is to remedy ongoing discrimination against racial and ethnic minorities who have historically faced widespread exclusion from the political process. Despite petitioner's protestation to the contrary, the 2006 reauthorization fits squarely within Congress's "wide latitude" to enact measures to "remedy or prevent unconstitutional actions" against such groups. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

B. The Constitution Grants Congress Special Authority To Safeguard Fundamental Rights.

1. Congress also has broad powers under the Reconstruction Amendments to enact legislation protecting fundamental rights. This Court has recognized that, as with protecting members of traditionally suspect classes, Congress's powers are at their greatest when it acts to safeguard fundamental liberties. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Congress's abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act with respect to access to the courts); *see also United States v. Georgia*, 546 U.S. 151 (2006) (same with respect to fundamental rights under the Eighth Amendment).

2. The right to vote is the quintessential fundamental right; indeed, the right to participate in the electoral process is a foundational right "preservative of all [other] rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969). Denial or dilution of the right to vote is subject to heightened scrutiny. *See Harper v. State Bd. of Elections*, 383 U.S. 663 (1966). Thus, Congress is acting at the height of its authority when it legislates in the VRA "to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

C. The Elections Clause Recognizes An Especially Robust Role For Congress In Regulating Federal Elections And Undercuts Any Tenth Amendment-Based Facial Challenge To The Voting Rights Act.

1. The text of the Constitution envisions a special role for Congress in regulating elections and structuring the political process. The Elections Clause grants Congress the authority "at any time" to "make or alter" state law governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1.

This Court has long recognized that the "comprehensive words" of the Elections Clause "embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932); *see Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (quoting *Smiley*).[7] Most recently, in *Vieth v. Jubelirer*, 541

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[7] The list of practices that this Court has found within the scope of Congress's Election Clause power is broad indeed. *See, e.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (election recounts); *United States v. Gradwell*, 243 U.S. 476, 483 (1917)

U.S. 267 (2004) (plurality opinion), this Court emphasized that in the Elections Clause, the Framers conferred on Congress ultimate control over even the redistricting process: although state legislatures may have "the initial power to draw districts for federal elections," the Elections Clause "permitted Congress to 'make or alter' those districts if it wished," *id.* at 275. The *Vieth* plurality's review of the history reflects that since 1842, Congress has, among other things, used its power to impose a particular theory of representation on the states, requiring the use of geographically defined single-member districts to elect Members of Congress. *See* Apportionment Act of 1842, 5 Stat. 491. And nearly a century before this Court imposed parallel restrictions as a matter of constitutional law, Congress mandated that districts contain equal numbers of inhabitants and be composed of compact territory. *See Vieth*, 541 U.S. at 276-77 (plurality opinion).

This Court has consistently understood that the Elections Clause authorizes Congress to "supplement" existing state regulations or "substitute its own." *Smiley*, 285 U.S. at 366-67. Congress "'has a general supervisory power over the whole subject.'" *Id.* at 367 (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)). For over a century, this Court has held that Congress's power to regulate federal elections

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(process from registration to certification of results); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (punishing state election officers for violation of state duties vis-à-vis congressional elections).

extends to all aspects of the electoral process whenever a federal candidate is on the ballot. *See In re Coy*, 127 U.S. 731, 753-54 (1888).

Finally, with respect to the regulation of federal elections, this Court has emphasized how the Elections Clause expresses "the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995); *see also Cook*, 531 U.S. at 527 (Kennedy, J., concurring) (stating that the Clause "delegates but limited power over federal elections to the States"). In other words, when it comes to their control over congressional elections, the states cannot assert the Tenth Amendment to resist congressional regulation: states have power over federal elections "but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997). Petitioner's reliance on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), a Tenth Amendment case that involved retirement ages for state-court judges, Petr. Br. 24, is thus entirely misplaced.

2. This Court recently reaffirmed the principle that "'the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). Particularly in light of the fact that petitioner presents this Court with *only* a facial challenge against the coverage and preclearance provisions of the VRA, *see* Pet. 12; Pet. App. 11a, 65a, its challenge can succeed *only* if it proves "that no set

of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in *all* of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But Congress has the power, under the Elections Clause and this Court's consistent construction of that Clause, to impose a federal review process, like the preclearance requirement, with respect to all aspects of the election system related to the election of Members of Congress. As applied to *those* elections, petitioner's challenge is unavailing and its invocation of the Tenth Amendment, *see* Petr. Br. i, 17, 23-24, is mistaken. For this reason alone, its facial challenge must fail.

Moreover, the coverage formula of Section 4(b) and the preclearance requirement of Section 5 do not cover only whole states. They also cover more than fifty political subdivisions in states that are not themselves covered. *See* 28 C.F.R. pt. 51, app. As applied to *those* jurisdictions, the Voting Rights Act does not remotely implicate the "equal sovereignty" argument that petitioner invokes, Petr. Br. 40. Accordingly, petitioner has not satisfied the "heavy burden of persuasion" that plaintiffs bear when they seek "relief that would invalidate the statute in all its applications." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008) (opinion of Stevens, J., joined by Roberts, C.J. & Kennedy, J.).

3. This Court has also recognized that Congress, not the judicial branch, bears the primary responsibility for fulfilling the promise embodied in the Guarantee Clause that "[t]he United States shall guarantee to every State in this Union a Republican

Form of Government." U.S. CONST. art. IV, § 4, cl. 1. This is because Congress is best equipped to address such matters as how to ensure political fairness in democratic elections. By contrast, this Court has found that "[i]t is hostile to a democratic system to involve the judiciary" in such determinations. *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (plurality opinion); *see also Vieth*, 541 U.S. at 281 (plurality opinion) (treating political gerrymandering claims as nonjusticiable due to a lack of "judicially discernible and manageable standards for adjudicating" them); *Luther v. Borden*, 48 U.S. 1, 42 (1849) (stating that enforcement of the guarantee clause "rests with Congress"). Consequently, "in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

Deference to Congress is particularly appropriate in this context because its Members are more intimately involved with and more knowledgeable about the electoral process than are the courts. They also hail from every political subdivision in the Nation and bring to bear local knowledge of the effects of racial discrimination on their districts' electoral systems. Therefore, they are best able to make choices between competing theories of political representation. *See Colegrove*, 328 U.S. at 556 (plurality opinion).

4. The 2006 reauthorization rested on a fact-based and complex inquiry into the best way to address the lingering effects of discrimination on the electoral process. The record before Congress left no doubt that widespread voting discrimination persists

in covered jurisdictions, and the reauthorization therefore hinged upon a political judgment regarding the proper response. The VRA falls squarely within the core of Congress's unique institutional expertise in regulating the political process, and Congress properly used this expertise to provide the desired political guidance by overwhelmingly reauthorizing Section 5 for another twenty-five years.

* * *

In 2006, after meticulous and extended consideration, Congress determined that the provisions of Section 5 have not yet "outlived their usefulness." *City of Rome v. United States*, 446 U.S. 156, 180 (1980). In making this determination, Congress acted at the height of its powers in regulating the intersecting areas of voting, race, and political rights. Congress's judgment is therefore entitled to substantial deference from this Court. Accordingly, as the district court and court of appeals properly held, Congress's decision to extend the VRA passes constitutional muster.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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RECORD
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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

Page

Question Presented i

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 5

- I. Section 5 Is Fifteenth Amendment Enforcement Legislation 5
  - A. The Voting Rights Act Of 1965 Tracks The Text Of The Fifteenth Amendment And Was Supported By Evidence Of Fifteenth Amendment Violations 7
  - B. The Court Has Always Held Section 5 To Be Fifteenth Amendment Legislation 9
- II. The Fifteenth Amendment Guarantees The Right To Cast A Vote, Not The Weight Of That Vote 13
  - A. When The Fifteenth Amendment Was Ratified, It Was Understood To Protect Only Access To The Ballot Box 13
  - B. The Court Has Never Held That Vote Dilution Violates The Fifteenth Amendment 14
- III. Congress Failed To Document A Pattern Of Fifteenth Amendment Violations Sufficient To Justify Reauthorizing Section 5 16
  - A. Congress Found That First Generation Barriers To Voting Had Been Largely Eliminated 17

TABLE OF CONTENTS—Continued

Page

B. Congress Exceeded Its Authority When It Relied Almost Exclusively On Alleged Vote-Dilution Evidence To Justify Reauthorizing Fifteenth Amendment Legislation........................ 18

IV. The Section 4(b) Coverage Formula Is Unconstitutional Because It Is Based On Irrelevant, Outdated Characteristics..... 21

A. Section 4(b)'s Coverage Formula Is Not Rational In Theory..................... 22

B. The Coverage Formula Is Irrational In Practice............................. 25

Conclusion.. 29

TABLE OF AUTHORITIES

Page

CASES

Baker v. *Carr*,
369 U.S. 186 (1962) 14

Bd. of Trs. of Univ. of Ala. v. *Garrett*,
531 U.S. 356 (2001) 6, 13, 19, 20, 21

Beer v. *United States*,
425 U.S. 130 (1976) 15

Chamber of Commerce of U.S. v. *Whiting*,
131 S. Ct. 1968 (2011) 11

City of Mobile v. *Bolden*,
446 U.S. 55 (1980) 6, 15, 20

City of Rome v. *United States*,
446 U.S. 156 (1980) 9, 10, 15, 16

Coleman v. *Court of Appeals of Md.*,
132 S. Ct. 1327 (2012) 4, 17, 21, 24

Gray v. *Sanders*,
372 U.S. 368 (1963) 6, 14

Guinn v. *United States*,
238 U.S. 347 (1915) 14

Lopez v. *Monterey Cnty.*,
525 U.S. 266 (1999) 9

Nw. Austin Mun. Util. Dist. No. One v. *Holder*,
557 U.S. 193 (2009) ....*passim*

Nw. Austin Mun. Util. Dist. No. One v.
Mukasey,
573 F. Supp. 2d 221 (D.D.C. 2008)..........................12

Reno v. *Bossier Parish Sch. Bd.*,
528 U.S. 320 (2000) 15, 16

Rice v. *Cayetano*,
528 U.S. 495 (2000) 6, 13, 14

Page

Shelby Cnty. v. *Holder*,
679 F.3d 848 (D.C. Cir. 2012) .... *passim*

South Carolina v. *Katzenbach*,
383 U.S. 301 (1966) .... *passim*

Voinovich v. *Quilter*,
507 U.S. 146 (1993) 15, 16

White v. *Regester*,
412 U.S. 755 (1973) 6, 15

STATUTES

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ..... *passim*

Pub. L. No. 94-73, 89 Stat. 400 (1975) 11

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 .... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 196, 94th Cong., 1st Sess. 10-11 (1975) 15

H.R. Rep. No. 478, 109th Cong., 2d Sess. 53 n.136 (2006) 11, 17, 18, 19, 20, 21, 26, 27

S. Rep. No. 295, 109th Cong., 2d Sess. 11 (2006) 4, 17, 18, 24, 26

S. Rep. No. 295, 94th Cong., 2d Sess. 47-48 (1975), reprinted in 1975 U.S.C.C.A.N. 774 12

MISCELLANEOUS

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Page

Bouie, *The Other Glass Ceiling*, American Prospect, Mar. 14, 2012, http://prospect.org/article/other-glass-ceiling 27

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BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues and litigates regularly before the Supreme Court of the United States, including in this Court in such cases as *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193 (2009); and *Fisher* v. *University of Texas at Austin*, No. 11-345 (argued Oct. 10, 2012).

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[1] All counsel of record consented to the filing of this *amicus* brief by filing blanket consents with the Clerk. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

SLF has a direct interest in this case, as it objects to the 2006 reauthorization of Section 5 of the Voting Rights Act because it runs contrary to the principles of race neutrality to which the Act is dedicated and to the American ideal of individual equality to which SLF is profoundly committed. For these reasons, SLF respectfully submits this brief in support of Petitioner and urges the Court to reverse the judgment below.

SUMMARY OF ARGUMENT

The Fifteenth Amendment, ratified in 1870, guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Tragically, for the next 95 years, the promise of the Fifteenth Amendment was not secured for most blacks living in the South. "[B]eginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310 (1966). By 1965, the discriminatory application of voting tests was "the principal method used to bar Negroes from the polls." *Id.* at 312. In the 1950s, Congress tried to fight this evil by authorizing case-by-case litigation, but these laws did "little to cure the problem of voting discrimination." *Id.* at 313. Registration rates for blacks "in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana they barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi they increased only from 4.4% to 6.4% between 1954 and 1964." *Ibid.* In these states, "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration." *Ibid.*

Informed by these past failures, Congress took a new approach with the Voting Rights Act of 1965, which enacted "a complex scheme of stringent remedies aimed at areas where voting discrimination had been most flagrant." *Id.* at 315. The Act's most stringent remedy was Section 5, a drastic but temporary provision that would require covered jurisdictions to obtain preapproval from a federal court or the Attorney General before making any change in voting procedures. To identify the jurisdictions to be covered, Congress constructed a formula that "was relevant to the problem of voting discrimination." *Id.* at 329. The coverage formula in Section 4(b) provided that only jurisdictions that employed voting tests or devices and had low voting rates in the 1964 presidential election would be covered. *Id.* at 330. Because these metrics were directly related to the evil Congress sought to eliminate, this Court found the formula "rational in both practice and theory," and held that is was a constitutional means for targeting Fifteenth Amendment violations. *Ibid.*

Today, "[t]he historic accomplishments of the Voting Rights Act are undeniable." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 201 (2009). Voting tests and devices have been abolished, and disparities in registration rates for black and white voters have been largely eliminated. Indeed, in 2004, five of the seven southern states originally covered by the Voting Rights Act had registration rates for blacks that exceeded the national average. Blacks voted at a higher rate than whites in

North Carolina, Georgia, Mississippi, and Alabama. See S. Rep. No. 295, 109th Cong., 2d Sess. 11 (2006) (2006 Senate Report). By 2006, the Voting Rights Act had succeeded in fulfilling "the Fifteenth Amendment's promise of full enfranchisement." *Nw. Austin*, 557 U.S. at 229 (Thomas, J., dissenting).

In 2006, Congress itself acknowledged that Fifteenth Amendment violations of the right to vote were largely a thing of the past. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006 Reauthorization). Congress nonetheless reauthorized Section 5's preclearance requirement and Section 4(b)'s coverage formula, relying primarily on evidence of racially polarized voting and "vote dilution." See generally *id.* § 2(b). In doing so, Congress exceeded its powers under the Fifteenth Amendment in two ways. First, the reauthorization of Section 5 is unconstitutional because it "lacks * * * evidence of a pattern of state [Fifteenth Amendment] violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1334 (2012) (plurality). From its ratification, the Fifteenth Amendment has guaranteed only the right to vote, not the weight of a vote once cast; indeed, this Court has never held vote dilution to violate the Fifteenth Amendment. Evidence of alleged vote dilution in covered jurisdictions therefore does not constitute evidence of Fifteenth Amendment violations that could support the reauthorization of Section 5.

Second, the coverage formula in Section 4(b) is unconstitutional because it departs "from the fundamental principle of equal sovereignty" without showing that its "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at

203. Although Congress in 2006 purported to target those areas of the country that were most likely to dilute the voting strength of minorities, it reauthorized the same coverage formula that was based on Fifteenth Amendment violations from 1972 and before. The Court of Appeals held that using the old formula was rational in theory because Congress identified recent violations in the covered jurisdictions. But this analysis negates the entire purpose of having a coverage formula—distinguishing the worst jurisdictions from the rest—for it makes no comparative assessment of whether recent violations in covered jurisdictions are more prevalent than those in non-covered jurisdictions.

This blind reauthorization of the old coverage formula does violence to the careful craftsmanship of the original Voting Rights Act and ignores the reasons this Court upheld it in the past. In 1965, the coverage formula used metrics that were closely linked to the targeted harm and allowed for fair comparisons among all 50 states. The Court in *Katzenbach* upheld the coverage formula because it reliably compared states and jurisdictions based on those relevant metrics. See 383 U.S. at 330. The formula reauthorized in 2006, by contrast, serves no purpose but to "[p]unish[] for long past sins," which "is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose." *Nw. Austin*, 557 U.S. at 226 (Thomas, J., dissenting). Because there is no justification for the Act's "departure from the fundamental principle of equal sovereignty," *id.* at 203 (majority opinion), Section 4(b) is unconstitutional.

ARGUMENT

I. Section 5 Is Fifteenth Amendment Enforcement Legislation.

The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "[T]he immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote." *Rice* v. *Cayetano*, 528 U.S. 495, 512 (2000). Consistent with its original meaning, the Fifteenth Amendment protects the core rights of access to voter registration and the ballot box. See *Katzenbach*, 383 U.S. at 311-312 (collecting examples of Fifteenth Amendment litigation).

The Equal Protection Clause of the Fourteenth Amendment forbids states to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This more broadly worded Amendment protects certain voting-related rights not guaranteed by the Fifteenth Amendment, including the right for all who participate in an election to have an equally weighted vote. *Gray* v. *Sanders*, 372 U.S. 368, 379 (1963). The Fourteenth Amendment also prevents states from arranging apportionment schemes in a manner that purposefully "minimize[s] or cancel[s] out the voting potential of racial or ethnic minorities." *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (citing *White* v. *Regester*, 412 U.S. 755 (1973)).

The first step in determining whether Section 5 of the Voting Rights Act remains valid enforcement legislation is to identify precisely *which* "constitutional right [is] at issue." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). The text and history of Section 5, along with this Court's interpretive precedents, reflect that Section 5 is solely Fifteenth Amendment enforcement legislation.

A. The Voting Rights Act Of 1965 Tracks The Text Of The Fifteenth Amendment And Was Supported By Evidence Of Fifteenth Amendment Violations.

In 1965, Congress enacted the Voting Rights Act to "enforce the fifteenth amendment to the Constitution of the United States." Pub. L. No. 89-110, § 1, 79 Stat. 437 (1965 Act). The Act, and Section 5 in particular, has historically been understood to enforce Fifteenth Amendment rights—the right to register to vote and the right to cast a ballot on election day.

Indeed, the statutory language of the Voting Rights Act of 1965 closely tracked the language of the Fifteenth Amendment. Section 2 forbade any state or political subdivision to impose or apply any "voting qualifications or prerequisite to voting, or standard, practice, or procedure * * * to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.* § 2. Similarly, Section 4(a) banned certain voting tests and devices "[t]o assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color." *Id.* § 4(a). And Section 5 required certain jurisdictions to preclear any change in their voting procedures with the Department of Justice or the United States District Court for the District of Columbia to ensure that any change would "not have the effect of denying or abridging the right to vote on account of race or color." *Id.* § 5.

When South Carolina challenged the constitutionality of certain provisions of the Voting Rights Act of 1965, the Court defined "the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" *Katzenbach*, 383 U.S. at 324. To answer this question, the Court reviewed the record of Fifteenth

Amendment violations on which Congress relied to craft appropriate legislation. The Court recounted that in 1890 several southern states "enacted tests still in use which were specifically designed to prevent Negroes from voting." *Id.* at 310. The Court noted that its past decisions "demonstrate[d] the variety and persistence of these and similar institutions," including grandfather clauses, white primaries, improper challenges, and racial gerrymandering. *Id.* at 311. Citing evidence from the Justice Department, the Court found that the discriminatory application of voting tests was at that time "the principal method used to bar Negroes from the polls," and that "the discrimination was pursuant to a widespread pattern or practice." *Id.* at 312. The Court recognized that "Congress ha[d] repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination," but "these new laws ha[d] done little to cure the problem of voting discrimination." *Id.* at 313. "Despite the earnest efforts of the Justice Department and of many federal judges," voter registration rates in some states remained roughly 50 percentage points higher for whites of voting age than for blacks. *Ibid.*

Congress determined that Section 5 should apply only to "areas where voting discrimination ha[d] been most flagrant." *Id.* at 315. Section 4(b) of the Voting Rights Act of 1965 laid out the formula that would sort the worst violators from the rest. Any state or political subdivision would be covered if (1) it maintained a voting test or device on November 1, 1964, and (2) fewer than 50 percent of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. 1965 Act, § 4(b). South Carolina argued that the formula violated "the doctrine of the equality of the States," *Katzenbach*, 383 U.S. at 328, but the Court held that Congress permissibly used the formula to differentiate between the states because it "was relevant to the problem of voting discrimination," *id.* at 329. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id.* at 330. It was irrelevant that there were some non-covered jurisdictions for which there was also evidence of voting discrimination because "Congress had learned that widespread and persistent discrimination in voting during recent years ha[d] typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed." *Id.* at 331. Congress "need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Ibid.* Because the formula's two triggers were tied to the same Fifteenth Amendment violations Congress had identified and sought to remedy, the formula was "rational in both practice and theory." *Id.* at 330. Accordingly, the Court concluded that Section 5 was "a valid means for carrying out the commands of the Fifteenth Amendment." *Id.* at 337.

B. The Court Has Always Held Section 5 To Be Fifteenth Amendment Legislation.

The Court has reviewed various challenges to Section 5, and each time it has affirmed that Section 5 is Fifteenth Amendment legislation. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980) ("The extension of the Act * * * was plainly a constitutional method of enforcing the Fifteenth Amendment."); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282 (1999) ("The Act was passed pursuant to Congress' authority under the Fifteenth Amendment."); *Nw. Austin*, 557 U.S. at 204 (discussing what standard to apply "in deciding whether * * * Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements"). The Court twice considered facial challenges to Section 5 and rejected the challenges only after analyzing evidence of Fifteenth Amendment violations and determining that the Act rationally attempted to remedy those Fifteenth Amendment harms. See *City of Rome*, 446 U.S. at 180-182; *Katzenbach*, 383 U.S. at 337.

The Court of Appeals ignored this consistent text, history, and precedent when it conducted its analysis "irrespective of whether Section 5 is considered Fifteenth Amendment enforcement legislation, Fourteenth Amendment enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments." *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 864 (D.C. Cir. 2012). The Court of Appeals mistakenly asserted that "when reauthorizing the Act in 2006, Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. Accordingly, like Congress and the district court, we think it appropriate to consider evidence of unconstitutional vote dilution in evaluating section 5's validity." *Ibid.* By eliding the Fifteenth Amendment roots of Section 5, the Court of Appeals was able to uphold its reauthorization despite the absence of current Fifteenth Amendment violations in the covered jurisdictions.

The 2006 reauthorization did not amend Section 1 of the original Voting Rights Act, which declared itself "[a]n Act to enforce the fifteenth amendment to the Constitution of the United States." 1965 Act, §1. Indeed, the 2006 reauthorization reiterates the continuing need to "eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th Amendment." 2006 Reauthorization § 2(b)(7). In holding that "Congress" invoked the Fourteenth Amendment to support the 2006 reauthorization, the Court of Appeals cited only a House Report that mentioned both the Fourteenth Amendment and Fifteenth Amendment as authority for reauthorizing the legislation. See *Shelby Cnty.*, 679 F.3d at 864 (citing H.R. Rep. No. 478, 109th Cong., 2d Sess. 53 n.136, 90 (2006) (2006 House Report)). A statement of one committee of one house of Congress, which was never voted upon by Congress or signed by the President, cannot trump the unambiguous text of the statute. *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011) (explaining that the "authoritative statement is the statutory text, not the legislative history"). Indeed, this Court has already acknowledged that the question in reviewing the 2006 reauthorization is "whether * * * Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements." *Nw. Austin*, 557 U.S. at 204.

In any event, the 2006 House Report's reference to the Fourteenth Amendment appears to derive from the 1975 reauthorization, which invoked the Fourteenth Amendment for the first time. The 1975 reauthorization, however, cited the Fourteenth Amendment only for the purpose of expanding the Act's Fifteenth Amendment ballot-access protections to include language minorities alongside racial minorities. See Pub. L. No. 94-73, § 203, 89 Stat. 400 (1975) ("Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments * * * it is necessary to eliminate [voting] discrimination [against citizens of language minorities] by prohibiting English-only elections, and by prescribing other remedial devices."). Congress therefore sought to reinforce the Act's protection of the Fifteenth Amendment right to vote, not to identify a new constitutional right it sought to enforce. As the Senate Report on the

1975 reauthorization explains, even though the Department of Justice had taken the position that "'language minorities' are members of a 'race or color' group protected *under the Fifteenth Amendment*," "[t]he Fourteenth Amendment is added as a constitutional basis for these voting rights amendments" in order to "doubly insure the constitutional basis for the Act." S. Rep. No. 295, 94th Cong., 2d Sess. 47-48 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 814-815 (emphasis added)). In other words, Congress invoked the Fourteenth Amendment to eliminate any doubt that the Act's Fifteenth Amendment protections could constitutionally be extended to language minorities. The Act remains Fifteenth Amendment legislation that may only be justified by evidence of Fifteenth Amendment violations and a correspondingly tailored Fifteenth Amendment remedy.

Judge Tatel himself previously recognized as much, writing for the three-judge district court in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008). There, he acknowledged that "at its core, this is a Fifteenth Amendment case: while Congress cited the Fourteenth Amendment when it adopted the Act's protections for language minorities in 1975 and extended them in 2006, it could have relied solely on its Fifteenth Amendment authority." *Id.* at 243-244. The Solicitor General agreed, arguing before this Court in *Northwest Austin* that the Voting Rights Act is "aimed at remedying and deterring violations of the core constitutional right, explicitly set forth in the Fifteenth Amendment itself, that the right to vote not be 'denied or abridged * * * on account of race, color, or previous condition of servitude.'" Brief for Appellee at 20, *Nw. Austin*, 557 U.S. 193 (No. 08-322). The Solicitor General therefore agreed that "[t]he district court correctly concluded that VRA Section 5 is Fifteenth Amendment legislation." *Id.* at 20 n.1.

The question before the Court now is the same that was presented in *Katzenbach*: "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" 383 U.S. at 324. Though respondents argued below that the issue is whether the legislation was appropriate to enforce the Fourteenth and Fifteenth Amendments, Brief for Appellee at 1, *Shelby Cnty.*, 679 F.3d 846 (No. 11-5256), this position is different from the one taken by the Solicitor General in 2009. More importantly, the Solicitor General's new position diverges from the text of the Voting Rights Act and the opinions of the Court in every Section 5 case it has decided. The Court must squarely confront whether the 2006 reauthorization of Section 5 is still appropriate Fifteenth Amendment legislation.

II. The Fifteenth Amendment Guarantees The Right To Cast A Vote, Not The Weight Of That Vote.

The scope of the Fifteenth Amendment's ballot-access right is distinct from the Fourteenth Amendment's concerns with how each vote is weighted. To assess whether Section 5 rests on a valid evidentiary foundation of constitutional violations, and whether it represents an appropriately tailored response to those violations, the Court first must carefully trace "the metes and bounds of the [Fifteenth Amendment] right" that Section 5 purports to enforce. *Garrett*, 531 U.S. at 368.

A. When The Fifteenth Amendment Was Ratified, It Was Understood To Protect Only Access To The Ballot Box.

"Enacted in the wake of the Civil War, the immediate concern of the [Fifteenth] Amendment was to guarantee to the emancipated slaves the right to vote." *Rice*, 528

U.S. at 512. "'[B]y the inherent power of the Amendment the word white disappeared' from our voting laws, bringing those who had been excluded by reason of race within 'the generic grant of suffrage made by the State.'" *Ibid.* (quoting *Guinn* v. *United States*, 238 U.S. 347, 363 (1915)).

That generic grant of suffrage in 1870 did not include the right to have one's vote weighted equally with all others. See *Baker* v. *Carr*, 369 U.S. 186, 310-318 (1962) (Frankfurter, J., dissenting) (explaining that states at the end of the Civil War employed a "wide variety of apportionment methods which recognized the element of population in differing ways and degrees"). As Justice Frankfurter explained, "the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies," *id.* at 307, and was still common among a majority of the states when they ratified the Fourteenth and Fifteenth Amendments, *id.* at 310-318. The Fifteenth Amendment did nothing to change this state of affairs. It extended the right to vote to more citizens, but did not guarantee citizens an equally weighted vote. Indeed, electoral systems that effectively assigned different weights to different localities persisted until the Court held in 1963 that the Equal Protection Clause of *the Fourteenth Amendment* demands that "all who participate in [an] election are to have an equal vote." *Gray*, 372 U.S. at 379.

B. The Court Has Never Held That Vote Dilution Violates The Fifteenth Amendment.

Consistent with vote dilution's Fourteenth Amendment roots in *Gray*, the Court has recognized that the Fourteenth Amendment prohibits vote dilution intended "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *Bolden*, 446 U.S. at 66 (citing *Regester*, 412 U.S. 755). But the Court "ha[s] never held that vote dilution violates the Fifteenth Amendment." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000) ("*Bossier Parish II*"); *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993); see also *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976) (noting that there is no decision of the Court holding a legislative apportionment plan in violation of the Fifteenth Amendment).

A plurality of the Court in *Bolden* rejected the argument that a dilutive apportionment scheme violated black voters' Fifteenth Amendment rights:

> The answer to the appellees' argument is that * * * their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected * * * . Having found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

446 U.S. at 65. Under this Court's holdings, vote dilution does not violate the Fifteenth Amendment. Consequently, evidence of vote dilution could not justify Fifteenth Amendment legislation such as Section 5.

Respondents asserted below that the Court relied on evidence of vote dilution when it upheld the 1975 reauthorization of the Voting Rights Act in *City of Rome*. See Brief for Appellee at 55, *Shelby Cnty.*, 679 F.3d 848 (No. 11-5256). Read in context, this Court did no such thing. It is true that the Court quoted from a House Report that supported extending Section 5 because "other measures may be resorted to which would dilute increasing minority voting strength." *City of Rome*, 446 U.S. at 181 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 10-11

(1975)). But the Court first noted that significant disparities in voter registration between whites and blacks persisted in several covered jurisdictions. *Id.* at 180-181. And the Court emphasized the depth and breadth of voting discrimination that Congress had found in 1965 and the short amount of time that had since elapsed:

> It must not be forgotten that in 1965, *95 years* after ratification of the Fifteenth Amendment extended the right to vote to all citizens regardless of race or color, Congress found that racial discrimination in voting was an insidious and pervasive evil * * * . Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination. When viewed in this light, Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable.

Id. at 182. In light of the surrounding context, Respondents' argument that the Court altered a century of Fifteenth Amendment jurisprudence in a lone quotation of a House Report is unpersuasive. Nor can this contention be squared with the Court's post-*City of Rome* pronouncements that it "ha[s] never held that vote dilution violates the Fifteenth Amendment." *Bossier Parish II*, 528 U.S. at 334 n.3; see also *Voinovich*, 507 U.S. at 159.

III. Congress Failed To Document A Pattern Of Fifteenth Amendment Violations Sufficient To Justify Reauthorizing Section 5.

Section 5 is Fifteenth Amendment enforcement legislation, and its coverage formula remains based upon Fifteenth Amendment triggers such as the existence of voting tests and depressed registration and turnout in 1964, 1968, and 1972. The 2006 reauthorization of Section 5, therefore, can only be justified by a record of widespread and persistent Fifteenth Amendment violations. See *Coleman*, 132 S. Ct. at 1334 (plurality) ("Legislation enacted under § [2] must be targeted at conduct transgressing the [Fifteenth] Amendment's substantive provisions.") (internal quotation marks omitted). Congress could not assemble such a record. To the contrary, the record shows that there were no significant deprivations of the right to register and cast votes.

A. Congress Found That First Generation Barriers To Voting Had Been Largely Eliminated.

When considering the 2006 reauthorization of the Voting Rights Act, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." 2006 Reauthorization, § 2(b)(1). The record established that many of the Fifteenth Amendment violations that had obstructed voter registration and turnout "have been eliminated." 2006 House Report 12.

The most reliable data gathered by Congress revealed how dramatic this progress has been. The gap between white and black voter registration that had been as wide as 50 percentage points in covered jurisdictions in 1964 had been virtually eliminated. 2006 Senate Report 11. The Senate Report noted that "in seven of the covered States, African-Americans are registered at a rate higher than the national average. Moreover, in California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election * * * was higher than that for whites." *Ibid.* Additionally, "the number of African-American elected officials serving in the original six [covered] States * * * increased by approximately 1000 percent since 1965, increasing from 345 to 3700." 2006 House Report 18. "In Georgia, the voting age population is 27.2% African-American, and African-Americans comprise 30.7% of its delegation to the U.S. House of Representatives and 26.5% of the officials elected statewide. Black candidates in Mississippi have achieved similar success." 2006 Senate Report 9. To put it succinctly, "[t]hings have changed in the South." *Nw. Austin*, 557 U.S. at 202.

B. Congress Exceeded Its Authority When It Relied Almost Exclusively On Alleged Vote-Dilution Evidence To Justify Reauthorizing Fifteenth Amendment Legislation.

Although Congress found that Fifteenth Amendment violations had been largely eliminated, Congress expressed concern that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." 2006 Reauthorization, § 2(b)(2). Instead of evidence that minorities were actually denied the right to vote, Congress relied on evidence of "racially polarized voting" in covered jurisdictions to conclude that minorities still needed the protection of the Voting Rights Act of 1965. *Id.* § 2(b)(3).

Congress, moreover, listed four additional categories of evidence that allegedly showed continued discrimination: (1) Section 5 actions taken by the Attorney General, including objections to voting changes, requests for more information about voting changes, and Section 5 enforcement actions against covered jurisdictions that tried to implement voting changes without preclearance; (2) the number of requests for declaratory judgment that were denied by the United States District Court for the District of Columbia; (3) the number of section 2 cases that originated in covered jurisdictions; and (4) the litigation the Department of Justice pursued to ensure that all language-minority citizens had full access to the political process. *Id.* § 2(b)(4). As discussed below, none of these findings reflects evidence of actual Fifteenth Amendment violations.

The legislative history contained less objective and more speculative evidence. The House Report surmised "that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." 2006 House Report 24. Accordingly, the Report counted "the number of voting changes that have never gone forward as a result of Section 5" as evidence justifying the reauthorization of Section 5. *Ibid.* Similarly, the Report opined "that indicia of discrimination are reflected in the continued need for Federal observers to monitor polling places located in covered jurisdictions." *Id.* at 44. The Report reasoned that because "observers are assigned to a polling location only when there is a reasonable belief that minority citizens are at risk of being disenfranchised," the assignment of thousands of observers to covered jurisdictions "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations." *Ibid.*

The Congressional record cannot justify reauthorizing Section 5 because it does not reflect evidence of a pattern of Fifteenth Amendment violations. See *Garrett*, 531 U.S. at 368. Racially polarized voting plainly does not demonstrate a Fifteenth Amendment violation. The House Report asserted that when white and minority voters cast ballots along racial lines it is the "clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept[ing] minority citizens * * * into the electoral process." 2006 House Report 34. Even if that were a sound statement of sociology or political science—which is doubtful[2]—it is not good constitutional law. If minorities can "register and vote without hindrance," "their freedom to vote has not been denied or abridged by anyone." *Bolden*, 446 U.S. at 65 (plurality opinion). A person's exercising his right to vote cannot be transmogrified into a denial of that right simply because he votes consistently with others of his race. The fact that Congress thought that racially polarized voting was the "clearest and strongest evidence" for reauthorization bespeaks the paucity of evidence of Fifteenth Amendment violations.

Congress's presumptions about the dispatch of election observers to covered jurisdictions and the deterrent effect of Section 5 fare little better. Congress did not identify any evidence to establish whether the Justice Department's predictions about violations were accurate enough to establish a pattern of actual Fifteenth Amendment violations. If "anecdotal," "unexamined," and "out of context" accounts of alleged discrimination are insufficient, pure conjecture on the part of Congress and Justice Department officials certainly cannot substitute for actual evidence of a pattern of constitutional violations. *Garrett*, 531 U.S. at 370-371. "As to the imputed deterrence, it is plainly unquantifiable. * * * Given much weight, the supposed deterrent effect would justify continued VRA renewals out to the crack of doom." *Shelby Cnty.*, 679 F.3d at 898 (Williams, J., dissenting). Moreover, undue reliance on the speculative claim that the Act has deterred Fifteenth Amendment violations runs afoul of this Court's declaration that "[p]ast success alone * * * is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202.

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[2] For example, it is hard to comprehend why black voters' twice voting for a successful black presidential candidate at rates exceeding 90% is evidence of "resistance * * * to fully accept[ing] minority citizens * * * into the electoral process."

The remaining categories of findings involve voting changes (or attempted changes), most of which were allegedly intended to dilute minority voting strength. See generally 2006 House Report 34, 36-43 (recounting instances of vote dilution). Evidence of alleged vote dilution cannot justify the reauthorization of Section 5. This Court has never held that vote dilution violates the Fifteenth Amendment, and Congress is not permitted to "redefine the substantive scope" of the Amendment under the guise of enforcing it. *Coleman*, 132 S. Ct. at 1333 (plurality). Unless the Court declares that vote dilution violates the Fifteenth Amendment or that the Voting Rights Act is Fourteenth Amendment legislation, Congress's findings are not relevant to support the reauthorization of Section 5. At the very least, as discussed below, Fourteenth Amendment vote-dilution evidence cannot support reauthorization of a coverage formula based upon 40-year-old Fifteenth Amendment metrics.

IV. The Section 4(b) Coverage Formula Is Unconstitutional Because It Is Based On Irrelevant, Outdated Characteristics.

Even if the Court finds that Congress identified a pattern of unconstitutional behavior, see *Garrett*, 531 U.S. at 372, Congress has failed to justify its "departure from the fundamental principle of equal sovereignty," *Nw. Austin*, 557 U.S. at 203, because it employs an irrational formula to determine which states are covered by Section 5. In questioning the coverage formula, the Court has noted that "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *Ibid.* Indeed, the record shows that those evils identified in 1965 have been largely eliminated. See *supra* Part III.A. In 2006, Congress targeted states based on long-past wrongs, rather than making a contemporaneous assessment whether covered jurisdictions are different from non-covered ones in any meaningful way. The nearly half-century-old coverage formula is no longer "rational in both practice and theory," *Katzenbach*, 383 U.S. at 330, and therefore must be invalidated.

A. Section 4(b)'s Coverage Formula Is Not Rational In Theory.

1. When South Carolina challenged Section 4(b)'s coverage formula on the ground that it was irrational and violated the principle of the equal sovereignty of states, the Court held that Congress could use the formula to differentiate between the states because it "was relevant to the problem of voting discrimination." *Id.* at 329. The Court explained how the formula's two metrics were clearly related to the wrong Congress was targeting:

> Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory.

Id. at 330.

2. The Court of Appeals failed to appreciate the centrality of a relevant coverage formula to determining whether Section 5 remains constitutional. Indeed, its holding would allow even the most arbitrary coverage formula to be found constitutional so long as Congress could find some evidence of ongoing discrimination in the covered jurisdictions. The Court of Appeals reasoned

that "[t]he triggers under section 4(b) were never selected because of something special that occurred in those years. Instead, Congress identified the jurisdictions it sought to cover—those for which it had evidence of actual voting discrimination—and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Shelby Cnty.*, 679 F.3d at 878-879 (alterations, citations, and internal quotation marks omitted).

Even if the Court of Appeals' account of Congress' approach in 1965 were accurate as a descriptive matter, the coverage formula was *upheld* because it "was relevant to the problem of voting discrimination," *Katzenbach*, 383 U.S. at 330, not because it was successful at describing pre-identified jurisdictions. Put differently, the 1965 coverage formula was rational in theory not because of *which states* it identified, but because of *how* it identified them. *Ibid.* By contrast, the outdated coverage formula reauthorized in 2006 has no theoretical relationship to determining which states *now* engage in actual voting discrimination. The existence of voting tests and low turnout in the midst of the LBJ-Goldwater faceoff simply has no rational capacity to determine whether a jurisdiction is likely to discriminate against voters in the midst of President Obama's successful bid for re-election. To state the proposition is to refute it.

3. If alleged evidence of vote dilution is held to support the reauthorization of Section 5 (but see *supra* at Part III.B), an additional theoretical problem with the coverage formula arises. A preclearance requirement that is reauthorized principally to address alleged vote dilution should not be governed by a coverage formula triggered by ballot-access metrics. Instead, a rational coverage formula would determine which states engage in the worst vote dilution—not which states suppressed ballot access decades ago. *Nw. Austin*, 557 U.S. at 203

(stating that Section 5's "disparate geographic coverage [must be] sufficiently related to the problem that it targets"). Thus if the Court considers Section 5 as Fourteenth Amendment legislation that can be supported by evidence of vote dilution, it must still invalidate the coverage formula because "there is no sufficient nexus" between the formula and the wrong Congress intended to remedy. *Coleman*, 132 S. Ct. at 1337 (plurality).

4. Even supporters of Section 5's extension tried to warn Congress "that the evidence in the record did not address systematic differences between the covered and the non-covered areas of the United States, and, in fact, the evidence that is in the record suggests that there is more similarity than difference." *Nw. Austin*, 557 U.S. at 204 (internal quotation marks and alterations omitted). Unfortunately, as Senators Cornyn and Coburn lamented, "the Act's language was a foregone conclusion, and [the Senate] w[as] unable to have the kind of debate and discussion and perhaps amendment process that might have been helpful to protect the act against future legal challenges." 2006 Senate Report 35 (statement of Sen. John Cornyn and Sen. Tom Coburn). The senators provided the most likely explanation for why Congress adopted such an irrational coverage formula: "We cannot help but fear that the driving force behind this rushed reauthorization process was the reality that the Voting Rights Act has evolved into a tool for political and racial gerrymandering." *Ibid.*

The political calculus that led Democrats and Republicans to overwhelmingly support the reauthorization is not difficult to work out. Republicans viewed the legislation "as largely serving their political interests. Most of them considered redistricting pursuant to aggressive enforcement of section 5 as creating inefficient Democratic districts." Nathaniel Persily, *The Promise and Pitfalls* *of the New Voting Rights Act*, 117 Yale L.J. 174, 180 (2007). "On the other hand, most Democrats supported the reauthorization in principle, and those who did not considered opposition (or even amendment) to constitute political suicide." *Ibid.* And, of course, any incumbent representative who was elected in a district drawn to satisfy the demands of Section 5 had a powerful incentive to preserve a friendly constituency. Thus, Congress speedily extended the irrational formula because members of Congress stood to benefit from its extension. "The most one can say in defense of the formula is that it is the best of the politically feasible alternatives or that changing the formula would * * * disrupt settled expectations." *Id.* at 208. Such considerations plainly cannot save a formula that is wholly irrational in theory.

B. The Coverage Formula Is Irrational In Practice.

The process the 2006 Congress followed to arrive at its coverage formula highlights why the formula is irrational in practice. When Congress originally crafted Section 4(b) in 1965, it "began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination." *Katzenbach*, 383 U.S. at 329. The metrics it used were closely linked to the targeted harm and could be applied to assess and sort all fifty states. The 2006 Congress inverted this process in a way that made its results fundamentally unreliable. The starting point for the 2006 Congress was not contemporaneous, competent evidence of discrimination, but was the old coverage formula. While the 1965 Congress started with evidence of current needs and devised relevant metrics to draw a coverage map, the 2006 Congress started with a map from the 1970s and searched for evidence that would allow it to color in all the familiar locations. See, *e.g.*, Persily, *supra*, at 182, 194-195.

Unsurprisingly, this *post hoc*, scattershot approach failed to produce evidence that could justify imposing substantial federalism costs on some states and not others. As Judge Williams persuasively explains in his dissent, the evidence that Congress relied on to justify maintaining a theoretically irrational coverage formula fails to establish that the formula is rational in practice. See *Shelby Cnty.*, 679 F.3d at 408-419 (Williams, J., dissenting). Much of the evidence on which Congress relied did not allow for any meaningful comparisons between covered and non-covered jurisdictions. For example, Congress noted that more federal election observers were sent to covered jurisdictions than non-covered jurisdictions, but observers could only be sent to jurisdictions covered by Section 4(b) or a court order. *Id.* at 412-413. Congress also relied on continuing Section 5 actions by the Department of Justice, but by its very nature, this evidence does not allow for any comparison between covered and non-covered jurisdictions.

Some of the evidence the House Report cites as support for Section 5 actually undermines the case for reauthorization and confirms the view of Senators Cornyn and Coburn that the legislative process was "rushed" and "incomplete." 2006 Senate Report 26. As evidence that substantial discrimination continued to exist in 2006, the House Report noted that in Texas only 41.5 percent of Hispanic citizens were registered to vote in 2004 compared to 61.5 percent of white citizens. 2006 House Report 29. But the House Report omitted the crucial fact that nationwide in 2004 only 34.3 percent of Hispanic citizens were registered to vote while 67.9 percent of white citizens were registered. 2006 Senate Report 11. Thus, it was sloppy if not dishonest for the House Report to assert that Texas's registration gap justified imposing extraordinary burdens on the state when the nationwide registration gap was 68 percent wider.

Similarly, the House Report highlighted that Louisiana had never elected a black governor, 2006 House Report 33, but as of 2006 only one state had ever elected a black governor, and that state was Virginia, a covered jurisdiction. See DeNeen L. Brown and Pierre Thomas, *Inauguration Shaking Va. "Cloak of Racism"; Wilder's Rise to Power Heralded with Joy*, Wash. Post, Jan. 12, 1990, at A1. Similarly, the House Report pointed to a general lack of blacks elected to statewide office, 2006 House Report 33, but since Reconstruction the U.S. Senate has never had more than one black senator serving at any time. Jamelle Bouie, *The Other Glass Ceiling*, American Prospect, Mar. 14, 2012, available at http://prospect.org/article/other-glass-ceiling.

The last black candidate elected to the Senate was Barack Obama, and though his electoral successes and the successes of other minority candidates after 2006 were not before Congress, their victories highlight the irrationality of extending a 40-year-old coverage formula 25 years into a rapidly changing future. Of course, in 2008 then-Senator Obama became the nation's first black president. Notably, he won a majority of voters in the covered jurisdictions of Virginia, North Carolina, and Florida. *Election Results 2008*, N.Y. Times, Dec. 9, 2008, http://elections.nytimes.com/2008/results/president/map.html. In 2012, a majority of Virginians and Floridians again cast their ballots for Obama. Aaron Blake, *Obama Picks Up a Split in Florida*, Wash. Post, Nov. 11, 2012, at A31; Jeff Zeleny and Jim Rutenberg, *Obama's Night: Tops Romney For 2nd Term In Bruising Run; Democrats Turn Back G.O.P Bid For Senate*, N.Y. Times, Nov. 7, 2012, at A1.

The recent success of minority politicians in the South should not be surprising, as the only reliable comparative evidence that Congress gathered showed that covered jurisdictions in fact *outperformed* their non-covered peers in voter registration, voter turnout, and ratio of black elected officials to black share of the citizen voting-age population. *Shelby Cnty.*, 679 F.3d at 408-412 (Williams, J., dissenting); see also *supra* Part III.A. Unlike in 1965—when Congress had relevant and reliable metrics to sort covered jurisdictions from the rest—Congress in 2006 ignored the only reliable comparative evidence it had. Thus, it can no longer be said that Section 5 is "aimed at areas where voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 315.

The anachronistic nature of the coverage formula was illustrated powerfully not long after this Court granted certiorari. When South Carolina Senator Jim DeMint resigned his seat, the duty to appoint a replacement fell to Governor Nikki Haley, an Indian-American. She selected U.S. Representative Tim Scott, an African American. Jeff Zeleny, *Congressman is Chosen to Succeed DeMint as South Carolina Senator*, N.Y. Times, Dec. 17, 2012, at A16. Congressman Scott reached the House in 2010 by defeating Paul Thurmond—Strom Thurmond's son—to claim the Republican nomination. *Ibid.* When Scott is sworn in as a senator this January, South Carolina—the first state to secede from the union and the first state to challenge the Voting Rights Act before this Court—will be the only state in the union represented by a black senator. *Ibid.*

* * * * * * *

In *Northwest Austin*, this Court admonished that "a departure from the fundamental principle of equal sovereignty requires a showing that [Section 5's] disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203. The Court pointedly noted that "there is considerable evidence" that the coverage formula "fails to account for current political conditions." *Ibid.* Congress declined to fix the problems with Section 5 that this Court identified just four Terms ago, even as recent events have confirmed the Court's observations. The Court must now take up its "duty as the bulwark of a limited constitution against legislative encroachments," *id.* at 205 (quotation omitted), and invalidate Section 5 of the Voting Rights Act and the coverage formula of Section 4(b).

CONCLUSION

The Voting Rights Act of 1965 was vital in fulfilling the promise of the Fifteenth Amendment. "Past success alone, however, is not adequate justification to retain the preclearance requirements." *Id.* at 202. There is no pattern of recent Fifteenth Amendment violations that could justify the substantial federalism costs of Section 5, and Congress ignored the changed conditions in the South when it reflexively relied on past sins as the basis for its coverage formula. The Southeastern Legal Foundation respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of Amicus Curiae..1

Summary of Argument 3

Argument...3

- I. DOJ Relentlessly Worked To Thwart Texas's Voter-Identification Law During Preclearance Proceedings. 5
  - A. DOJ Unreasonably Delayed Its Review Of SB 14 Before Announcing Its Decision To Withhold Preclearance...6
  - B. DOJ Disregarded This Court's Decision In *Crawford* By Demanding That Texas Produce Evidence Of Significant In-Person Voter Impersonation To Justify Its Photo-Identification Requirement. 8
  - C. DOJ Forced Twelve Members Of The Texas Legislature To Sit For Depositions In An Effort To Uncover Evidence Of Discriminatory Purpose. ...11

D. DOJ Has Adopted Vague And Shifting Interpretations Of Section 5 That Fail To Give Covered Jurisdictions Notice Of What is Permitted And Allow DOJ To Withhold Preclearance From Any Law That It Dislikes. 15

II. When Section 5's Preclearance Regime Imposes Such Heavy Burdens On Covered Jurisdictions, Its Coverage Formula Must Be Precisely Drawn And Based On Current Data. 22

Conclusion 26

TABLE OF AUTHORITIES

Page

Cases

Common Cause/Georgia v. Billups,
554 F.3d 1340 (11th Cir. 2009) 19-20

Crawford v. Marion County Election Bd.,
553 U.S. 181 (2008) 2, 3, 9

Goldstein v. Pataki,
516 F.3d 50 (2d Cir. 2008) 13

Northwest Austin Mun. Utility Dist. No. One v. Holder,
557 U.S. 19 (2009) .... *passim*

Shelby County, Ala. v. Holder,
679 F.3d 848 (D.C. Cir. 2012) 22

Texas v. Holder,
No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012) 7

Texas v. United States,
831 F. Supp.2d 244 (D.D.C. 2011) 21

Texas v. United States,
No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) 20

Village of Arlington Heights v. Metropolitan Development Corp.,
429 U.S. 25 (1977) 13

Statutes

42 U.S.C. § 1973c(a) 5, 6

42 U.S.C. § 1973c(d) 11

GA. CODE ANN. § 21-2-417 19

TEX. ELEC. CODE §§ 82.002-.003 4

TEX. ELEC. CODE §§ 272.001-.010 1

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Adam B. Cox and Thomas J. Miles, *Documenting Discrimination?*, 108 COLUM. L. REV. SIDEBAR 31 (2008), http://www.columbialawreview.org/Sidebar/volume/108/31_CoxMiles.pdf 23

Adam B. Cox and Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008) . 23

Extended Interview: Attorney General Holder on Voting Rights, http://video.msnbc.msn.com/nightly-news/46724699#46724699 (last visited on December 31, 2012) 10

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H.R. REP. NO. 109-478 (2006) 1, 22

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INTEREST OF AMICUS CURIAE

The State of Texas has been subject to section 5 of the Voting Rights Act since 1975, when the coverage formula was expanded to include any jurisdiction in which at least five percent of the voting-age citizens were members of a single language-minority group, election materials were printed only in English, and less than fifty percent of voting-age citizens voted or registered to vote in the most recent presidential election.

While the preclearance regime's coverage formula has remained the same for over 35 years, much else has changed. *See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("Things have changed in the South."). Today Texas law requires bilingual ballots, *see* TEX. ELEC CODE §§ 272.001-.010, and voter turnout in presidential elections exceeds fifty percent, *see, e.g.*, U.S. Census Bureau, Voting and Registration: Historical Time Series Tables A-5a, A-5b, http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html (last visited Jan. 2, 2013). Moreover, the congressional record in 2006 showed that blacks registered and voted at higher rates than whites in Texas in every federal election from 1996 to 2004, and Latino citizens in Texas registered to vote at higher rates than Latinos in non-covered jurisdictions in every federal election from 1980 to 2002. *See* H.R. REP. NO. 109-478, at 14 (2006).

But as the need for section 5's extraordinary measures has waned, the preclearance regime's burdens have increased. Texas's effort to gain preclearance for its recently enacted voter-identification law is a case in point. In 2011, the Texas Legislature enacted a voter-identification law patterned after the law this Court upheld in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). Yet for nearly two years, the Civil Rights Division of the Department of Justice has used every weapon in its arsenal to thwart the implementation of a law that this Court has recognized as a legitimate and constitutional fraud-prevention measure. Because of section 5, the State of Texas *still* is unable to implement its voter-identification law—a law that Indiana and non-covered jurisdictions may enact and enforce without any interference from federal authorities.

Texas's ongoing efforts to gain preclearance of its voter-identification law demonstrate that section 5 continues to impose "substantial federalism costs" at a time when the need for a preclearance regime has receded—even after *Northwest Austin* warned that section 5 must be construed and enforced in a manner that mitigates intrusions into state policymaking. *See* 557 U.S. at 202.

SUMMARY OF ARGUMENT

The constitutionality of Congress's decision to reauthorize section 5's preclearance regime must be measured against the burdens that decision currently imposes on covered jurisdictions. *See Northwest Austin*, 557 U.S. at 203. The preclearance proceedings involving Texas's voter-identification law illustrate the enormous burdens of the section 5 regime. Section 5 has empowered the Department of Justice to thwart the implementation of a constitutional voter-identification measure with abusive and heavy-handed tactics.

DOJ's actions during the preclearance process indicate that the Department has not heeded this Court's decision in *Northwest Austin* and leave no doubt that DOJ will continue to enforce section 5 in a manner that aggravates rather than mitigates the "federalism costs" imposed by the preclearance regime. *See id.* at 202. The only way for this Court to alleviate these unwarranted and burdensome federalism costs is to declare the reauthorization of section 5 unconstitutional.

ARGUMENT

On May 27, 2011, Texas enacted a voter-identification law similar to the Indiana statute that this Court upheld in *Crawford v. Marion County*. The Texas law, also known as Senate Bill 14 (or SB 14), requires persons voting at the polls to present one of the following forms of photographic identification: (1) a driver's license, election identification certificate, or personal identification card issued by the State; (2) a U.S. military identification card that contains the person's photograph; (3) a U.S. citizenship certificate that contains the person's photograph; (4) a U.S. passport; or (5) a Texas license to carry a concealed handgun. Acts 2011, 82nd Leg., R.S., Ch. 123 § 14.[1] SB 14 will make the "election identification certificate" available to persons who lack other forms of acceptable photo identification. The certificate will be issued free of charge.[2]

Unlike Indiana, Texas is a "covered jurisdiction" under section 5, so it cannot implement its voter-identification law until it obtains "preclearance" from either the Department of Justice or a federal court. *See* 42 U.S.C. § 1973c(a). Although Texas submitted SB 14 to DOJ for administrative preclearance in July 2011, the State's voter-identification requirement *still* has not been precleared. Part I of this brief describes how DOJ used section 5 to delay for as long as possible the implementation of Texas's law. Part II discusses the implications for the constitutionality of section 5 and its coverage formula.

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[1] Each of these forms of identification must be either unexpired or expired no earlier than 60 days before the date of presentation.

[2] Under SB 14, voters who fail to bring proper photo identification to the polls may cast a provisional ballot. And those provisional ballots will be counted if the voter presents proper photo identification to the voter registrar within six days after the election, or if the voter executes an affidavit stating that the voter has a religious objection to being photographed or that he has lost his photo identification in a natural disaster that occurred within 45 days of the election. *See* SB 14 §§ 17-18. Voters who are disabled or over the age of 65 are authorized to submit their ballots by mail and can therefore vote without obtaining photo identification. TEX. ELEC. CODE §§ 82.002-.003.

I. DOJ RELENTLESSLY WORKED TO THWART TEXAS'S VOTER-IDENTIFICATION LAW DURING PRECLEARANCE PROCEEDINGS.

DOJ's determination to delay the implementation of SB 14 demonstrates how section 5 can be used to prevent a constitutional (but newly enacted) election law from taking effect before an upcoming election.

First, when Texas sought administrative preclearance, DOJ took seven months to make a decision that the statute requires to be made in 60 days.

Second, DOJ insisted that Texas produce evidence of significant in-person voter impersonation, despite this Court's holding in *Crawford* that States need not produce *any* evidence of in-person voter impersonation to justify a photo-identification law.

Third, DOJ forced twelve members of the Texas legislature to sit for depositions and explain why they supported SB 14. It is unheard of for legislators to be subjected to depositions in ordinary constitutional litigation, even when legislative purpose is at issue in a case.

Finally, DOJ has adopted vague and shifting interpretations of section 5 and its "non-retrogression" doctrine. Covered jurisdictions are denied clear notice of the standard by which their laws will be judged, while DOJ is left with nearly unlimited discretion to withhold preclearance from any voting-related measure that it dislikes.

A. DOJ Unreasonably Delayed Its Review Of SB 14 Before Announcing Its Decision To Withhold Preclearance.

On July 25, 2011, Texas submitted SB 14 to DOJ for preclearance. Although the Voting Rights Act requires the Attorney General to rule on a preclearance request within 60 days of submission,[3]

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[3] *See* 42 U.S.C. § 1973c(a) ("Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such [preclearance] proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.").

Texas asked DOJ for expedited consideration so that it could train poll workers and otherwise prepare to implement the law for the 2012 election. *See Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), Expedited Complaint for Declaratory Judgment (ECF No. 1) Ex. 2 at 2.

DOJ responded by giving Texas the opposite of expedited consideration. Exactly 60 days after Texas submitted SB 14 for administrative preclearance, and on the last possible day for DOJ to respond, DOJ notified Texas that its preclearance submission was "insufficient to enable us to determine" whether SB 14 complies with section 5. *See* Expedited Complaint Ex. 3 (Sept. 23, 2011). DOJ demanded a wide variety of new information regarding the racial makeup of registered voters in Texas. *Id.* at 2-3.

DOJ could have requested this additional information shortly after Texas made its submission. Instead, DOJ waited until the statutory deadline for issuing its preclearance decision to request these data. Texas responded on October 4, 2011, explaining that much of the racial data sought by DOJ was unavailable because Texas does not collect racial information from voting registrants. *See* United States' Statement in Support of Its Request to Depose and Seek Documents from State Legislators and Staff (ECF No. 69) Ex. 5 (Letter from Ann McGeehan to Thomas Perez at 6 (Oct. 4, 2011)).

Nevertheless, on November 16, 2011—six weeks after the State had informed DOJ that it did not have the requested information—DOJ reiterated its demand for these non-existent voter data, and threatened to deny preclearance unless Texas produced them.

On January 24, 2012, having waited nearly six months without a decision from DOJ, the State filed suit in federal district court seeking judicial preclearance of SB 14. DOJ did not issue a decision denying administrative preclearance until March 12, 2012—exactly 60 days after the State's last administrative preclearance supplemental submission and once again on the last possible day for DOJ to respond. United States' Notice of Filing Section 5 Determination (ECF No. 11) Attach. 1 at 5. In total, DOJ took *more than seven months* to issue a preclearance ruling that the statute requires to be made within 60 days. By resorting to these dilatory tactics and ignoring Texas's request for expedited consideration, DOJ disregarded *Northwest Austin*'s instruction to interpret and enforce section 5 in a manner that mitigates the "federalism costs" associated with the preclearance regime.

B. DOJ Disregarded This Court's Decision In *Crawford* By Demanding That Texas Produce Evidence Of Significant In-Person Voter Impersonation To Justify Its Photo-Identification Requirement.

In its letter denying preclearance, DOJ criticized Texas's submission because it did not include evidence of "significant" in-person voter fraud occurring in Texas. *Id.* at 2 ("[W]e note that the state's submission did not include evidence of significant in-person voter impersonation not already addressed by the state's existing laws."). Yet this Court previously held in *Crawford* that evidence of in-person voter impersonation is not needed to justify a photo-identification law. *See Crawford*, 553 U.S. at 194 (Stevens, J.). And DOJ *never asked* Texas to produce evidence of in-person voter impersonation during the administrative preclearance process—even though DOJ repeatedly demanded other additional information from the State over the course of several months. Texas would have produced this information if requested.

Crawford holds that the State's interests in preventing opportunities for fraud and safeguarding public confidence in the integrity of the election process are so strong that they permit a State to require photo identification regardless of whether voter impersonation is actually occurring in that State. *Id.* at 196-197. DOJ's stance cannot be squared with *Crawford*; its preclearance-denial letter indicates that preclearance will be withheld from every photo-identification law enacted in covered jurisdictions unless the State produces not only some evidence but *significant* evidence of in-person voter impersonation.

Public statements by Attorney General Eric Holder reflect a similar unwillingness to respect this

Court's decision in *Crawford*. In a televised interview on NBC's Nightly News, the Attorney General explained why he had withheld preclearance from Texas's and South Carolina's voter-identification laws:

> Because the solutions that have been proposed go to things that do not exist, or go to a problem that does not exist. In the interaction, for instance, that we had with Texas, where we asked them to tell us, show us, the statistical proof that there is voter fraud in Texas, we got nothing, not a question of what the statistics were, we got nothing from Texas. . . . [T]here is no statistical proof that vote fraud is a big concern in this country, in-person vote fraud is a big concern in this country, and as a result, these voter-ID laws are solutions that deal with a problem that does not really exist. . . . [T]here is no proof that our elections are marred by in-person voter fraud.[4]

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[4] Extended Interview: Attorney General Holder on Voting Rights, http://video.msnbc.msn.com/nightly-news/46724699#46724699 (last visited Jan. 2, 2013).

It is troubling enough that the Attorney General and the Department of Justice appear to be using section 5 to circumvent this Court's decision in *Crawford*. But it is more disturbing that DOJ's reliance on the supposed non-existence of voter impersonation is so far removed from DOJ's limited responsibility of confirming that voting laws comply with section 5's substantive requirements. Section 5 protects the ability of minority voters to elect their candidate of choice. *See* 42 U.S.C. § 1973c(d). Yet DOJ has never attempted to connect its complaints about the alleged lack of voter impersonation to this requirement.

C. DOJ Forced Twelve Members of the Texas Legislature To Sit For Depositions In An Effort To Uncover Evidence Of Discriminatory Purpose.

When DOJ filed its answer in the judicial-preclearance proceedings, it did not allege that SB 14 was enacted with a discriminatory purpose. *See* Answer (ECF No. 68) ¶ 42 ("Defendant lacks knowledge or information sufficient to form a belief as to whether Plaintiff's photo identification law was enacted with a racially discriminatory purpose and therefore, denies the same."). The next day DOJ claimed that it "does not have sufficient information at this time to state a position on whether Texas has or has not met its burden to establish that S.B. 14 was enacted without any discriminatory purpose." United States' Statement in Support of Its Request to Depose and Seek Documents from State Legislators and Staff (ECF No. 69) at 3 n. 1.

Nevertheless, DOJ's brief included declarations from four Democratic state legislators who voted against the voter-identification law. Each declaration contained conclusory allegations that SB 14 had been enacted with a racially discriminatory purpose. *See id.* at 11 (citing declarations of Representative Anchia, Representative Veasey, Senator Ellis, and Senator Uresti). DOJ argued that "[t]hese statements by first-hand witnesses of the process by which S.B. 14 was developed and enacted are indicia of discriminatory purpose more than sufficient to warrant discovery of legislators and their staff." *See id.* at 12-13.

Then, relying on declarations that were drafted by DOJ attorneys for legislators who opposed SB 14,[5] DOJ embarked on a massive fishing expedition in the hope of uncovering some evidence of racially discriminatory purpose. DOJ demanded that dozens of state legislators and their staff sit for depositions to explain their reasons for supporting SB 14. DOJ eventually deposed four members of the Texas Senate, eight members of the Texas House of

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[5] Representatives Anchia and Veasey testified under oath that their declarations had been drafted by attorneys at the Department of Justice. *See* Texas Proposed Findings of Fact and Conclusions of Law (ECF No. 202) ¶¶ 127, 128.

Representatives, two legislative staff members, three current and former members of the Governor's staff, and three current and former members of the Lieutenant Governor's staff. Many of these depositions lasted for seven hours, the maximum time allotted under the Federal Rules of Civil Procedure. Worse, these legislators were subjected to questioning not only from DOJ's lawyers but also from the different groups of lawyers representing the 25 intervening parties.

It is unheard of for state legislators to be forced to sit for depositions in ordinary constitutional litigation, even when a plaintiff is alleging that a state law was enacted with a forbidden purpose. We have been unable to find *any* case outside of section 5 preclearance proceedings in which a litigant was permitted to depose members of a state legislature and grill them on their motives for supporting a law. *See Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 268 (1977) (holding that litigants cannot compel testimony from state legislators absent "extraordinary instances"); *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008) (forbidding plaintiffs in an eminent-domain dispute to depose "pertinent government officials" and discover their "emails, confidential communications, and other pre-decisional documents" because this would represent "an unprecedented level of intrusion"). Yet DOJ routinely seeks to depose state legislators in contested preclearance proceedings, even arguing that "contested preclearance actions" are per se "'extraordinary circumstances' in which legislators may be called to the stand." *See* Defendant's Response in Opposition to Plaintiff's Motion for a Protective Order (ECF No. 57) at 6.

DOJ and the intervenors aggravated this situation by subjecting the State's legislators to undignified and unprofessional questioning during their depositions. One of the career attorneys at the Department of Justice propounded the following question to State Representative Patricia Harless:

> Did Texans have more confidence in their elections when elections were limited on the basis of race?

Harless Tr. at 129:16-17.

A lawyer from the ACLU posed this loaded question to State Senator Tommy Williams:

> Have you ever heard that African Americans in your district consider you to be racially biased against minorities?

Williams Depo. Tr. at 237:1-3.

And counsel for the Texas League of Young Voters asked the Lieutenant Governor's Chief of Staff:

> Are you aware of the assertions that the Lieutenant Governor campaign for this year's Republican nomination

> for the Senate have resort[ed] to bigotry?

Brunson Depo. Tr. at 168:14-16.

These questions serve no purpose other than to harass and embarrass the deponent. It is unacceptable that section 5 allows the legislators of a sovereign State to be subjected to this type of questioning when the very existence of section 5's preclearance requirement already pushes constitutional boundaries.

D. DOJ Has Adopted Vague And Shifting Interpretations Of Section 5 That Fail To Give Covered Jurisdictions Notice Of What Is Permitted And Allow DOJ To Withhold Preclearance From Any Law That It Dislikes.

DOJ's interpretations of section 5 are so vague and indeterminate that a covered jurisdiction has no way of knowing how it can "prove" nonretrogression to the satisfaction of the Department of Justice or a randomly selected three-judge panel. It is always possible for DOJ (or a federal court) to say that a covered jurisdiction has "failed to carry its burden" of proving nonretrogression, either by demanding that the State produce evidence that is impossible to obtain, or by invoking new theories of "retrogression" and requiring the State to rebut them.

When Texas sought administrative preclearance of its voter-identification law, DOJ rejected SB 14 primarily on the ground that the State had failed to prove that registered voters with Spanish surnames possess state-issued photo identifications at rates that equal or exceed the rate of identification possession among registered voters without Spanish surnames. *See* United States Notice of Filing Section 5 Determination (ECF No. 11) Attach. 1 (Letter from Thomas Perez to Keith Ingram at 5 (Mar. 12, 2012)) (claiming that "the state has not met its burden of proving that, when compared to the benchmark, the proposed requirement will not have a retrogressive effect" and noting that DOJ's database analysis "show[s] that over 600,000 registered voters do not have either a driver's license or personal identification card issued by DPS [and] that a disproportionate share of those registered voters are Hispanic"). And DOJ maintained this stance throughout the preclearance litigation, claiming that section 5 required Texas to prove that rates of photo-identification possession among minority registered voters equal or exceed the rates of photo-identification possession among non-minority registered voters. *See, e.g.*, The Attorney General's Proposed Findings of Fact and Conclusions of Law (ECF No. 223) at 56 (arguing that an alleged ID disparity established that "SB 14 will severely retrogress black and Hispanic voters' effective exercise of the electoral franchise").

At trial, the State exposed the many problems with DOJ's identification-disparity theory. First, DOJ's no-match data considered only state-issued photo identifications, and never even considered possession of passports, military identification, or citizenship certificates—even though each of these qualifies as acceptable photo identification under SB 14. *See* Opinion (ECF No. 340) at 34-35. Second, DOJ's efforts to "match" entries in the state databases were biased against Hispanics because DOJ insisted on exact-name matches, and Hispanic names are more likely to generate discrepancies when entered into state databases. *See* Trial Tr. July 10, 2012 (AM) 12:16-22, 21:15-23:15; Opinion (ECF No. 340) at 37. Third, DOJ's expert witness failed to remove 50,000 deceased individuals from the State's voter-registration database (even though he removed these individuals from the State's driver's license database), causing his analysis to significantly overstate the number of registered voters who lack photo identification. *See* Opinion (ECF No. 340) at 35-36. DOJ's claim in court that "over 1.5 million" registered voters in Texas lack photo identification was demonstrably untrue; evidence at trial revealed that DOJ's "no-match" list included many people who have photo identification, including President George W. Bush, U.S. Senators Kay Bailey Hutchison and Phil Gramm, state Senator Leticia Van de Putte, state Representative Aaron Pena, and persons who had moved from Texas years ago. *See* Trial Tr. July 12, 2012 (PM) 49:3-19, 51:14-19, 52:18-53:17, 55:14-57:4, 59:15-60:21, 61:11-62:19, 63:6-12, 64:5-25, 70:3-9, 71:8-9. State Director of Elections Keith Ingram and his wife appeared *twice* on DOJ's no-match list—even though both of them have Texas driver's licenses. Trial Tr. July 9, 2012 (AM) 73:25-75:14. Numerous voters who appeared on DOJ's "no-match" list were found in the state's driver's license database, and DOJ's expert witness was unable to explain at trial how those voters had made it on to his no-match list. The district court rejected every single piece of the DOJ expert's analysis. Opinion (ECF No. 340) at 37.

Although the State so thoroughly discredited DOJ's ID-disparity theory that the district court found it to be "plagued by several methodological flaws," the district court nevertheless held that Texas failed to prove that rates of photo-identification possession among minority registered voters equal or exceed the rates of photo-identification possession among non-minorities. *Id.* at 44-45. But how exactly is Texas (or any other State) supposed to "prove" the absence of a disparity in photo-identification possession? Since 1965, Texas has not asked voters to report their race or ethnicity when they register to vote, so there is no reliable way to determine the race of a registered voter in Texas.

And the opportunity for DOJ (or a court) to impose a similarly impossible burden of proof on a State exists in every preclearance proceeding, not just those involving voter-identification laws. Moving a polling place? Prove that it won't cause any member of a racial or language minority group to walk or drive greater distances. Changing the time period for early voting? Prove that the racial composition of those who will cease voting in response to the change mirrors the racial makeup of the overall electorate. Enacting any type of voter-identification law? Prove the absence of any racial disparities in ID possession. Whether these "impossible burdens" will in fact be imposed on the State seeking preclearance rests entirely with the discretion of DOJ or the relevant three-judge panel. And even when a State is capable of proving "nonretrogression" under some specific theory, it remains possible for DOJ (or a federal court) to demand that the State satisfy a different theory of "nonretrogression"—perhaps by demanding that the State prove equal rates of photo-identification possession among *eligible* rather than registered voters. And the chosen theory of "nonretrogression" will depend on whether DOJ (or the federal court) wants to preclear or thwart the law.

All of this becomes evident when one considers that DOJ's refusal to preclear SB 14 is irreconcilable with its decision to preclear Georgia's voter-identification law in 2005. *See* GA. CODE ANN. § 21-2-417. Opponents of the Georgia law claimed that it would impose severe burdens on minority voters, and that minority voters in Georgia were more likely than non-minority voters to lack the photo identification needed to vote at the polls. *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). Yet DOJ precleared the Georgia law, even though preclearance surely would have been denied under the version of "nonretrogression" that DOJ espoused during the Texas preclearance proceedings. And DOJ precleared Georgia's law without requiring the State to produce evidence that voter impersonation was occurring at the polls.

If section 5 allows DOJ to preclear Georgia's voter-identification law, but then redefine "nonretrogression" in a manner that would require preclearance to be withheld from Texas's and Georgia's voter-identification laws, then section 5 not only fails to provide fair notice to covered jurisdictions but also fails to cabin the discretion of federal officers in a manner that will avoid arbitrary decisionmaking. DOJ undeniably has changed its definition of "nonretrogression" from the time when it precleared Georgia's voter-identification law, and DOJ has not offered any explanation to reconcile its decision to preclear Georgia's voter-identification law with its refusal to preclear SB 14.[6]

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[6] The same vagueness and indeterminacy emerge in the redistricting context, where DOJ and the courts fail to provide any useful guidance to covered jurisdictions on what "nonretrogression" means. *See Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *2 (D.D.C. Aug. 28, 2012) (holding that section 5 requires court to apply a "multi-factored, functional analysis" in determining retrogression). *See also*

Northwest Austin affirmed that the States enjoy "equal sovereignty" under the Constitution. 557 U.S. at 203. Even if one accepts the distinction that section 5 draws between covered and non-covered jurisdictions, section 5 still violates the Constitution by infringing the equal sovereignty of the States *within* the section 5 coverage formula. Georgia's photo-identification law was precleared by the Department of Justice without requiring the State to prove that minority registered voters were as likely as non-minorities to possess photo identification. The caprice exhibited by the Department of Justice in its responses to the Georgia and Texas voter-identification laws is not consistent with the equal sovereignty that the Constitution and the decisions of this Court secure to each of the several States.

Texas v. United States, 831 F. Supp. 2d 244, 272 (D.D.C. 2011) (holding that section 5 preclearance "does not lend itself to a formalistic inquiry and complexity is inherent in the statute," and that it "can rarely be measured by a simple statistical yardstick"); *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.").

II. WHEN SECTION 5'S PRECLEARANCE REGIME IMPOSES SUCH HEAVY BURDENS ON COVERED JURISDICTIONS, ITS COVERAGE FORMULA MUST BE PRECISELY DRAWN AND BASED ON CURRENT DATA.

It cannot be denied that section 5's coverage formula is out of kilter. As this Court noted in *Northwest Austin*, "[t]he statute's coverage formula is based on data that [are] now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." 557 U.S. at 203. Now the data are more than 40 years old and, as this Court has already observed, "the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Id.* In Texas, blacks vote at *higher* rates than whites, and Hispanic voter registration and turnout is *higher* in Texas than it is in States outside the South. *See* H.R. REP. NO. 109-478, at 14. The court of appeals's opinion upholding section 5 and its coverage formula cannot stand when considered in light of the heavy burdens imposed by the preclearance regime and the drastically improved voting patterns in the South.

The court of appeals attempted to justify section 5 and its antiquated coverage formula by invoking the "Katz study." *See Shelby County, Ala. v. Holder*, 679 F.3d 848, 874-877 (D.C. Cir. 2012). But this study has been dismantled by scholarship that the court of appeals refused to acknowledge or cite. Professors Adam Cox and Thomas Miles have shown that there has been a distinct downward trend in the rate of successful claims brought by section 2 plaintiffs since 1982. In the most recent years, there is no difference in the rate of claimant success in covered versus uncovered jurisdictions. *See* Adam B. Cox and Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 8, 45-46 (2008). The court of appeals's opinion ignores this unmistakable time trend in the data by improperly bunching together all of the section 2 claims filed since 1982. Professors Cox and Miles have also demonstrated that section 2 claimants in covered jurisdictions are less successful at the appellate level than claimants in non-covered jurisdictions. The higher rate of claimant success in covered jurisdictions appears only at the trial level—and even that has been in steady decline and is now negligible in the data from recent years. *Id.* at 38, 46-47; *see also* Adam B. Cox and Thomas J. Miles, *Documenting Discrimination?*, 108 COLUM. L. REV. SIDEBAR 31 (2008), http://www.columbialawreview.org/wp-content/uploads/2008/06/31_CoxMiles.pdf (last visited Jan. 2, 2013). And in all events, litigation success rates are not a reliable measure of actual discrimination because successful litigation outcomes are influenced by factors such as resources and attorneys' strategy that have no relation to the merits of the claim. *Id.* at 35-37.

The question for this Court to resolve is not whether the coverage formula is imprecise and outdated, but what should be done about it. When the preclearance requirement becomes a weapon for DOJ to prevent or delay the implementation of voter-identification laws that have been approved as constitutional by the Supreme Court, that is an intolerable burden to impose on covered jurisdictions. And it cannot be justified unless the coverage formula is tailored to single out jurisdictions that *currently* cannot be trusted to respect the commands of the Fifteenth Amendment; it cannot be based on events that occurred more than 40 years ago. *Northwest Austin*, 557 U.S. at 203 ("[C]urrent burdens . . . must be justified by current needs."). The heavier the burdens imposed by section 5's preclearance regime, the more tightly drawn the coverage formula must be.

The State of Texas's experiences through a seven-month administrative preclearance process and a section 5 trial show that the burdens that section 5 imposes on covered jurisdictions are severe and extraordinary. Texas has had its voter-identification law delayed for nearly two years—even though States outside of section 5 can enact and implement similar laws without any interference from federal officials. There is no justification for continuing to subject Texas to section 5 when the "evil [it] is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.*

Worse, the Attorney General and the lawyers in DOJ have not heeded this Court's admonition in

Northwest Austin. That decision made clear that section 5—if it is to remain constitutional—must be interpreted and enforced in a manner that mitigates the "substantial federalism costs" that a preclearance regime imposes on covered jurisdictions. *Id*. at 202 (internal quotation marks omitted). Yet DOJ has responded by aggravating rather than mitigating the "federalism costs" associated with section 5. DOJ prevented Texas from implementing a voter-identification law that non-covered jurisdictions are free to enforce under *Crawford* and that covered jurisdictions were free to enforce less than a decade ago. DOJ unreasonably delayed its decision on Texas's request for administrative preclearance, then forced twelve of the State's legislators to sit for depositions during the preclearance proceedings. DOJ attempted to justify its decision to deny preclearance by claiming that Texas's voter-identification law is unnecessary as a policy matter. And it did all of this while adopting a vague and shifting definition of "non-retrogression" that denies covered jurisdictions fair notice of the standards against which their election changes will be judged. This is not the conduct of a Department of Justice that takes *Northwest Austin* seriously.

Stronger medicine is needed to rein in these abuses. The State of Texas respectfully asks this Court to strike down section 5 and its coverage formula under the congruence-and-proportionality test.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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January 2013

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CURIAE
BRIEF

No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF DICK THORNBURGH, DREW S. DAYS, III, JOHN R. DUNNE, BILL LANN LEE, J. STANLEY POTTINGER, PAUL F. HANCOCK, JAMES P. TURNER, WILLIAM R. YEOMANS, BRIAN K. LANDSBERG, AND GILDA R. DANIELS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of authorities iii
Interest of amici 1
Summary of the argument 3
Argument:
I. The scope of the 2006 amendments is not properly before the Court 5
  A. The constitutionality of the 2006 amendments was not challenged below and is not within the Court's grant of certiorari 5
  B. The 2006 amendments are not vulnerable to a broad facial challenge 7
II. The 2006 amendments to Section 5's preclearance standard are constitutional 8
  A. Section 5's prohibition of discriminatory purpose is straightforward and anchored to well-established law 9
  B. Denial of preclearance to voting standards or procedures enacted with a discriminatory purpose cannot be considered unduly burdensome 11
  C. The handful of preclearance denials based on the 2006 purpose prong revision illustrate effective and straightforward enforcement 13
  D. Section 5, as amended, continues to serve important purposes distinct from those served by Section 2 15

- E. The limited 2006 revision to the retrogression standard protects certain ability-to-elect districts from fragmentation and does not pose constitutional concerns 17
- F. The amended retrogression standard has been applied without incident in a full redistricting cycle 21

III. The Justice Department's record of enforcement is consistent with the text and purpose of Section 5....24

- A. Recent enforcement of Section 5 demonstrates its continued vitality....23
- B. Voter ID enforcement demonstrates the effective functioning of Section 5 25
- C. Past enforcement of Section 5 does not raise current constitutional concerns....31

Conclusion 36

TABLE OF AUTHORITIES

Cases **Page**

Applewhite v. *Commonwealth*, 54 A.3d 1 (Pa. 2012) 26

Applewhite v. *Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) 26

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984) 16

Bartlett v. *Strickland*, 556 U.S. 1 (2009) 20

Beer v. *United States*, 425 U.S. 130 (1976) 17

City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 12

City of Rome v. *United States*, 446 U.S. 156 (1980) 15

Crawford v. *Marion County Election Bd.*, 553 U.S. 181 (2008) ....passim

Democratic Party of Ga., Inc. v. *Perdue*, 288 Ga. 720 (2011) 28

Franchise Tax Bd. of Cal. v. *Hyatt*, 538 U.S. 488 (2003) 6

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 6

Georgia v. *Ashcroft*, 539 U.S. 461 (2003) 4, 15, 17, 18

LaRoque v. *Holder*, 831 F. Supp. 2d 183, 223 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012), cert. denied *sub nom. Nix* v. *Holder*, No. 12-81, 133 S. Ct. 610, 2012 WL 2955934 (Nov. 13, 2012) ....passim

Cases—Continued **Page**

Milavetz, Gallop & Milavetz, P.A. v. *United States*, 559 U.S. 229, 120 S. Ct. 1324 (2010) 7

Miller v. *Johnson*, 515 U.S. 900 (1995) 5, 11, 31

Morales v. *Handel*, No. 08-03172, Dkt. Entry No. 113 (N.D. Ga. Aug. 24, 2010) 24

Nat'l Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 32

Nevada Dep't of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) 23

Northwest Austin Mun. Utility Dist. No. One v. *Holder*, 557 U.S. 193 (2009) 22

Personnel Admin. of Mass. v. *Feeney*, 442 U.S. 256 (1979) 16

Reno v. *Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) 9

Reno v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) 9

Sabri v. *United States*, 541 U.S. 600 (2004) 18, 19

Shelby Cnty. v. *Holder*, 679 F.3d 848 (D.C. Cir. 2012) ....passim

Shelby Cnty. v. *Holder*, 811 F. Supp. 2d 242 (D.D.C. 2011) 21

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 15

South Carolina v. *United States*, — F. Supp. 2d —, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) ....passim

Cases—Continued **Page**

Tennessee v. *Lane*, 541 U.S. 509 (2004) 23

Texas v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), notice of appeal filed (D.D.C. Aug. 30, 2012) 28, 29

Texas v. *United States*, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), appeal pending No. 12-496 (S.Ct.) (filed Oct. 19, 2012) ....passim

Texas v. *United States*, No. 12-496, 27 (U.S. Dec. 7, 2012) 10, 12

Tilton v. *Richardson*, 403 U.S. 672 (1971)............. 8

United States v. *Georgia*, 546 U.S. 151 (2006)..7, 10

United States v. *Raines*, 362 U.S. 17 (1960) 8

United States v. *Salerno*, 481 U.S. 739 (1987) 7

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).........................9, 10, 11, 12

Washington State Grange v. *Washington State Republican Party*, 552 U.S. 442 (2008)...passim

Constitution, statutes and regulations

U.S. Const.

Art. VI, cl. 2 10

Pub. L. No. 109-246, 120 Stat. 577 (2006) 6

Voting Rights Act of 1965

42 U.S.C. 1973, *et seq*...............................passim

42 U.S.C. 1973a(c) 6

Constitution, statutes and regulations — continued **Page**

42 U.S.C. 1973c(a) 16
42 U.S.C. 1973c(b) 9, 17
42 U.S.C. 1973c(c)... 9
42 U.S.C. 1973c(d) 17
28 C.F.R. Part 51
Section 51.52(a)...................................... 12, 31
Section 51.54(a)... 9
Section 51.56 ....8, 9, 11, 31
Section 51.57(e)...................................... 10, 12
Section 51.59(a)...................................... 19, 20
Section 51.59(a)(6) 18, 19
Section 51.59(b) 11
Ga. Code Ann. § 21-2-417.1(a) 28
Mich. Comp. Laws § 168.523 27

Miscellaneous

Department of Justice, Status of Statewide Redistricting Plans, *available at* http://www.justice.gov/crt/about/vot/sec_5/statewides.php 21
Department of Justice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011) 9, 18, 20
H.R. Rep. 109-478 (2006) 4, 12, 18, 19

Miscellaneous—Continued **Page**

Letter from Grace C. Becker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008) 24

Letter from Grace C. Becker, Acting Assistant Attorney General, to Brian DeBano (Dec. 26, 2007) 27

Letter from John Tanner, Chief, Voting Section, to Thurbert Baker (Apr. 21, 2006) 28

Letter from Thomas E. Perez, Assistant Attorney General, to Melody T. Chappel (Dec. 21, 2012) 25

Letter from Thomas E. Perez, Assistant Attorney General, to Dennis R. Dunn (Dec. 21, 2012) 24

Letter from Thomas E. Perez, Assistant Attorney General, to Kenneth Dreher (Dec. 3, 2012) 14

Letter from Thomas E. Perez, Assistant Attorney General, to Everett T. Sanders (Apr. 30, 2012) 14

Letter from Thomas E. Perez, Assistant Attorney General, to Michael S. Green (Apr. 13, 2012) 20

Letter from Thomas E. Perez, Assistant Attorney General, to Robert T. Bass (Mar. 12, 2010) 23

Letter from Thomas E. Perez, Assistant Attorney General, to Melissa Ocker (June 28, 2010) 23

Miscellaneous—Continued **Page**

Letter from T. Christian Herren, Jr., Chief, Voting Section, to J. Gerald Herbert (Sept. 4, 2012) 27

Letter from Thomas Perez, Assistant Attorney General, to C. Havird Jones, Jr. (Dec. 23, 2011) 29

Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. On the Constitution of the H. Judiciary Comm., 109th Cong. 8, Serial No. 109-69 (2005) 10

INTEREST OF AMICI[1]

Amici are a group of former officials in the U.S. Department of Justice, including former Attorney General Dick Thornburgh, former Solicitor General Drew S. Days, III, and former officials in the Civil Rights Division. They have served during both Democratic and Republican administrations, and they have substantial experience with the Department's implementation of the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. 1973. Amici respectfully submit that their collective experience may illuminate the issues before the Court.

Amici write this brief principally to respond to contentions raised in two amicus briefs filed in support of petitioner contending that constitutional concerns regarding the Voting Rights Act are "exacerbate[d]" by the 2006 amendments to Section 5's substantive standards. See *Shelby County* v. *Holder*, Brief of Former Government Officials Hans von Spakovsky *et al.* (No. 12-96) (von Spakovsky Br.); *Shelby County* v. *Holder*, Brief of John Nix *et al.* (No. 12-96) (Nix Br.).

Amici former Justice Department officials submit this brief to demonstrate that neither the text of the 2006 amendments nor their interpretation gives rise to constitutional concerns, at least no concerns regarding the amendments' facial validity. Moreover, the Justice Department's enforcement record demonstrates that the concerns articulated by petitioner's amici are purely speculative. The Department has enforced Section 5 in a manner faithful to the Constitution, the statutory text, and this Court's precedent.

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[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

A list of amici follows.

Dick Thornburgh served as Attorney General from 1988-1991, under Presidents Ronald Reagan and George H.W. Bush. Preceding that service, he was Governor of Pennsylvania from 1979-1987.

Drew S. Days, III, served as Solicitor General from 1993-1996. He also served as Assistant Attorney General for Civil Rights from 1977-1980.

John R. Dunne served as Assistant Attorney General for Civil Rights from 1990-1993.

Bill Lann Lee served as Assistant Attorney General for Civil Rights from 1997-2001. Since his government service, he has chaired the bipartisan National Commission on the Voting Rights Act.

J. Stanley Pottinger served as Assistant Attorney General for Civil Rights from 1973-1977.

Paul F. Hancock served in the Civil Rights Division of the Justice Department for 27 years, including as director of the Voting Rights Act litigation program and later as Acting Assistant Attorney General for Civil Rights.

James P. Turner was an attorney in the Civil Rights Division from 1965-1994. He served as Deputy Assistant Attorney General for Civil Rights from 1969-1994, and as Acting Assistant Attorney General for Civil Rights from 1993-1994.

William R. Yeomans served in the Justice Department from 1978-2005, with 24 years in the Civil

Rights Division, including as Chief of Staff and Acting Assistant Attorney General for Civil Rights.

Brian K. Landsberg served in the Civil Rights Division for 22 years, including as Chief of the Appellate Section from 1974-1986 and as Acting Deputy Assistant Attorney General for Civil Rights in 1993.

Gilda R. Daniels served in the Civil Rights Division from 1995-1998 and 2000-2006, including as Deputy Chief of the Voting Section.

SUMMARY OF THE ARGUMENT

A. Although the question on which this Court granted review concerns only the continued validity of Section 4B of the Voting Rights Act's coverage formula, petitioner's amici attempt to interject two additional constitutional challenges that are not properly before the Court. Relying on pure speculation, amici urge that the Department of Justice will apply the 2006 amendments to Section 5's substantive standards in an unconstitutional manner.

The Court should refuse to consider these arguments. Petitioner made no such argument below, nor in the petition for certiorari. Moreover, amici's arguments amount to a broad facial challenge of the type rightly disfavored by this Court. Rather than speculate about theoretical unconstitutional conduct on the part of the Department of Justice, the Court should apply the presumption of regularity and address any problematic applications of the law if and when they occur.

B. Even if the Court does consider amici's challenges, the 2006 amendments to Section 5 are constitutional as written, interpreted, and enforced.

Section 5's amended purpose prong bars voting changes enacted with discriminatory intent, reflecting Congress's unremarkable determination that the Justice Department should not preclear voting laws intended to burden minority voters disproportionately. Petitioner's amici do not challenge the substance of the standard, but rather complain of the burden of establishing a lack of discriminatory intent. But, in application, the covered jurisdiction carries its prima facie case simply by making a straightforward showing that the change has a legitimate, non-discriminatory rationale. Since 2006, the amendment has provided the basis for only a handful of preclearance denials, none of which petitioner's amici challenge.

Section 5's amended retrogression standard evinces Congressional disagreement with the statutory interpretation set forth in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), in one narrow context: the fragmentation of geographically compact ability-to-elect districts into potentially illusory "influence" districts. The amendment disallows such fragmentation. It was intended in part to streamline the preclearance process to make it *less* onerous, and has accomplished that goal throughout the 2010 redistricting cycle. Moreover, the amended retrogression standard is directed at compact districts that would result from neutral redistricting principles. Regarding these districts, the amendment simply protects the ability of minority voters to elect candidates "on terms similar to other communities," H.R. Rep. No. 109-478, 70 (2006)—embodying the very purpose of the Voting Rights Act.

C. Far from raising constitutional concerns, the recent enforcement of Section 5 demonstrates its continued necessity and vitality. Recent preclearance denials include a jurisdiction with a large Hispanic population seeking to abandon professional Spanish translations of its election materials and reduce the number of bilingual poll workers; a state's program purportedly designed to strike non-citizen voters from its voter rolls under a method disproportionately striking African-American and Hispanic *citizens* registered to vote; and a municipality that rescheduled its elections from high-turnout November to low-turnout July just as African Americans reached a majority of the voting-age population.

Petitioner's amici ignore this record. Instead, they mischaracterize the Justice Department's enforcement record with respect to voter ID laws and speculate that the Department will require minority-maximization redistricting. Contrary to amici's assertions, when evaluating voter ID laws, the Justice Department has acted consistently with this Court's holding in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), focusing on the burden the law imposes on prospective voters and any provisions aimed at mitigating that burden. The Department has precleared such laws more often than not. And speculation that the Department will demand so-called "max-black" redistricting is baseless; such enforcement is prohibited under *Miller* v. *Johnson*, 515 U.S. 900, 923-925 (1995), and the Department's regulations expressly provide that enforcement of Section 5 shall adhere to this Court's precedent.

The Voting Rights Act is hailed across the political spectrum as a crown jewel of American liberties and a monumental legislative achievement. Congress recently reenacted it with overwhelming majorities.

Like any statute, it is not vulnerable to challenge on the basis of baseless speculation concerning potential misinterpretation or wrongful enforcement.

ARGUMENT

I. THE SCOPE OF THE 2006 AMENDMENTS IS NOT PROPERLY BEFORE THE COURT

A. The Constitutionality Of The 2006 Amendments Was Not Challenged Below And Is Not Within The Court's Grant Of Certiorari

This case presents a constitutional challenge to the coverage formula set forth in Section 4(b) of the Voting Rights Act, 42 U.S.C. 1973b(b). It is not a challenge to the limited amendments to Section 5 adopted by Congress in 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006), codified at 42 U.S.C. 1973, *et seq.* Petitioner has not asked the Court to interpret the 2006 amendments, nor to assess how they have been applied. Indeed, petitioner concedes that Section 5, as amended, is properly applied to bailed-in jurisdictions found to have violated "any statute to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth Amendment." 42 U.S.C. 1973a(c); see Pet. Br. 57. The issue before the Court, then, is not whether the particular pre-clearance standard set forth in Section 5 is constitutional, but rather whether the jurisdictions covered by Section 4(b) should be subject to the preclearance process at all.

The Court's grant of certiorari reflects this scope: The Court limited the question presented to the constitutionality of "Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula." And the court of appeals below likewise recognized that the 2006 amendments' constitutionality was not before it. *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 883 (D.C. Cir. 2012) (noting that "Shelby County [had] neither challenge[d] the constitutionality of the 2006 amendments [n]or even argue[d] that they increase [S]ection 5's burdens.").

In these circumstances, petitioner's amici's challenge must be disregarded. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 538 U.S. 488, 497 (2003) (Court generally will not consider challenges to the judgment below advanced only by amici). And, although petitioner now raises—for the first time—an argument that the 2006 amendments impermissibly added to the burden of the preclearance process, Pet. Br. 25-27, the Court should disregard these belated contentions. See *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below.").

B. The 2006 Amendments Are Not Vulnerable To A Broad Facial Challenge

Moreover, even if the 2006 amendments were properly before this Court, petitioner and its amici raise, at most, a broad facial challenge. Such a challenge is "the most difficult challenge to mount," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), as this Court will "uphold the law if there is any 'conceivabl[e]' manner in which it can be enforced" consistent with the constitution, *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, —, 120 S. Ct. 1324, 135 (2010). The record of the amendments' enforcement since 2006, see pp. 24-34, *infra*, conclusively demonstrates petitioner's failure to meet this "heavy burden of persuasion." *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008).

Furthermore, this Court has been clear that "[f]acial challenges are disfavored for several reasons"—reasons vindicated here. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450-451 (2008). Most importantly, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Ibid.*; see *ibid.* (quoting *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)). Facial challenges also "raise the risk of premature interpretation of statutes on the basis of factually barebones records" and "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 450 (internal quotations and citations omitted).

The submissions by petitioner's amici bear the hallmarks of a flawed facial challenge. Rather than addressing the 2006 amendments' text, interpretation, or enforcement, petitioner's amici rely on speculation "about hypothetical or imaginary cases." *Washington State Grange*, 552 U.S. at 450 (internal quotation marks and citations omitted); see pp. 28-35, *infra*. But "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U.S. 17, 22 (1960). Petitioner's amici also suggest that the amendments may lead the Justice Department to overreach in disregard of this Court's precedent. See, *e.g.*, von Spakovsky Br. 17-24. This naked speculation is refuted by the Department's own regulations, which require fidelity to this Court's decisions. 28 C.F.R. 51.56. Even were it not, "judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).

In any event, even if amici's argument were properly before the Court, it finds no support in the statute's text, interpretation, or enforcement. See pp. 9-34, *infra*.

II. THE 2006 AMENDMENTS TO SECTION 5'S PRECLEARANCE STANDARD ARE CONSTITUTIONAL

The 2006 amendments are constitutional as written. They are constitutional as interpreted by the Justice Department in regulations and guidelines promulgated under the Act. And they are constitutional as applied in the handful of preclearance decisions to which they have been relevant since 2006, none of which is presently before this Court.

A. Section 5's Prohibition Of Discriminatory Purpose Is Straightforward And Anchored To Well-Established Law

Congress's clarification of Section 5's purpose prong reflects its unremarkable conclusion that the Justice Department should not preclear a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that has been enacted with an unconstitutional, discriminatory purpose. 42 U.S.C. 1973c(b).

Interpreting the former language of the statute, in 2000, this Court held that "the 'purpose' prong of § 5 cover[ed] only retrogressive dilution." *Reno* v. *Bossier*

Parish Sch. Bd., 528 U.S. 320, 328 (2000). As the Court recognized, under its interpretation, the statute required preclearance of a voting change enacted with a discriminatory purpose "that is *not* retrogressive—*no matter how unconstitutional it may be.*" *Id.* at 336 (emphasis in original). In 2006, Congress indicated its disagreement by amending Section 5 to prohibit preclearance of voting changes enacted with "any discriminatory purpose," retrogressive or otherwise. 42 U.S.C. 1973c(c).

As amended, the purpose provision simply incorporates this Court's standard for unconstitutional discrimination. 28 C.F.R. 51.54(a) ("The Attorney General's evaluation of discriminatory purpose under [S]ection 5 is guided by the analysis in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)."); Department of Justice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("2011 Guidance") (same); see 28 C.F.R. 51.56 ("In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and other Federal courts."). Section 5, as amended, operates to preclude intentional discrimination, in which no jurisdiction has any right to engage. U.S. Const. art. VI, cl. 2. The amendment therefore validly enforces the Fourteenth and Fifteenth Amendments. See *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (emphasis in original).

The discriminatory purpose standard is well-defined by reference to this Court's precedents. Analysis under the standard begins with a simple requirement that the covered jurisdiction provide a reasonable explanation for its voting change. See pp. 12-14, *infra*. Thereafter, the factors set forth in *Village of Arlington Heights* are considered: whether the decision's impact "bears more heavily on one race than another"; the decision's historical background; the sequence of events leading up to the decision, including whether there are procedural abnormalities or substantive departures from the factors ordinarily considered; and the decision-makers' contemporaneous statements. 28 C.F.R. 51.57(e); 2011 Guidance at 7471. These finite and concrete factors form a "longstanding yardstick for determining discriminatory intent." *Texas* v. *United States*, — F. Supp. 2d —, No. 11-1303, 2012 WL 3671924, at *13 (D.D.C. Aug. 28, 2012), *appeal filed* No. 12-496 (U.S. Oct. 19, 2012); see *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-489 (1997) (collecting Section 5 preclearance decisions applying *Village of Arlington Heights* analysis).

Moreover, the Justice Department has found the *Village of Arlington Heights* analysis fully administrable in the Section 5 context. See *Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. On the Constitution of the H. Judiciary Comm.*, 109th Cong. 8, Serial No. 109-69 (2005) (testimony of Mark A. Posner, former Special Counsel for Section 5, Department of Justice).[2]

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[2] The *Village of Arlington Heights* analysis will not permit the Justice Department to withhold preclearance of all redistricting plans that fail to adopt a so-called "max-black" approach, as

B. Denial Of Preclearance To Voting Standards Or Procedures Enacted With A Discriminatory Purpose Cannot Be Considered Unduly Burdensome

No jurisdiction, covered or uncovered, has a sovereign right to enforce a voting law enacted with discriminatory intent. U.S. Const. art VI, cl. 2. That Section 5 prevents a covered jurisdiction from enforcing a voting law enacted with discriminatory intent cannot, therefore, constitute an undue burden. Implicitly acknowledging as much, petitioner's amici contend not that the substantive purpose prong itself is problematic, but instead that the requirement to "prove a negative"—the absence of discriminatory intent—presents an overly burdensome, nearly insurmountable obstacle. von Spakovsky Br. 14-16; Nix Br. 34-38. This concern echoes one voiced by petitioner. Pet. Br. 25-26.

Judicial interpretation of the Section 5 purpose prong requires no extraordinary or impossible showing. Instead, the covered jurisdiction only "must present some prima facie evidence 'to show that [its] voting changes are nondiscriminatory.'" *Florida* v. *United States*,— F. Supp. 2d —, No. 11-1428, 2012 WL 3538298, at *38 (D.D.C. Aug. 16, 2012) (citing *Shelby*

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petitioner's amici purportedly fear. von Spakovsky Br. 15-16; Nix Br. 35. To the contrary, Department regulations and guidance—ignored by petitioner and its amici—expressly provide that "[a] jurisdiction's failure to adopt the maximum possible number of majority-minority districts *may not* be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose." 28 C.F.R. 51.59(b) (emphasis added); 2011 Guidance at 7471 (same); see *Miller* v. *Johnson*, 515 U.S. 900, 923-925 (1995) (prohibiting the practice); 28 C.F.R. 51.56 (providing that Justice Department will be guided by the Court's precedent).

Cnty. v. *Holder*, 811 F. Supp. 2d 242, 431 (D.D.C. 2011)). "As a practical matter, this means that the plaintiff must come forward with evidence of legitimate, nondiscriminatory motives for the proposed changes to [its] voting laws." *Ibid.* (quoting *State of New York* v. *United States*, 874 F. Supp. 394, 400 (D.D.C. 1994)). This requirement—essentially just to show a rational basis for the law—cannot be considered onerous or unusual. Cf. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-447 (1985).

Once the jurisdiction makes such a showing, the burden "'shifts to the Attorney General,' to provide some evidence to 'refute the covered jurisdiction's prima facie showing.'" *Florida*, 2012 WL 3538298, at *38 (quoting *Bossier*, 528 U.S. at 332). The Attorney General's evidence, if any, will relate to the *Village of Arlington Heights* factors. *Id.* at *39; see 28 C.F.R. 51.57(e). Only "[w]hen each party has met its production burden" will the Court assess discriminatory purpose. *Florida*, 2012 WL 3538298, at *38. The Justice Department's preclearance process follows the same framework. See 28 C.F.R. 51.52(a) ("the Attorney General shall make the same determination that would be made by the court in an action for declaratory judgment under Section 5"); cf. United States' Mot. to Affirm in Part, *Texas* v. *United States*, No. 12-496, 27 (U.S. Dec. 7, 2012) (reflecting Justice Department's acceptance of burden-shifting approach).

Far from proving a negative, the covered jurisdiction need only demonstrate that evidence of a legitimate purpose outweighs the evidence of discriminatory intent. Only where the record reflects evidence of racial hostility and the law lacks a discernible purpose does the jurisdiction's burden become weighty. And that is what Congress intended. H.R. Rep. No. 109-478, 68 (2006) (attempts to "'purposefully' keep minority groups 'in their place' have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar").

C. The Handful Of Preclearance Denials Based On The 2006 Purpose Prong Revision Illustrate Effective And Straightforward Enforcement

The revised purpose definition, portrayed as a vast expansion by petitioner and its amici, is anything but. A survey of enforcement since 2006 illustrates the point.

Since the amendment, only three jurisdictions' redistricting plans have been denied preclearance under the revised purpose prong. In each instance, the covered jurisdiction failed to provide *any* rational explanation for its proposed plan.[3] One of these three, Texas, bypassed the Justice Department and was denied judicial preclearance for its post-2010 statewide redistricting plans. See *Texas* v. *United States*, 2012 WL 3671924, at *1, *37. In Texas's U.S. House redistricting, incumbent representatives of African-

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[3] The Justice Department denied preclearance to a non-redistricting voting change, in *sui generis* circumstances. See Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006) (refusing preclearance where Randolph County Board of Registrars met, without notice or rational explanation, to reassign the African-American Chair of the Randolph County Board of Education from his ability-to-elect District 4 to predominately-white District 5, despite a court decision expressly determining his residence to be in District 4; the change would have ensured his defeat in the upcoming re-election).

American and Hispanic ability-to-elect districts saw their respective offices meticulously excised from their districts. *Id.* at *19-20. The same fate did not befall a single representative of a majority-white district. *Id.*[4] "The only explanation Texas offere[d] for this pattern [was] 'coincidence.'" *Id.* The district court rejected that explanation, citing the "substantial surgery" to ability-to-elect districts, the complete exclusion of African-American and Hispanic representatives from the redistricting process, and the plan's expedited consideration in a special legislative session "quite different from what [Texas had] seen in the past." *Id.* at *21.

The City of Clinton, Mississippi, likewise failed to offer any plausible explanation for its post-2010 redistricting plan. See Letter from Thomas E. Perez, Assistant Attorney General, to Kenneth Dreher (Dec. 3, 2012). Despite an African-American population that had doubled in the prior 20 years to 34 percent of Clinton's population, the city's redistricting afforded minority voters no ability to elect a candidate of choice in any of the six wards. *Ibid.* The redistricting plan—adopted on an expedited schedule without consideration of alternatives—fragmented minority population centers to reach this result. *Ibid.* The only explanation the city gave for the fragmentation was that it was "not possible to devise a constitutionally valid ward in which African American voters have the ability to elect candidates of choice to office." *Ibid.* This explanation proved flatly incorrect. *Ibid.*

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[4] The "economic engines" of these districts—*e.g.*, hospitals, universities, arenas, and even the Alamo—were likewise excised. *Texas* v. *United States*, 2012 WL 3671924, at *20. Majority white districts managed to avoid similar surgery. *Ibid.*

The City of Natches, Mississippi similarly failed to offer any rational explanation for its decision—for the fourth consecutive redistricting cycle—to reduce the African-American population of its Ward 5, which had nearly been an ability-to-elect district. See Letter from Thomas E. Perez, Assistant Attorney General, to Everett T. Sanders (Apr. 30, 2012). Ward 5 happened to hold the balance of power on Natches's Board of Aldermen. See *ibid.* The city's sole explanation was that the reduction of the African-American population in Ward 5 was needed to prevent retrogression elsewhere. *Ibid.* That explanation proved false. *Ibid.*

In light of this record, the most that can be said about the burden imposed by the amended purpose prong is that a covered jurisdiction cannot meet evidence of discriminatory intent with silence, falsehoods, or implausible assertions of coincidence. The record refutes amici's hyperbolic suggestion that the modified purpose prong "will effectively force covered jurisdictions to prove that hundreds of legislators *did not* act with a particular motivation." von Spakovsky Br. 14 (emphasis added).[5] Such speculation cannot form the basis for striking down an act of Congress. *Washington State Grange*, 552 U.S. at 455 (quoting *Pullman Co.* v. *Knott*, 235 U.S. 23, 26 (1914)) ("A statute 'is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are.'").

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[5] The Nix amici further speculate that the purpose analysis is so withering as to coerce covered jurisdictions to "prioritiz[e] changes that improve minorities' expected electoral success." Nix Br. 37. Setting aside the fundamental implausibility of this suggestion, amici do not cite a single instance of such coercion.

D. Section 5, As Amended, Continues To Serve Important Purposes Distinct From Those Served By Section 2

Section 5 performs the important function of "shifting 'the advantage of time and inertia' " from those who have enacted discriminatory voting laws to the laws' victims. *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980) (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 309 (1966)). Section 5 thus redresses the problem that, if discriminatory voting changes take effect, those harmed cannot be adequately compensated, and those benefited may be more firmly ensconced in positions of power. See *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012).

Petitioner's amici argue that preclearance should be used only to prevent "backsliding." Nix Br. 3 (quoting *Georgia* v. *Ashcroft*, 539 U.S. 461, 477 (2003)). They further assert that if preclearance may be denied for any discriminatory purpose, Section 5 will no longer serve its limited purpose of freezing "the status quo so that it do[es] not worsen while Section 2 cases [are] pending." *Id.* at 3, 18-19.

These arguments fail to address the fact that that Congress could reasonably conclude that a voting change enacted with a discriminatory purpose would likely worsen the status quo, *i.e.*, that there is a risk the change would achieve its discriminatory objective. See *Personnel Admin. of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose' implies * * * that the decision maker * * * selected or reaffirmed a particular course of action at least in part 'because of' * * * [expected] adverse effects upon an identifiable group."); see also *Bacchus Imports, Ltd.* v. *Dias*, 468

U.S. 263, 271 (1984) (noting that in dormant Commerce Clause context, evidence of discriminatory purpose alone is sufficient to support finding of economic protectionism). Moreover, the statute's plain language cannot accommodate amici's attempt to distinguish between, on the one hand, those voting laws that *do* have retrogressive effect, which they argue are the historical focus of Section 5, and, on the other, those laws that *intend* to have a discriminatory effect but may not. See 42 U.S.C. 1973c(a) (covered jurisdiction must establish that change in voting law "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color"). Section 5 reaches all laws enacted with a discriminatory intent, preventing their proponents from inflicting an irreparable injury.

E. The Limited 2006 Revision To The Retrogression Standard Protects Certain Ability-To-Elect Districts From Fragmentation And Does Not Pose Constitutional Concerns

Ballot access alone does not guarantee effective exercise of the electoral franchise, as votes may be diluted through discriminatory districting. Accordingly, protection of the "ability of minority groups to participate in the political process" must be paired with protection of their ability "to elect their choices to office." *Beer* v. *United States*, 425 U.S. 130, 141 (1976) (quoting H.R. Rep. No. 94-196, at 60 (1975)). The latter protection is the focus of the 2006 amendments to the Section 5 effects prong, which now provides that no voting procedure should "diminish the ability" of protected citizens to "elect their preferred candidates of choice." 42 U.S.C. 1973c(b), (d).

The 2006 amendments have a narrow purpose, namely to address a specific disagreement over the definition of retrogression—a disagreement relevant only in the context of *some* redistricting plans. See pp. 23-24, *infra*. In *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), this Court considered a state senate redistricting plan that reduced the African-American voting-age population in three previously majority-minority districts to "just over 50 [percent]," which made it at least "marginally less likely that minority voters [could] elect a candidate of their choice in those districts." *Id.* at 486. At the same time, the plan increased the African-American voting-age population in four districts where African Americans remained a voting-age minority. *Id.* at 487. Interpreting Section 5, the Court concluded that the addition of these non-majority "influence" districts *could* render the redistricting plan non-retrogressive. *Ibid.* The Court concluded that "[t]he State may choose, consistent with § 5, that it is better to risk having fewer minority representatives" in order to attain "greater overall minority" influence. *Id.* at 483.

The amended Section 5 reflects Congress's conclusion, contrary to *Georgia*, that retrogression generally occurs where minority voters are removed from certain ability-to-elect districts and fragmented into districts in which they have only a lesser, undefined "influence" in the electoral process. 42 U.S.C. 1973c(b), (d); see *LaRoque* v. *Holder*, 831 F. Supp. 2d 183, 223 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012), cert. denied *sub nom. Nix* v. *Holder*, No. 12-81, 133 S. Ct. 610, 2012 WL 2955934 (Nov. 13, 2012). The legislative record indicates that the amendments are directed at "geographically compact" majority-minority districts. H.R. Rep. 109-

478, at 70. These are the districts that would result from adherence to neutral redistricting principles, such as "compactness and contiguity" and regard for "natural or artificial boundaries" like rivers or municipal borders. 28 C.F.R. 51.59(a)(6). Where the Voting Rights Act has operated to create or protect such districts, the "ability to elect" standard preserves them, *at least* against their substitution for potentially illusory "influence" districts. See H.R. Rep. 109-478, at 69-70 (2005); accord *Georgia*, 539 U.S. at 493-494 (Souter, J., dissenting) (noting that "without the anchoring reference to electing a candidate of choice," the nonretrogression principle would be "substantially diminished" and "practically unadministrable").

Petitioner's amici contend that this limited revision to the retrogression standard, applicable only in limited contexts, simply "ossif[ies] existing majority-minority districts." von Spakovsky Br. 13; see Nix Br. 29. As an initial matter, this is not a redistricting case, and redistricting cases necessarily involve unique facts. See 2011 Guidance, 76 Fed. Reg. at 7471-7472. Consequently, the Court's general reluctance to pass "judgment on [a] fact-poor record" should be particularly acute here. *Sabri* v. *United States*, 541 U.S. 600, 609 (2004); see *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 198-199 (2008).

Furthermore, although the height of post-2010 redistricting has passed, amici have not identified a single instance where the amended retrogression standard has been misapplied. See pp. 23-24, *infra*. Speculation that the standard *could* be misapplied founders on the principle that hypothetical harms do not justify "'premature interpretation of statutes on the basis of factually barebones records.'" *Washington*

State Grange v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Sabri*, 541 U.S. at 609).

There are at least four additional reasons why the speculative ossification argument fails. First, as the legislative history reflects, the ability-to-elect standard focuses primarily on protecting "geographically compact" majority-minority districts from fragmentation *via* redistricting—that is, protects districts that would have existed in a world of race-neutral redistricting. See H.R. Rep. 109-478 (noting standard provides that a "geographically compact minority group" will be able to elect its preferred "candidates * * * to office—on terms similar to other communities"). The governing Justice Department regulations reflect this focus. See 28 C.F.R. 51.59(a) (in determining retrogressive effect, Department will consider minority fragmentation, dilution, departure from objective redistricting criteria, compactness, and contiguity, and regard for naturally occurring boundaries).

Second, "courts and the Justice Department are required to consider certain constitutional mandates, including compliance with the one person one vote principle and equal protection principles." *LaRoque*, 831 F. Supp. 2d at 224. As the Department has recognized, retrogression analysis necessarily incorporates these constitutional mandates, which, under some circumstances, can and do require dilution of ability-to-elect districts. See 28 C.F.R. 51.59(a); 2011 Guidelines at 7472.

Third, over time, overall population decline may result in the elimination of an ability-to-elect district. 2011 Guidelines at 7472; cf. Letter from Thomas E.

Perez, Assistant Attorney General, to Michael S. Green (Apr. 13, 2012) (denying preclearance to county's elimination of both ability-to-elect districts, but noting that reduction to one ability-to-elect district may have been permitted).

Finally, as racially polarized voting diminishes, minority ability to elect may require ever-smaller percentages of the voting population. Cf. *Bartlett* v. *Strickland*, 556 U.S. 1, 25 (2009) (opinion of Kennedy, J.). The Department's guidelines recognize this fact. "In determining whether the ability to elect * * * continues in the proposed [redistricting] plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment." 2011 Guidelines, 76 Fed. Reg. at 7471. "Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction," including "voting patterns within the district, voter registration and turnout information." *Ibid.* These are not static factors; nor, consequently, is the racial composition of an ability-to-elect district. See *ibid.*[6] Amici's suggestion that majority-minority districts will be frozen in perpetuity lacks foundation, and this Court should not presume that the 2006 amendments to Section 5 will be applied in that manner.

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[6] Petitioner's amici inexplicably contend that the amended retrogression standard "requires preserving every functioning 'influence' district." Nix Br. 30. They fail to address the authority to the contrary. See *LaRoque*, 831 F. Supp. 2d at 223 ("Influence districts do not fit within the terms of the amendments because voters who only 'influence' an election are not able to choose, and then elect, the candidates who best represent them."); *Texas* v. *United States*, 831 F. Supp. 2d 244, 265 (D.D.C. 2011) ("Redistricting can have no retrogressive effect on an ability to elect that has not yet been realized."). Nor do amici identify a single denial of preclearance on this basis.

F. The Amended Retrogression Standard Has Been Applied Without Incident In A Full Redistricting Cycle

The 2006 extension of the Voting Rights Act was intended to cover two full redistricting cycles. See *Shelby Cnty.*, 811 F. Supp. 2d at 499. The first cycle, following the 2010 Census, is mostly complete. Only Texas—which proceeded directly to a three-judge panel—had its redistricting plan blocked as retrogressive. See *Texas* v. *United States*, 2012 WL 3671924. Every other statewide redistricting plan met the retrogression standard. Department of Justice, Status of Statewide Redistricting Plans, *available at* http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last accessed Feb. 1, 2013). Moreover, only approximately 15 local jurisdictions have failed to satisfy the retrogression standard, and petitioner's amici fail to identify a single one in which the 2006 amendments were determinative.

Given this record, there is no credible argument that the 2006 retrogression amendments increase the preclearance burden imposed on covered jurisdictions. In fact, as the *LaRoque* Court recognized, the amendments likely have made the preclearance process more straightforward. See *LaRoque,* 831 F. Supp. 2d at 218-219 (citing legislative concerns that *Georgia* decision made "preclearance decisions 'less predictable and more open to subjective judgments, individual preconceptions and even political biases' "); Fed. Resp. Br. 46 (collecting legislative history reflecting these concerns).

III. THE JUSTICE DEPARTMENT'S RECORD OF ENFORCEMENT IS CONSISTENT WITH THE TEXT AND PURPOSE OF SECTION 5

Recent enforcement of Section 5 has reflected two priorities: protecting minority voting rights and due regard for state and local interests in enforcement of nondiscriminatory voting laws. The record of approximately 30 denials of preclearance since 2006 reflects these priorities. See pp. 25-28, *infra*.

Instead of addressing this record, petitioner's amici focus on a supposed disparity between the ability of uncovered jurisdictions to condition the right to vote on the presentation of photo ID and the inability of covered jurisdictions to do so. Neither the facts nor the law support their argument. The Justice Department has granted preclearance to photo ID laws in the State of Georgia, and in covered jurisdictions in Michigan and New Hampshire; and the district court has precleared South Carolina's photo ID law for future application. *South Carolina* v. *United States*, — F. Supp. 2d —, No. 12-203, 2012 WL 4814094, at *19-21 (D.D.C. Oct. 10, 2012). Moreover, photo ID laws in covered jurisdictions, like those in uncovered jurisdictions, rise or fall depending on the burden imposed on voters and the ameliorative processes accorded voters for whom that burden is too great.

In addition, amici's emphasis on long-past Section 5 enforcement practices in order to suggest concerns about the Act going forward is misplaced and inaccurate. Enforcement decisions made in the 1980s and 1990s—prior to this Court's more recent relevant decisions—shed little light on the "current burdens" imposed by Section 5. *Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009). To the extent past decisions are demonstrative of anything, it is the "[p]ast success" of the Act that this Court has consistently recognized. See, *e.g.*, *ibid.*

A. Recent Enforcement Of Section 5 Demonstrates Its Continued Vitality

A review of the approximately 30 preclearance denials since 2006 reveals the importance of Section 5 in precluding discriminatory voting changes before proponents of such changes are permitted to "win[] elections" under them "and gain[] the advantage of incumbency." *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 861, 872 (D.C. Cir. 2012). Rather than giving rise to constitutional concerns, this record of enforcement has remedied them.[7]

For example, the Justice Department has refused to preclear a number of voting laws with the purpose or effect of limiting minority ballot access. Despite a continued increase in Hispanic voters, Gonzales County, Texas, proposed to replace professional translation of election materials with Google-translate and to reduce the number of bilingual poll workers. See Letter from Thomas E. Perez, Assistant Attorney General, to Robert T. Bass (Mar. 12, 2010). Citing retrogressive purpose and effect, the Department denied preclearance. *Ibid.* Similarly, Runnels County, Texas, proposed to replace the bilingual worker assigned to each polling place with a single

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[7] In addition, as noted by Respondent, this Court has considered post-enactment evidence when determining whether Congress validly exercised its authority under the Reconstruction Amendments. Fed. Resp. Br. 25, n. 3; see, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 524-525 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 733-734 & nn. 6-9 (2003).

(purportedly bilingual) county official available by phone. See Letter from Thomas E. Perez, Assistant Attorney General, to Melissa Ocker (June 28, 2010). Again noting retrogressive purpose and effect, the Department denied preclearance. *Ibid.* (Runnels County had also improperly failed to submit the change for preclearance immediately, and, while the change was in effect, one "bilingual" official made available by telephone was not, in fact, proficient in Spanish. *Ibid.*) In addition, the Department denied preclearance to a Georgia voter verification process that errantly and disproportionately struck minority voters from the voting rolls, unless those voters took additional steps to verify their eligibility—including appearing at the county courthouse with three days' notice. Letter from Loretta King, Assistant Attorney General, to Hon. Thurbert E. Baker (May 29, 2009); see also *Morales* v. *Handel*, No. 08-03172, Dkt. Entry 113 (N.D. Ga. Aug. 24, 2010) (discussing Georgia's revisions to its verification process and subsequent Justice Department preclearace).

The Justice Department has also refused to preclear voting changes with the purpose or effect of limiting minority representation at the very time that representation was about to shift the balance of power. For example, the African-American voting-aged population in the Cities of Augusta and Richmond, Georgia, which share a consolidated municipal government, has been steadily growing. See Letter from Thomas E. Perez, Assistant Attorney General, to Dennis R. Dunn (Dec. 21, 2012). The 2010 Census reflected that African Americans had reached a majority of the voting-age population. *Ibid.* Shortly thereafter, the Georgia legislature passed a bill drafted so as to apply only to Augusta-Richmond, which rescheduled municipal elections from November (when African-American turnout is high) to July (when it is not). *Ibid.* Preclearance was rejected on the basis of retrogressive purpose and effect. *Ibid.* In Charles Mix County, South Dakota, the county elected its commissioners from three single-member districts, one of which was a Native American ability-to-elect district. See Letter from Grace C. Becker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008). Just as a Native American won a primary in that district, and was to run unopposed to be the county's first Native American commissioner, the county increased its commission to include five representatives—the additional two hailing from at-large districts. *Ibid.* The proposed change was denied preclearance. *Ibid.* In the Beaumont Independent School District of Jefferson County, Texas, African-American and Hispanic voters—constituting approximately 56 percent of the population—had become the majority in four of seven districts. See Letter from Thomas E. Perez, Assistant Attorney General, to Melody T. Chappel (Dec. 21, 2012). The district redistricted, creating five districts and two at-large seats. *Ibid.* Only one African-American candidate had won an at-large election for any office in that district in the prior ten years. *Ibid.* Citing retrogressive purpose and effect, the Department denied preclearance. *Ibid.*

Unwilling to grapple with this record of enforcement, amici focus instead on photo ID requirements and the illusory fear that the Justice Department will mandate "max-black" redistricting. As addressed below, they fail to identify any constitutional concerns.

B. Voter ID Enforcement Demonstrates The Effective Functioning Of Section 5

Petitioner's amici asserted dichotomy of uncovered states free to require voters to present photo ID and covered states incapable of enforcing such a requirement, von Spakovsky Br. 17-21, is wrong on both the facts and the law.

First of all, among the photo ID laws passed by covered jurisdictions since 2006, more have been cleared (New Hampshire, Georgia, and Michigan), than not (Texas and South Carolina, the latter blocked for the 2012 election only). In addition, the Justice Department has precleared a number of state voter ID laws that require voters to present one of a broader class of non-photo IDs, like Social Security cards and utility bills. *E.g.*, Letter from T. Christian Herren, Jr., Chief, Voting Section to Joshua N. Lief (Aug. 20, 2012) (Virginia); see Fed. Resp. Br. in Opp. at 32 (discussing Arizona and Virginia preclearance). And covered jurisdictions are not the only ones who find their photo ID requirements subject to immediate challenge. See, *e.g.*, *Applewhite* v. *Commonwealth*, 54 A.3d 1, 3-5 (Pa. 2012) (expressing serious reservations regarding burden imposed by Pennsylvania's photo ID law due to delay in issuing required IDs); *Applewhite* v. *Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211, at *3 (Pa. Commw. Ct. Oct. 2, 2012) (enjoining enforcement of photo ID law for the 2012 election).

Second, as a legal matter, amici's argument relies on a misinterpretation of this Court's decision in *Crawford* v. *Marion County*, 553 U.S. 181 (2008). *Crawford* does not grant an automatic constitutional pass to any and all photo ID requirements. Rather, in rejecting a *facial* challenge, the Court stressed the paucity of the evidentiary record of unreasonable burdens imposed by Indiana's particular photo-ID requirement and observed that the petitioners had "not introduced evidence of a single Indiana resident who will be unable to vote as a result" of the law. *Id.* at 188-189, 204. The Court's analysis focused on the burden imposed on Indiana voters, which it found to be minimal; the required photo IDs were free and widely available, and a trip to obtain one did not "represent a significant increase over the usual burdens of voting." *Id.* at 198-200.[8] The Court further stressed that any such burden was mitigated by the fact that voters lacking photo ID would not be denied ballot access. *Id.* Instead, they were afforded an opportunity to cast a provisional ballot to be supplemented, within 10 days, by an affidavit indicating, among other possibilities, that the "affiant is indigent and unable to obtain proof of identification." *Id.* at 186 n.2 (quoting Ind. Code Ann. § 3-11.7-5-2.5(c)). And the Court stressed that the statute remained subject to an as-applied challenge, particularly as to those burdens "imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting." *Id.* at 200.

Consistent with this Court's analysis in *Crawford*, the Justice Department's preclearance scrutiny of photo ID laws has focused on the burden imposed on protected voters by the particular statutes at issue and any provisions aimed at mitigating that burden.

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[8] The documents required to obtain a photo ID, *e.g.*, a birth certificate, were available for $3 to $12. *Crawford*, 553 U.S. at 198 n.17. The *Crawford* petitioners' facial challenge did not identify anyone incapable of paying this fee.

Accordingly, the Department has precleared photo ID laws where appropriate, as in New Hampshire, Michigan, and Georgia. New Hampshire's photo ID law, for example, provides for issuance of free photo IDs and permits voters without photo ID to vote upon execution of an affidavit affirming his or her identity, residence, and registration. See N.H. Rev. Stats. §§ 659:13, 260:21. Finding that these requirements neither were enacted with a discriminatory purpose nor would cause a retrogressive effect, the Department precleared the law. See Letter from T. Christian Herren, Jr., Chief, Voting Section, to J. Gerald Herbert (Sept. 4, 2012). Michigan's photo ID law, which permits a wide range of photo IDs, also allows any voter unable to obtain a photo ID to vote upon executing an affidavit affirming his or her identity. See Mich. Comp. Laws § 168.523. Finding no underlying discriminatory purpose nor retrogressive effect, the Department precleared the law. See Letter from Grace C. Becker, Acting Assistant Attorney General, to Brian DeBano (Dec. 26, 2007).

Similarly, Georgia requires in-person voters to present photo IDs that are available free of charge at offices in each of Georgia's (many) counties. Ga. Code Ann. § 21-2-417.1(a). But every voter is afforded the opportunity to vote by absentee ballot, which may be obtained without photo ID. *E.g.*, *Democratic Party of Ga., Inc.* v. *Perdue*, 288 Ga. 720, 726 (2011). These factors supported the Justice Department's conclusion that the law is compliant with Section 5. Letter from John Tanner, Chief, Voting Section, to Thurbert Baker (Apr. 21, 2006).[9]

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[9] Both the Michigan and Georgia preclearance decisions predated *Crawford*.

By contrast, where a photo ID law imposes a disproportionate burden on minority voters and does not provide any means to mitigate that burden, Section 5 will bar its enforcement. See *Texas* v. *Holder*, No. 12-cv-128, 2012 WL 3743676, at *26-30, *32-33 (D.D.C. Aug. 30, 2012). Texas's photo ID law, a "strict, unforgiving" requirement described by the district court as "the most stringent in the country," required all voters to present one of a limited number of photo IDs. *Id.* at *33, *1. The most readily obtainable ID could be acquired from the Texas Department of Public Safety ("DPS"). *Id.* But "almost one-third of Texas's counties" lack a DPS office, and undisputed evidence reflected that certain voters would need to travel "200 to 250 mile[s] round trip" to the nearest office. *Id.* at *28. On this evidence, the court concluded that "when the closest office is 100 to 125 miles away," the "trip—especially for would-be voters having no driver's license [*i.e.*, those actually in need of obtaining a photo ID]—constitutes a 'substantial burden' on the right to vote." *Ibid.*[10] Texas conceded that the voters unable to meet this burden disproportionately would be those protected by Section 5. *Id.* at *29.

In addition, Texas provided no alternative ballot access for voters unable to obtain a photo ID (aside from limited exceptions for the disabled). See *Texas*, 2012 WL 3743676, at *29. Indeed, the Texas legislature had rejected an amendment that would have "allowed indigent persons to cast provisional ballots without photo ID." *Id.* at *33. Given the burdens it imposed, without material ameliorative provisions, the *Texas* court concluded that the photo ID requirement statute would have a retrogressive effect. *Id.* at *1. Thus Section 5 barred enforcement of Texas's photo ID law because it was defined by characteristics that the laws in New Hampshire, Michigan, and Georgia lacked: for many voters the act of obtaining the required photo ID was substantially more burdensome than the act of voting itself, see *Crawford,* 553 U.S. at 199, and Texas provided no alternate ballot access for those voters.

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[10] Further, the required photo ID could not be obtained without documentation costing at least $22, which the *Texas* court found to be more burdensome than the Indiana photo ID law upheld in *Crawford* and the Georgia photo ID law precleared by the Justice Department. *Texas*, 2012 WL 3743676, at *15-16.

The denial of preclearance to South Carolina lies between the poles of New Hampshire, Michigan and Georgia, on the one hand, and Texas, on the other—and illustrates Section 5's continuing efficacy. As enacted, South Carolina's photo ID requirement raised certain retrogression concerns. These included the limited availability of the required IDs and the ambiguous scope of the alternative ballot access, which permitted a voter without photo ID to vote only after executing an affidavit stating that he or she "suffers from a reasonable impediment that prevents the elector from obtaining photographic identification." See Letter from Thomas Perez, Assistant Attorney General, to C. Havird Jones, Jr. (Dec. 23, 2011). As the Justice Department noted, the "exception's vagueness raises the possibility that it will be applied differently from county to county * * * and thus risks exacerbating rather than mitigating the retrogressive effect of the new [photo ID] requirement." *Ibid.* In addition, there was a concern that the exception was circular. The South Carolina law required the affidavit to be notarized, which in turn may have required a photo ID. See *South Carolina*, 2012 WL 4814094, at *7. Noting these concerns, among others, the Department denied preclearance, subject to reconsideration should South Carolina provide additional information concerning its enforcement plans.

Before a three-judge panel of the district court, South Carolina committed to an interpretation of the photo ID requirement under which, the court concluded, the law would not be retrogressive in purpose or effect. See *South Carolina*, 2012 WL 4814094, at *6 ("accept[ing] and adopt[ing], as a condition of pre-clearance, the expansive interpretation offered by the South Carolina Attorney General and the South Carolina State Election Commission"); *id.* at *21 (Bates, J., concurring) ("[T]o state the obvious, [the law] as now pre-cleared is not the [law] enacted in May 2011. It is understandable that the Attorney General * * * would raise serious concerns about South Carolina's voter photo ID law as it then stood."). This interpretation ensured that the alternative ballot access was expansive. Though the plain language of the statute required voters without a photo ID to attest to a "reasonable impediment" to obtaining one, South Carolina construed the statute to permit a voter to cast a ballot simply by attesting to his or her identity and his or her reason for failing to obtain a photo ID. *Id.* at *7. No reason given would be rejected as unreasonable unless demonstrably false. *Ibid.* In addition, South Carolina committed that the "process of filling out the [affidavit] must not become a trap for the unwary," and represented that would not become a *de facto* literacy test. *Id.* at *9-10. These constructions—rendered, as the district court noted, in "real time," *id.* at *4—ensured that the State's interest in preventing voting fraud would be met without retrogressive consequences. *Id.* at *5.[11]

The *South Carolina* decision demonstrates the continued wisdom of Section 5. Rather than permitting a vague ballot access provision to take effect, subject to a multitude of potentially retrogressive interpretations, the Section 5 process led South Carolina to construe its law consistent with the unencumbered exercise of voting rights. As two of the panel's judges noted, Section 5 was the catalyst to this "evolutionary process." *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring).

C. Past Enforcement Of Section 5 Does Not Raise Current Constitutional Concerns

Justice Department regulations expressly provide that the enforcement of Section 5 "will be guided by the relevant decisions of the Supreme Court of the United States." 28 C.F.R. 51.56. In its preclearance decisions, the Department "shall make the same determination that would be made by the court in an action for declaratory judgment under [S]ection 5." 28 C.F.R. 51.52(a). Accordingly, where this Court's decisions have evolved, see, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 923-927(1995), Section 5 enforcement has evolved in kind. Petitioner's amici provide no evidence that either the Justice Department or covered jurisdictions have engaged in prohibited minority maximization since this Court's decision in *Miller*. Amici's continued reference to "max-black" redistricting and other straw men prohibited by this Court's precedent is therefore misplaced. Amici provide the Court no reason to doubt that the Justice Department's lengthy track record of assiduous adherence to this Court's precedent and to the Department's own regulations embodying that precedent will continue. See, *e.g.*, *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, we must be careful not to * * * speculate about 'hypothetical' or 'imaginary' cases."); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004) (and cases cited) (in absence of clear evidence to the contrary, presumption of regularity attaches to acts of public officers in discharging official duties).

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[11] Because the statute contemplated an eleven-month ramp-up period, and because certain of South Carolina's positions congealed only weeks before the 2012 election and required standardizing and simplifying the affidavit form, the district court could not conclude that the photo ID requirement was immediately compliant with Section 5 with respect to the 2012 election. *South Carolina*, 2012 WL 4814094, at *17-18. Instead, the court "preclear[ed] [the requirement] for *future* elections." *Id.* at *17 (emphasis in original).

CONCLUSION

For the foregoing reasons, neither the 2006 amendments to Section 5, nor the Justice Department's record of Section 5 enforcement poses constitutional concerns. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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FEBRUARY 2013

AMICUS
CURIAE
BRIEF

No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al*.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE VETERANS OF THE MISSISSIPPI CIVIL RIGHTS MOVEMENT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND INTERVENOR-RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. EVERY PERSON AND EVERY GROUP WITHIN OUR NATIONAL FAMILY DESERVES FEDERAL PROTECTION AGAINST THE SUPPRESSION OF POLITICAL VOICE 4

II. HEALTHY FEDERALISM REQUIRES A DELICATE BALANCE OF POWERS RATHER THAN REFLEXIVE OPPOSITION TO FEDERAL OVERSIGHT 6

III. THE NEED FOR FEDERAL PROTECTION AGAINST VOTER SUPPRESSION IS NEITHER TEMPORARY NOR EXTRAORDINARY BUT NECESSARY TO GUARD AGAINST THE PERPETUAL TENDENCY OF "POLITICAL FACTIONS" TO EXCLUDE REAL OR PERCEIVED "MINORITIES" FROM OUR NATIONAL POLITICAL FAMILY 9

CONCLUSION 13

APPENDIX

Description of *Amicus Curiae* 1a

TABLE OF CITED AUTHORITIES

CASES Page(s)

Boynton v. Virginia, 364 U.S. 459 (1960) 5

Brown v. Bd. of Educ., 347 U.S. 483 (1953) 5

Dred Scott v. Sanford, 60 U.S. 393 (1856)... 2, 3, 4

Ex parte Virginia, 100 U.S. 339 (1879)........ 2, 5

Garner v. Louisiana, 368 U.S. 157 (1961) ... 5

Giles v. Harris, 189 U.S. 475 (1903) 11

Giles v. Teasley, 193 U.S. 146 (1904) 11

Gomillion v. Lightfoot, 364 U.S. 339 (1960)... 12, 13

Grovey v. Townsend, 295 U.S. 45 (1935) 11

Guinn v. United States, 238 U.S. 355 (1915) 12, 13

Lane v. Wilson, 307 U.S. 268, (1930) 12, 13

Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959) 11, 12

Love v. Griffith, 266 U.S. 32 (1924) 11

Loving v. Virginia, 388 U.S. 1 (1967) 5

Louisiana v. United States, 380 U.S. 145 (1965) 5

Meyer v. Nebraska, 262 U.S. 390 (1923) 5

Myers v. Anderson, 238 U.S. 368 (1915) 12, 13

Neal v. Delaware, 103 U.S. 370 (1880) 12, 13

Nixon v. Herndon, 273 U.S. 536, 541 (1927) 12, 13

Nixon v. Condon, 286 U.S. 73, 82 (1932) 12, 13

Peterson v. City of Greenville, 373 U.S. 244 (1963) 5

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Page(s)

Pierce v. Society of Sisters, 262 U.S. 510 (1925) 5

Smith v. Allwright, 321 U.S. 649 (1944) 12, 13

Terry v. Adams, 345 U.S 461, 476 (1953) 12, 13

United States v. Cruikshank, 92 U.S. 542 (1876) 11

United States v. Mississippi, 380 U.S. 128 (1965) 5

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Janet Malcolm, *The Crime of Sheila McGough*, (New York: Alfred A. Knoof, 1999) 6

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Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruishank* (University Press 2011) .. 12

The Federalist Papers No. 9 (Alexander Hamilton) 7

The Federalist Papers No. 10 (James Madison) 9

The Federalist Papers No. 45 (James Madison) 3, 6, 7, 8

The Federalist Papers No. 84 (Alexander Hamilton) 7

William Gillette, *Retreat From Reconstruction: 1869-1879* (1979) 11

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Veterans of the Mississippi Civil Rights Movement, Inc. ("Veterans"), is a Not-For-Profit organization with the mission of documenting and telling the stories of Civil Rights Veterans to empower the next generation to continue the quest for freedom, justice and equality.[1] We are part of a long and continuing campaign to fulfill the promise of the 13th 14th and 15th amendments to our Constitution that all the people of the United States would be full partners in our national democracy and given the respect and political voice that democratic citizens are due. Years ago, before passage of the Voting Rights Act of 1965, when many of us were barely out of our teens, we worked through such institutions as the Student Nonviolent Coordinating Committee (SNCC), the Congress for Racial Equality (CORE), the National Organization for the Advancement of Colored People (NAACP), the Council of Federated Organizations (COFO), the Mississippi Freedom Democratic Party (MFDP), and Freedom Schools throughout the Deep South to help register disenfranchised African-American citizens in Mississippi and other Southern states. The work was difficult and dangerous and some of our number were assassinated trying to carry it out, but it helped bring about enactment of the Voting Rights Act.

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

Our stories as veterans of the movement are as diverse as our races, religions, economic backgrounds, and ancestral origins. Some of our ancestors were slaves and sharecroppers.[2] Some of our ancestors were immigrants escaping oppression elsewhere in the world. Some of us are children of the Deep South whose lives were touched by lynchings and other forms of racial terror. Some of us traveled to the Deep South as students inspired by civil rights protesters' brave claims of the right to occupy public spaces, to register and vote and to take their civic roles as people of the United States. The common thread that runs through our lives is a desire to "provide leadership in the ongoing pursuit of human rights." In that spirit we urge the Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit and uphold the constitutionality of Section 5 of the Voting Rights Act of 1965.

SUMMARY OF ARGUMENT

The original framers of our Constitution committed federal power to protect "[t]he right to traffic in [human property] as if it were an ordinary article of merchandise." *Dred Scott v. Sanford*, 60 U.S. 393, 451-52 1856). We fought the Civil War to transform the federal government from a guardian of human property to a protector of human freedom. *See Ex parte Virginia*, 100 U.S. 339, 344-45 (1879). *Dred*

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[2] Selected biographical sketches of the veterans are reproduced in the Appendix at the conclusion of this brief and are available in the form of video recordings at http://www1.law.nyu.edu/davisp/neglectedvoices/index.html. A complete archive of their stories stories have been collected in an Oral History Project at http://www.mscivilrightsveterans.com/oral-history.html.

Scott's exclusionary description of our national family was fully repudiated by the Civil War Amendments. Never in our reconstructed nation will people of African descent—or people of any description—stand without rights that the Nation is bound to respect and enforce.

In a vast, complex and diverse nation, it is inevitable that factions will seek to suppress the political and civic expression of groups that have—or appear to have—opposing interests. Since the Civil War, the federal government has been empowered to counter this dangerous tendency and assure all Americans full access to the political process.

Petitioners and its supporting *amici* argue that for the sake of state sovereignty, this Court should retreat from its repeated constitutional endorsements of the Voting Rights Act of 1965 and its longstanding role in protecting voting rights for all Americans. The Court has appropriately struggled to honor both its function in policing the boundaries of federal power and its fundamental duty as guarantor of the dignity and public roles of national citizens. Petitioner's claims elevate deference to states' rights over careful respect for the role of the federal government in protecting the dignity and political voice of all Americans. We did not spill "the precious blood" of our people, nor waste "the hard-earned substance of millions" just so that "the governments of the individual States might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty." The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961). We did so in the cause of human freedom.

ARGUMENT

I. EVERY PERSON AND EVERY GROUP WITHIN OUR NATIONAL FAMILY DESERVES FEDERAL PROTECTION AGAINST THE SUPPRESSION OF POLITICAL VOICE

In *Dred Scott v. Sandford*, this Court ruled that Congress lacked the power to outlaw slavery and declared that "the Constitution brought into existence" "a political family," from which African Americans were excluded. 60 U.S. 393, 406 (1857).

The Reconstruction Amendments repudiated *Dred Scott*'s doctrine of an exclusive political family. These Amendments broadened our definition of the American political family, deepened our understanding of federal citizenship, and changed the relationship between the federal and state governments. In this reconstructed national family every person, and every group, has the right to participate fully in civic and political life. Congress has the power—and the duty—to protect these basic rights and liberties.

Taken as a whole, the Reconstruction Amendments opened the doors of political and civic life to all the Nation's people and made the federal judiciary a guardian of freedom. The story of post-Reconstruction jurisprudence is the story of the federal government in general and this Court in particular standing time and time again to protect the rights of a free, democratic people. Notwithstanding its respect for state sovereignty, this Court has struck down state laws that posed undue infringements on liberty (*Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); compelled social subjugation (*Brown v. Board of Education*, 347 U.S. 483 (1954)); infringed an individual's right of intimate association (*Loving v. Virginia*, 388 U.S. 1 (1967)), or prevented full access to the democratic process (*Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965)). Three years after *Brown*, when nine children attempted to exercise their right to equal public education in Little Rock Central High School, and when the Governor of Arkansas deployed the Arkansas National Guard to block the schoolhouse door, it was the federal government that escorted them to school. In *Boynton v. Virginia*, 364 U.S. 459 (1960), *Peterson v. City of Greenville*, 373 U.S. (1963), and *Garner v. Louisiana*, 368 U.S. 157 (1961), this Court protected our rights as free citizens to be accommodated in public spaces without fear of eviction and prosecution by state officials. In *United States v. Price*, 383 U.S. 787 (1966), this Court affirmed the federal government's power to prosecute Mississippi men who murdered three of our number for exercising their rights under the Fourteenth and Fifteenth Amendments.

These events merely confirmed what Justice Strong long ago explained in *Ex parte Virginia*, that the Reconstruction Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." 100 U.S. 339, 345 (1879).

A central question in this case is whether Section 5 of the Voting Rights Act gives the federal government inordinate power *vis a vis* its state and local constituent governments. We who have fought to define and strengthen our rights as citizens of the Nation urge the utmost care in deciding this important question of state versus federal rights.

II. Healthy Federalism Requires A Delicate Balance Of Powers Rather Than Reflexive Opposition To Federal Oversight

In the mythology of our constitutional origin, the Framers, having cast off Britain's oppressive monarchy, were wary of the tyranny of centralized power and thus saw the federal government as a necessary evil—an ever-present threat to liberty that, if not restrained, would trample the rights and liberties of the People. But to understand federalism as a principle that begins and ends with limiting federal power sacrifices complicated truth for deceptive coherence.[3] The messy truth is not simply that powers which "'concern the lives, liberties and properties of the people' [should be] held by governments more local and more accountable than a distant federal bureaucracy." The Federalist No. 45, at 293 (J. Madison). American federalism properly understood is an on-going effort to reconcile the ambiguous and conflicting principles upon which this Nation was founded. It is an effort to achieve the strength of unity without sacrificing liberty and difference and to turn our collective and diversified strengths to the service of the People.

The Federalist Papers, which often serve as the authoritative source for the narrative of limited federal power, were published at a time when leaders of the early Republic struggled to assert an identity distinct from the British system they had so recently

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Janet Malcolm, *The Crime of Sheila McGough*, 3-4 (New York: Alfred A. Knopf, 1999).

rejected. These documents were never intended to be the definitive expression of the Framers' original intent, but were instead part of an effort to garner political support for constitutional ratification by quelling anti-federalist fears that the Congress would be an oligarchy and the President a king. *See* Federalist Papers No. 84, A. Hamilton; Debates of the Federal Convention of 1787, Notes of J. Madison. But even though they are political discourse rather than doctrine, the Federalist Papers show plainly that the Framers did not believe that limiting Federal power and broadening State power were invariably necessary to protect the interests of the People.

Alexander Hamilton's support of strong central government is documented in his contributions to the Federalist Papers and to the Federal Convention of 1787, where he proposed an exclusively national government. *Id.* Specifically, Hamilton believed that "there is no absolute rule on the subject" of balancing federal and state power, and that efforts to prove such a rule were "the cause of incurable disorder and imbecility in the government." Federalist Papers No. 9 at 53, (A. Hamilton).

James Madison, for his part, was chiefly concerned with the liberty of the People. As he explained: "Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." Federalist Papers No. 45, at 229 (J. Madison). He therefore expressed dismay that the sovereignty of the States would be seen as an end in itself:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? . . . It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.

Federalist Papers No. 45, at 288-89 (J. Madison).

The notion that state sovereignty is a virtue for its own sake, even when it prevents the federal government from acting in the defense of liberty, is inconsistent with our nation's story. The Founders may have had reason to fear concentrated federal power, but they were equally mindful of the dangers of a too assiduous protection of states' rights. Thus, where, as here, Congress makes a reasonable judgment that it is acting in defense of individual liberty and equality it should fall to those who would challenge Congressional authority to explain why and how limiting federal power will serve the cause of human liberty.

III. THE NEED FOR FEDERAL PROTECTION AGAINST VOTER SUPPRESSION IS NEITHER TEMPORARY NOR EXTRAORDINARY BUT NECESSARY TO GUARD AGAINST THE PERPETUAL TENDENCY OF "POLITICAL FACTIONS" TO EXCLUDE REAL OR PERCEIVED "MINORITIES" FROM OUR NATIONAL POLITICAL FAMILY

The founders of this Republic would have shared our understanding, as civil rights activists, of the need for federal protection of meaningful political participation by all members of the national family. James Madison identified the "propensity" of democratic governments to the "dangerous vice" of political factions, and the problem that "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." The Federalist No. 10, at 49 (James Madison). These problems, Madison contended, are inherent in republican government, as they are "sown in the nature of man." *Id.* at 50, 54. Madison's solution was a republican form of government in which "[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States." *Id.* at 54. The sober judgment of a nation must at times stand against more selfish local passions. The civil rights movement has consistently relied—and insisted—on national protections against factious suppression of political participation by any group within the American family.

For a brief shining moment following the conclusion of the Civil War, the federal government assured that African-American citizens of former confederate states would have full access to the political process. *See generally* Eric Foner, *Reconstruction: America's Unfinished Revolution: 1863-1877* (1988). "The Census of 1870 showed that African Americans made up a majority of the population in three of the former Confederate states, Louisiana, Mississippi, and South Carolina. They were over 40% in Alabama, Florida, Georgia, and Virginia; and more than a third in North Carolina. In no former confederate state were African Americans less than a quarter of the population." *See* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65, 89 (2008). This translated into political power: In states such as Louisiana Mississippi, and South Carolina, African-Americans outnumbered whites in voter registration. *Id.* In others, such as Alabama and Georgia, African-Americans constituted nearly forty percent of registered voters. *Id.*; *see also* Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1357-58 (1993-94). As Professor Foner, the foremost historian on Reconstruction, has shown, "[b]y the early 1870s, biracial democratic government, something unknown in American history, was functioning effectively in many parts of the South, and men only recently released from bondage were exercising genuine political power." Eric Foner, *Forever Free: The Story of Emancipation and Reconstruction 129* (2006).

This ended with the withdrawal of federal power. Between 1890 and 1908, every former confederate state adopted a number of voter suppression methods, including poll taxes, literacy tests, property requirements for municipal voters, and outright violence by the Ku Klux Klan and other vigilante groups. *See* William Gillette, *Retreat From Reconstruction: 1869-1879*, xiii (1979). And, by 1880, blacks had been stripped of virtually all the state and federal political power they had achieved during Reconstruction. *See* J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 322* (1999).

In the face of post-Reconstruction hostility to universal franchise, this Court struggled between its legitimate role in policing the boundaries of federal power and its fundamental duty as guarantor of the dignity and public roles of national citizens.

At times, the Court has believed itself lacking in the requisite grant of constitutional or statutory power to stop what were plainly attempts by state officials to deny the political franchise to African-Americans. *See e.g., United States v. Reese*, 92 U.S. 214, 218 (1875) (holding that Congress lacked the power under the Fifteenth Amendment to require state election officials to count the ballots of all qualified voters); *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the Fourteenth Amendment did not provide federal authority to indict of a mob of private citizens for the killing of freedmen in the disputed 1872 Louisiana elections); *Giles v. Harris*, 189 U.S. 475 (1903) and *Giles v. Teasley*, 193 U.S. 146 (1904) (upholding good character clauses); *Love v. Griffith*, 266 U.S. 32 (1924) and *Grovey v. Townsend*, 295 U.S. 45, 55 (1935) (declining to outlaw white primaries); *Lassiter v. Northampton Cnty Bd.*

of Elections, 360 U.S. 45, 51 (1959) (upholding the constitutionality of literacy tests).[4]

But at its best, in the years between Reconstruction and passage of the Voting Rights Act of 1965, this Court refused to permit claims of state sovereignty to trump demands for full national citizenship. Ten years after ratification of the Fifteenth Amendment, the Court made it clear that the Amendment rendered inoperative provisions in any existing state constitution that explicitly limited the right to vote to whites. *Neal v. Delaware*, 103 U.S. 370 (1880). Then, little by little, and step by step, but inexorably and relentlessly, the Court cast aside state policies and practices designed "to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color." Thus, the court outlawed grandfather clauses and held state officials civilly liable for enforcing them, *Guinn v. United States*, 238 U.S. 355, 360 (1915), *Myers v. Anderson*, 238 U.S. 368, 383 (1915), and *Lane v. Wilson*, 307 U.S. 268, 269 (1930); it invalidated de jure and de facto white primaries, *see Nixon v. Herndon* 273 U.S. 536, 541 (1927); *Nixon v. Condon*, 286 U.S. 73, 82 (1932), *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S 461, 476 (1953); and it held racial gerrymandering unconstitutional, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

In those years, what the Court learned was that, as soon as it struck down one method of voter suppression, states would quickly respond with

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[4] *See also generally* Robert M. Goldman, *Reconstruction and Black Suffrage: Losing The Vote In Reese And Cruikshank* (University Press of Kansas 2001).

"schemes intended to emasculate constitutional provisions or circumvent [the Court's] constitutional decisions." *Harrison v. NAACP*, 360 U.S. 167, 182 (1959) (Douglas, J., dissenting). Decisions such as *Neal v. Delaware, Guinn v. United States, Myers v. Anderson, Lane v. Wilson, Nixon v. Herndon, Nixon v. Condon, Smith v. Allwright, Terry v. Adams*, and *Gomillion v. Lightfoot*, show, if nothing else, that this Court's own precedent served as the jurisprudential justification for the Voting Rights Act. For if, as Chief Justice Roberts explained barely four years ago, the Voting Rights Act is grounded in a judgment by Congress that it needed to have preemptive measures "[r]ather than continuing to depend on case-by-case litigation," it was in no small part the work of this Court between 1915 and 1964 that provided the incontrovertible evidence that nothing short of a permanent federal presence would ever be a sufficient corrective to the "dangerous vice" of political factions.

CONCLUSION

The story of the Voting Rights Act of 1965 in general and Section 5 of the Act in particular is not, as petitioners would have it, an extraordinary departure and temporary diversion from federalism principles, requiring the Court, in the name of state sovereignty, to step back from its historic role in defending voting rights.

Rather, it is the story of Congress discharging its duties under its Reconstruction powers to protect the basic rights and liberties of every person and every group in our national family to participate fully in civic and political life. It is also the story of this Court's continuing struggle to honor both its function in policing the boundaries of federal power and its fundamental duty as guarantor of the dignity and public roles of national citizens.

And, not least of all, it is the story of young men and women who, in the teeth of violence and terror and sometimes at the price of their own lives, made sure our Nation would honor the dignity and political voice of all Americans. They were determined "to make [freedom] happen," believing that "insofar as they can make it real for themselves, they will make it real for all of us."[5] Though today some may have been "made weak by time and fate,"[6] these veterans and their work, past and present, remain vital testimony to the continuing need for the Voting Rights Act of 1965 and its Section 5 preclearance provisions.

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[5] James Baldwin, *They Can't Turn Back*, collected in *The Price of the Ticket* 228 (St. Martin's Press 1985).

[6] Alfred Lord Tennyson, *Ulysses*, in *The Poems of Tennyson*, 560, 562-66 (Christopher Ricks ed., Longmans, Green & Co. Ltd. 1969).

APPENDIX

APPENDIX

Description of *Amicus Curiae*

Amicus Curiae, the Veterans of the Mississippi Civil Rights Movement, is a large organization with a membership crossing state lines, and religious, educational, professional and economic backgrounds. Some of their stories have been collected in an Oral History Project at http://www.mscivilrightsveterans.com/oral-history.html, and http://www1.law.nyu.edu/davisp/neglectedvoices/index.html. While a full accounting of their membership cannot be usefully catalogued in this brief, the selected sample below is representative of the diversity of their membership, the sacrifices they made in helping all Americans gain meaningful access to the political process, and their continuing commitment to the cause of human freedom:

Hollis Watkins is the great-grandson of an African slave on his father's side and a Choctaw Native American and White Jewish plantation owner on his mother's side. Now the Chair of the Veterans, Mr. Watkins began his voting rights work as a seventeen-year old member of the youth chapter of the NAACP. At nineteen he became a Mississippi field secretary for SNCC with the responsibility of going door to door throughout the state to register African-Americans to vote. For that he was arrested and sent to work on a chain gang. He was then transferred to the State Penitentiary where he was locked in the maximum security death row unit. For singing freedom songs, he was placed in solitary confinement, a six by six foot concrete box called "the hole" where the only access to air was the small crack between the bottom of the door and the floor. A native of Mississippi, Mr. Watkins has lived in the state all his life and today continues to work on behalf for equal rights for all Americans.

Jesse Harris' ancestors came from the Bahamas, where his grandfather worked on a plantation before immigrating to South Carolina, and Mississippi, where his grandmother grew up on a Choctaw Reservation. The year Harris turned seventeen, a local white mob lynched Mack Charles Parker, a twenty-three year old Black man, accused but not tried or convicted of sexually assaulting a white woman. Two years later, Harris joined the Freedom Rides when they arrived in Jackson, Mississippi. He was arrested and sent to the Mississippi State Penitentiary. There, he recalls, his education began. His cellmates were James Farmer, a co-founder of CORE, James Lawson, an early adherent of Gandhi and non-violent protest, and James Bevel, a member of SNCC. He remembers listening to and learning from these activists and, even though in prison, feeling for the first time in his life like a free man. On his release, he became a field secretary for SNCC, working on voter registration in Mississippi and organizing direct protests to desegregate public accommodations in Jackson, Mississippi.

Robert (Bob) Moses' paternal grandparents, William Henry Moses and Julia Trent Moses, met while students at Virginia Seminary late in the 19th century. William was a former officer in General Robert E. Lee's army of Northern Virginia who, in time, would become a Vice President of the National Baptist Convention and a supporter of Marcus Garvey. Moses's maternal grandmother was raised in Richmond, Virginia, and traces her family to a slave plantation in Richmond where her grandfather appears as an item of property on the will of the plantation owner. Moses was raised in Harlem. He attended public schools in New York and earned his Bachelor's degree at Hamilton College in 1956, and his Master's in Philosophy at Harvard University in 1957. In 1958, Moses was working as a math teacher in New York when the sit-ins broke out in the Deep South. Fascinated, that April he visited Virginia to experience the sit-in movement first hand. He marched with Hampton students to Newport News and then worked in Harlem to gather support for Dr. Martin Luther King, Jr. Bayard Rustin, who eventually would organize the 1963 March on Washington, sent Moses to work with Ella Baker of SCLC in Atlanta. In the SCLC Atlanta office Moses discovered SNCC and began a SNCC scouting trip through Alabama, Mississippi and Louisiana. In Mississippi, Moses met Amzie Moore, president of the Cleveland, Mississippi NAACP, who aid out the concept of student-led voter registration organizing among Blacks of the Mississippi Delta. Moses spent the next four years working on the "SNCC/Amzie Moore" voter registration strategy. These days, Moses applies the lessons learned in the Mississippi voter registration work to establish math as an indispensable aspect of twenty-first century literacy for the nation's students

Owen Herman Brooks was born in 1928 in New York City of parents who emigrated from Jamaica. His family moved to Boston, Massachusetts, where he began his political education working on the municipal campaign of Edward Brooks, who would in time serve as a the first African-American in the United States Senate since Reconstruction. He recalls his first journey south in 1951, chartering an integrated bus to drive to Richmond, Virginia to observe the trial of the so-called Martinsville Seven, a group of young African-American men who were tried, convicted, and executed for the alleged gang rape of a white woman. He came to Mississippi for the first time in 1964. That year, the National Council of Churches, an ecumenical partnership of Christian faith groups, formed the Delta Ministry to hold grassroots training of black sharecroppers in Mississippi on the importance of voting and political activism. Brooks became a field representative of the Ministry in 1965 and has remained in the state to the present day working on political empowerment of disenfranchised groups.

Ellen Lake's ancestors were Jews; some came from Germany while others fled Eastern Europe at the turn of the 20th century to escape anti-Jewish pogroms and forced draft into the Tsar's army. Her family settled in New York City. Her first involvement with civil rights work came as a high school student when she picketed a landlord in Rye, New York who would not rent to blacks. In 1964, after her sophomore year in college, she travelled to Mississippi for Freedom Summer, where she worked on voter registration. The following summer, she co-founded *The Southern Courier*, a weekly civil rights newspaper in Alabama. After Lake went south for Freedom Summer, her father became the treasurer of the local Friends of the Mississippi Freedom summer while her mother wrote letters to her congressmen, senators, and the Justice Department, demanding protection for the volunteers and local civil rights activists.

Willie Edward Blue is a native of Charleston, Mississippi, whose grand-parents worked as sharecroppers on a plantation in Louisiana. Growing up, he recalls two neighbors being run of town, their houses burned and their lands seized for trying to organize a local chapter of the NAACP for Tallahatchie County. After discharge from the United States Navy in 1963, he returned to Charleston, planning to use his veteran benefits to spend time home before college. However, at the time Mississippi vagrancy laws required that he be employed or deemed a vagrant and subject to arrest and imprisonment. The only employment open to a young Black man was work in cotton fields, so, he hitchhiked to Greenwood, Mississippi, where he joined the local SNCC office, first as a volunteer and then as a staff member in the organization's voter registration campaign. Like many of his colleagues, he suffered jailings and beatings, the physical scars of which he carries to this day. And, like many of his colleagues, he recalls back in those days of protests turning to the Federal Bureau of Investigation and other federal agencies for protection, only to be told that it was not the place of the federal government to interfere with state business.

Doctor Leslie Burl McLemore was born in 1940 in Walls, Mississippi. He obtained a Bachelor's Degree from Rust College, a Master's Degree in Political Science from Atlanta (now Clark) University and a Ph.D in government from the University of Massachusetts at Amherst. After a post-doctoral fellowship at John Hopkins University, he joined the faculty at Jackson State University. Since his retirement from Jackson State as Professor Emeritus in Political Science, Dr. McLemore has served as Director of the Fannie Lou Hamer National Institute on Citizenship and Democracy. Founded in 1997 and named after a pioneer of the civil rights movement, the Institute works with local school boards, colleges, state agencies and national organizations to promote civic engagement and popular sovereignty. Dr. McLemore began his civil rights work as a student in 1961 when he helped organize protests to integrate the lone movie theater and lunch counter in Hollis Springs, Mississippi. Rather than integrate, the movie theater closed down, while the drug store removed all seating at its lunch counter. He helped found a local branch of the NAACP at his college. Approximately a year before he would be assassinated in his driveway, Medgar Evers installed Dr. McLemore as an officer of the local NAACP. Dr. McLemore's grandfather was one of the first African-American men to own land in Walls, Mississippi, but he was not permitted to vote. Today, Dr. McLemore continues his civil rights work through the Fannie Lou Hamer Institute.